Texas Review of Entertainment & Sports Law

Volume 11 **Spring 2010** **Number 2**

Published by The University of Texas School of Law

Texas Review of Entertainment & Sports Law

Volume 11
Issue 2
Spring 2010

CONTENTS

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Volume 11
Issue 2
Spring 2010

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THE TEXAS REVIEW OF ENTERTAINMENT AND SPORTS LAW'S FIRST ANNUAL SYMPOSIUM

On March, 25, 2010, TRESL hosted its first annual symposium in the Eidman Courtroom at The University of Texas School of Law. The symposium focused on the expiring collective bargaining agreements in the NFL and NBA.

PARTICIPANTS

LESTER MUNSON
SENIOR WRITER AND LEGAL ANALYST FOR ESPN
Using a unique combination of journalistic investigative skills and courtroom experience, Lester Munson has reported on legal issues in sports for 18 years. He analyzes criminal charges against sports celebrities; analyzes labor issues that divide team owners and players; and he describes the dynamics of money, celebrity, race, politics, economics, drugs, gambling, and violence in the sports industry, a business that commands a larger audience than any other in America. Munson is a graduate of Princeton University and the University of Chicago Law School and is licensed to practice law in the State of Illinois. He teaches at Northwestern University's Medill School of Journalism.

GEORGE POSTOLOS
PRESIDENT AND CEO, THE POSTOLOS GROUP LP
George Postolos is the President and CEO of The Postolos Group, an investment and advisory firm that specializes in the sports and live entertainment business. The Group actively seeks to acquire major league teams, live entertainment businesses, venues and media properties that service the sports and live entertainment industry.
As Special Assistant to NBA Commissioner David Stern, Postolos assisted with administration and management of the league, including collective bargaining. After leaving the NBA, Postolos served as the President and CEO of the Houston Rockets from 1998-2006. Mr. Postolos is a graduate of Harvard College and Harvard Law School and began his legal career as an associate of Wachtell, Lipton, Rosen & Katz. Mr. Postolos joined us despite extremely short notice, and TRESL would like to extend a special thanks to Mr. Postolos.

MATTHEW PARLOW
ASSOCIATE PROFESSOR OF LAW, MARQUETTE UNIVERSITY LAW SCHOOL
Professor Parlow's scholarship focuses on local government law, land use, urban redevelopment, and sports law. He currently consults with professional sports teams about issues relating to collective bargaining agreements, particularly in the NBA. Prior to his academic career, Professor Parlow was an associate with the Los Angeles firm of Manatt, Phelps & Phillips, LLP. He also served as a law clerk for the Honorable Pamela Ann Rymer of the United States Court of Appeals for the Ninth Circuit.

L.A. (SCOT) POWE
ANNE GREEN REGENTS CHAIR IN LAW & PROFESSOR OF GOVERNMENT
UNIVERSITY OF TEXAS SCHOOL OF LAW
A leading historian of the Supreme Court, Professor Powe clerked for Supreme Court Justice William O. Douglas before joining the Texas faculty in 1971. His latest book is The Supreme Court and The American Elite, 1789-2008 (2009). Powe's three award-winning books were American Broadcasting and the First Amendment (California 1987),

The Fourth Estate and the Constitution (California 1991), and The Warren Court and American Politics (Harvard 2000). Additionally, he has co-authored Regulating Broadcast Programming (MIT 1994) and written scores of articles. Powe was also a principal commentator on the 2007 four-part PBS series "The Supreme Court."

SPEECHES

TOPIC: THE IMPACT OF *AMERICAN NEEDLE V. NFL*

Lester Munson, as the keynote speaker, focused on the American Needle litigation currently before the Supreme Court and its effect on NFL collective bargaining. Since there had been no decision at the time of the symposium, the discussion emphasized the historic importance of the case, the NFL's decades-long quest for single entity antitrust immunity, and the disastrous consequences of immunity on players, coaches, fans, and consumers. Munson relied on the briefs filed by the player unions, the attorneys for the NFL, the attorneys for American Needle, and the economists who filed amicus briefs on both sides. If the court grants the NFL the broad immunity from antitrust scrutiny that the league requested in its filings, it will radically reduce the union's bargaining leverage in the upcoming negotiations.

TOPIC: COMMISSIONER POWER, PUNISHMENT AND NBA/NFL COLLECTIVE BARGAINING

With the National Basketball Association and National Football League collective bargaining agreements set to expire within the next two years, many experts are already predicting what changes may be made to both leagues' governing labor documents. One likely point of contention between the owners and the players' unions – though rarely discussed in the experts' predictive discourse – is the power of the respective league commissioner to punish or discipline wayward players for misbehavior committed off the court or field. This presentation will explore this area of sports law by examining the power of each league's commissioner and its place in collective bargaining.

TOPIC: NBA AND NFL OWNERS IN THE UPCOMING NEGOTIATIONS

Professor Powe discussed the dichotomy of the NBA Owners claim that they are losing money and NFL Owners argue that they are not making enough money. He also discussed the topics of Mr. Munson's and Professor Parlow's discussions.

PANEL

TOPIC: THE FUTURE OF COLLECTIVE BARGAINING IN THE NFL AND NBA

Professor Parlow, Professor Powe, and George Postolos joined a panel moderated by Professor David Sokolow, a member of the TRESL Editorial Advisory Board.

The panel began with remarks from Mr. Postolos and was followed by questions from the moderator and audience as well as a discussion amongst the panel participants.

Ten Years Later

STEPHEN WADE NEBGEN*

As one of the founders of the TEXAS REVIEW OF ENTERTAINMENT AND SPORTS LAW ("TRESL"), I am so pleased to write this commentary for the second issue of Volume 11. This commentary will be brief and address two points: (i) what it was like to start TRESL; and (ii) some quick comments on the changes in the entertainment universe.

I. FOUNDING TRESL

As a 1L at The University of Texas School of Law in 1996, I thought of the idea of creating a law review for entertainment and sports law. I discussed it with Jamie Nordhouse, a fellow student, who quickly and enthusiastically seconded the idea. We then went to Professor David Sokolow and proposed the creation of The University of Texas School of Law Review of Entertainment and Sports Law. Professor Sokolow was enthusiastic but also realistic in describing the effort it would take and the obstacles to overcome.

Through the Entertainment and Sports Law Society, Jamie and I put out a call for those interested in participating in a law review about entertainment and sports. Approximately twenty students expressed their interest and we scheduled the first meeting.

One issue we needed to address was that the Texas Bar Association (the "Bar") had an existing journal dedicated to entertainment and sports law ("Texas Entertainment and Sports Law Journal"). It was possible that the Bar would see TRESL as a competitor and not want to support it. After amiable discussions, the Bar became supportive of TRESL and the initial issues were published in conjunction with the Bar. I believe this cooperation has benefited both the Law School and members of the Bar. It combined the intellectual resources of a great university with the wealth of experience possessed by lawyers in Texas.

Another obstacle quickly became apparent was how to put out a law review when no one had law review experience. So, Jamie, myself, and all the students of that inaugural issue had to improvise. The staff worked hard to get that first issue of TRESL to print. We created teams of students comprised of 1L's, 2L's, and 3L's. This gave each team a variety of experience and skills. We went to Professor Wayne Schiess, who helped with proper Bluebook editing. And, of course, there was Professor Sokolow. It is such a cliché but literally true that without his guidance and support, TRESL would not be here. And, as you can see on the masthead, those initial professors are still active with TRESL. It is gratifying to see that TRESL not only continues, but flourishes at the Law School.

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* Mr. Nebgen, a co-founder of TRESL, graduated from The University of Texas School of Law in 1998, and is licensed to practice in New York, New Jersey & Arizona. Mr. Nebgen has his own law firm and practices corporate and business law with an emphasis on entertainment law.

II. CHANGES IN THE INDUSTRY

Since I graduated from law school in 1998, the entertainment industry has not undergone a revolution of change; it has been hit by a tsunami. Each and every aspect of what we used to consider the traditional entertainment industry, i.e., film, music, television, theatre, dance, etc., has had to cope with a variety of issues. But the 800-pound gorilla, in my opinion, is technology. Technology has affected, among other things: (A) revenue streams, both positively and negatively; (B) the ability to create art; (C) the ability to deliver entertainment cheaply and quickly; (D) the insatiable need for content due to the multiple delivery systems; and, (E) the marketing of entertainment.

A. Revenue

Technology has affected revenue streams in both a positive and negative way. The positive is that, via the Internet, more music is available at cheaper prices and in formats that the buyer wants (a single track instead of an entire album; mp3, mp4, etc.). It is unequivocal that technology has been positive for the consumer. The "download" has steadily increased its percentage of record revenues, to the point that downloads have passed CD sales.

The aforementioned problems in the recording industry also resonate in the film industry. Due to the increase in ease of getting a DVD for a movie (Blockbuster, Netflix, Red Box), the major studios are making decisions on content based upon a perceived box office return. Now, more than ever, the studios are focusing on blockbusters. The small film companies (e.g., Sony Classics) that were subsidiaries of the majors (e.g., Universal, Sony, and Warner Brothers) have been either closed or have suffered such severe cuts in funding that they might as well be closed.

The result is that entertainment companies are racing to find ways to utilize the new delivery systems. But the days of going down to the record store to hear a new song or the movie theatre to see a new film are long gone.

B. The Ability to Create Art

Another significant change wrought by technology regards the equipment to produce the entertainment content. In 1999, digital technology was just emerging. Now, in 2010, a filmmaker can buy an HD video camera for under $3,000. He can get an editing program for under $1,000. He can buy excellent lighting packages for under $1,000. Consequently, a talented filmmaker can get the basic equipment to do a film for $5,000. The quality of that film will, in many ways, rival anything done for millions of dollars.

In the recording industry, computer programs such as ProTools, give a musician the ability to put a functional recording studio in his basement. Basement tapes, surprisingly, are now held to the same standard as a record done in RCA Studios. Combined with the other aspects of technology described herein, a performer can now record his song, create his own CD to make hard copies for distribution, upload a digital copy to his various websites (both business and social networking), receive orders from the Internet, fulfill those orders, and never leave his basement.

C. Creation of Multiple Delivery Systems and Need for Content

Finally, technology has also had a profound effect on the creation of delivery systems. The Internet has created the ability for literally millions of people to instantly find and purchase content. Cable has expanded the world of television. Also, satellite technology is completely changing the world of radio. With services such as Sirius, radio has regained its relevance as a communications medium.

The other fact is that these different delivery systems are voracious in eating up content. Cable, in particular, with its 500-channel universe, is a blackhole of content. For artists, this is almost a golden age in the need for their output. Consequently, creative people are being recognized earlier and more often.

III. CONCLUSION

In a short ten years, the entertainment industry has undergone more change than in the previous 110 years dating back to the advent of radio. Once formidable and established companies such as MGM have disappeared or are a mere shadow of their former stature. Companies in the cable industry (e.g. Comcast) are now major players. And, though banks have always been important for capital purposes, their importance has exploded.

Given the turmoil of the past ten years, it is going to be very interesting to see what happens in the next ten years. Will a person be able to be his or her own "virtual" studio? What new devices will be created in the next ten years? Will we even have a "television set" anymore?

As the answers to these questions are revealed, one thing is true - it is certainly an exciting time to practice entertainment law.

Professional Sports League Commissioners' Authority and Collective Bargaining

MATTHEW J. PARLOW*

ABSTRACT

With the National Basketball Association (NBA) and National Football League (NFL) collective bargaining agreements set to expire within the next two years, many experts are already predicting what changes may be made to both leagues' governing labor documents. One likely point of contention between the owners and the players' unions—though rarely discussed in the experts' predictive discourse—is the power of the respective league commissioners to punish or discipline wayward players for misbehavior committed off of the court or field. This article will analyze this area of sports law by exploring this power of each league's sports commissioner, as well as its place and significance in collective bargaining.

This article will begin in Part II by giving a brief overview of the rise in commissioner discipline for players' misbehavior committed off of the court or field and why commissioners punish in this manner. Parts II and III will track and situate the source of the commissioners' power to discipline for such reasons—namely, in the leagues' respective collective bargaining agreements. Part IV will describe how courts and arbitrators have treated commissioners' decisions to punish players for their actions off of the court or field, and posit why such treatment is a concern for the labor unions representing professional athletes in these two leagues. Part IV will then give an overview of the collective bargaining process and the effect it has on this power of each league commissioner. Part IV will also explore why the players' unions will likely make this power of the league commissioner a provision of the collective bargaining agreement that will be negotiated over, unlike in years past. Finally, Part V will provide some concluding insights.

* Associate Professor of Law, Marquette University Law School; J.D., Yale Law School; B.A., Loyola Marymount University. I would like to thank Professor Janine Kim for her comments on an earlier draft of this article; Ben Tulis, Emeka Anyanwu, and the other editors of the Texas Review of Entertainment and Sports Law for inviting me to speak at their symposium entitled "The Implications of the Expiring Collective Bargaining Agreements in the NFL and NBA," as well for their research and editing assistance; Alex Porteshawver and Ashley Wilson for their research assistance; and Marquette University Law School for its financial support.

SUMMARY

I. INTRODUCTION

The National Football League Players Association (NFLPA)—the union that represents professional football players in the National Football League (NFL)—has thrown down the gauntlet for its upcoming renegotiation of its collective bargaining agreement (CBA) with the NFL.[1] The National Basketball Players Association (NBPA)—the union that represents professional basketball players in the National Basketball Association (NBA)—may follow suit. Many are predicting that traditional substantive terms of each of the league's respective CBA will be the focal points that determine whether labor peace can be achieved: salary cap,[2] revenue sharing,[3] and others. However, one area of the CBA negotiations for the NBA and the NFL that has received little attention, but that may prove integral to the success of these negotiations, is the power of the respective league's commissioners to discipline wayward athletes for misbehavior

1. *See Goodell's Authority To Be Part of Talks*, ESPN.COM, July 28, 2009, http://sports.espn.go.com/nfl/news/story?id=4360661 (quoting NFLPA Executive Director DeMaurice Smith discussing his union's intention to negotiate over the NFL Commissioner's power to discipline athletes in the new CBA).

2. *See, e.g.*, Ken Berger, *Owners Share Grim Figures with Players as CBA Negotiations Begin*, CBSSPORTS.COM, Aug. 4, 2009, http://www.cbssports.com/nba/story/12022364 (discussing the drop in league-wide revenue, the resulting reduction in the NBA salary cap, and the implications for the renegotiation of the CBA).

3. *See, e.g.*, Barry Wilner, *NFLPA Challenges League Cutting Portion of Revenue Sharing*, STAR TRIB. (Minneapolis), Dec. 22, 2009, http://www.startribune.com/templates/Print_This_Story?sid=79912472 (noting the NFLPA's challenge to the NFL elimination of a supplemental revenue-sharing program between the NFL teams).

committed off of the court or field. This article will analyze this unique area of sports law by exploring the power of each leagues' commissioner and its place in collective bargaining.

This article will begin by giving a brief overview of the rise of commissioner discipline as a consequence of players' misbehavior committed off the court or field, and explore why commissioners punish in this manner. Parts II and III will track and situate the source of the commissioners' power to discipline for such reasons—namely, in the leagues' respective CBAs. Part IV will describe how courts and arbitrators have treated commissioners' decisions to punish players for their actions off the court or field and posit why such treatment is a concern for the labor unions representing professional athletes in these two leagues. Part IV will then give an overview of the collective bargaining process and the effect it has on this power of each league's commissioner. Part IV will also explore why the players' unions will likely make this power of the league commissioner a term of the CBA that will be more heavily negotiated over, unlike in years past. Finally, Part V will provide some concluding insights.

II. THE RISE OF COMMISSIONER PUNISHMENT AND THE REASONS BEHIND IT

In the past decade, professional sports have seen an increase in the discipline doled out by professional sports league commissioners[4] to players who act inappropriately off the court or field.[5] Some misbehavior has been criminal in nature, such as Michael Vick's involvement in dogfighting and gambling,[6] Plaxico Burress's unlawful carrying and discharging of a firearm,[7] or Gilbert Arenas's possessing and drawing a gun on teammate Javaris Crittenton in the Washington Wizards locker room.[8] However, commissioners have also suspended players for actions which were not criminal, but instead brought disrepute and embarrassment to the league—actions which run counter to the best interest of the sport.[9] A quintessential example of this type of discipline occurred when Major League

4. Hereafter, when I refer to "commissioners," I will be referring to professional sports league commissioners for the NBA, NFL, Major League Baseball (MLB), and National Hockey League (NHL).

5. Janine Young Kim & Matthew J. Parlow, *Off-Court Misbehavior: Sports Leagues and Private Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 573, 574 (2009).

6. *Vick Suspended Indefinitely After Filing Plea*, NFL.COM, Aug. 25, 2007, http://www.nfl.com/news/story?id=09000d5d801c1644&template=without-video&confirm=true; *see also* Mark Maske, *Falcons' Vick Indicted in Dogfighting Case*, WASH. POST, July 18, 2007, at E1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/07/17/AR2007071701393.html (detailing the 19-page indictment against Vick alleging that he was involved in the dogfighting operation, attended and gambled on fights, and participated in the execution of under-performing dogs).

7. *Burress Pleads Guilty on Felony Charge*, ESPN.COM, Aug. 21, 2009, http://sports.espn.go.com/nfl/news/story?id=4411373 (commenting on Burress's suspension by NFL Commissioner Roger Goodell after Burress's guilty plea to one count of attempted criminal possession of a weapon, after being charged with two counts of criminal possession of a weapon and one count of reckless endangerment).

8. *Arenas Suspended Indefinitely*, ESPN.COM, Jan. 7, 2010, http://sports.espn.go.com/nba/news/story?id=4802267 (describing NBA Commissioner David Stern's indefinite suspension of Arenas because of Arenas's behavior both in the locker room and afterward).

9. *See* Kim & Parlow, *supra* note 5, at 582-83.

Baseball (MLB) Commissioner Bud Selig suspended then-Atlanta Braves pitcher John Rocker for making racially-insensitive statements to a *Sports Illustrated* reporter.[10]

This recent increase of commissioner-imposed discipline demonstrates a broadening of the types of players' behavior which have been deemed appropriate for commissioner punishment. In the past, commissioners handed down discipline for players' misbehavior on the court or field or in relation to drug testing. However, this more recent phenomenon provides a more expansive purview of punishable behavior. While this shift may be in application only, as opposed to legal right—which the commissioners have always had—it is, nonetheless, noteworthy.

This change should not be altogether unsurprising. In 2000, NFL Commissioner Paul Tagliabue acknowledged that criminal behavior by players off the field had become an important area for reform in the NFL.[11] Indeed, commissioners have many legitimate reasons for disciplining athletes for their actions off the court or field. Economic realities provide one such justification. Players' misbehavior can affect a professional sports league's—or one of its team's—image and profitability.[12] In response to inappropriate athlete behavior, fans may attend fewer games (and thus buy less merchandise and concessions), and corporations may cancel or choose not to renew their sponsorships of a league or team.[13] Accordingly, commissioners discipline wayward athletes to deter them and other athletes from acting in such an inappropriate manner again and to send a signal to fans and sponsors that such behavior is not tolerated by the league.

However, such punishment is not always so self-interested. Commissioners also impose discipline on wayward athletes in an attempt to rehabilitate them. For example, several scholars have noted the problems with professional athletes and violence against women.[14] Many attribute this violence as an extension of the aggression and violence required to excel on the court or field.[15] In response, commissioners punish athletes that engage in violence against women not only to protect the reputation of their league[16]—by denunciating the behavior—but also to require players to seek counseling to help them

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10. *Id.* Another example is MLB Commissioner Bowie Kuhn's suspension of former MLB pitcher Denny McLain for associating with gamblers. *See* William Leggett, *Denny McLain: Ready for his Comeback Try*, SPORTS ILLUSTRATED, June 29, 1970, at 20, *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1083763/index.htm. NBA Commissioner David Stern also fined former Chicago Bulls player Dennis Rodman $50,000 for referring to Mormons as "assholes" in 1997. Karen Martin Dean, *Can the NBA Punish Dennis Rodman? An Analysis of First Amendment Rights in Professional Basketball*, 23 VT. L. REV. 157, 157 (1998). Stern also fined then New Jersey Nets Coach John Calipari for calling a reporter a "Mexican idiot." *See* Selena Roberts, *Ethnic Insult from Calipari Results in Apology by Nets*, N.Y. TIMES, March 24, 1997, at C1, *available at* http://www.nytimes.com/1997/03/24/sports/ethnic-insult-from-calipari-results-in-apology-by-nets.html?pagewanted=1.

11. Sean Bukowski, Note, *Flag on the Play: 25 to Life for the Offense of Murder*, 3 VAND. J. ENT. L. & PRAC. 106, 106-07 (2001).

12. *Id.* at 107.

13. *Id.* at 107-08.

14. *See, e.g.*, Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against Women*, 31 COLUM. J.L. & SOC. PROBS. 167 (1998); Carrie A. Moser, *Penalties, Fouls, and Errors: Professional Athletes and Violence Against Women*, 11 SPORTS LAW. J. 69 (2004); Kimberly M. Trebon, *There is No "I" in Team: The Commission of Group Sexual Assault by Collegiate and Professional Athletes*, 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 65 (2007).

15. *See* Dabbs, *supra* note 14, at 170 (explaining the view that athletes have difficulty "turning off" the violent and aggressive traits taught by their sports); *see also* Moser, *supra* note 14, at 71 (describing the character traits that distinguish athletes from normal citizens).

16. *See* Kim & Parlow, *supra* note 5, at 590-91 (comparing punishment in sports leagues to employment-related punishment).

learn from their mistakes and avoid repeating such behavior in the future.[17] Finally, commissioners have an incentive to punish misbehaving athletes because of the role model factor. Despite former NBA star Charles Barkley's protestations,[18] professional athletes are role models.[19] Commissioners are mindful of the good image that professional athletes must project for their devoted fans—particularly kids—and thus discipline athletes accordingly to reinforce the good character required of them.[20]

While commissioners may have compelling reasons for disciplining wayward athletes for actions committed off of the court or field, the practice of doing so is somewhat controversial. As noted above, this may be due, at least in part, to commissioner punishment evolving solely (or largely) from instances of misbehavior committed on the court or field to a much more expansive purview of behavior that includes actions in athletes' private lives. The controversy may also stem from the fact that the power given the commissioner in his league's governing documents has not been at the forefront of negotiations between the players' labor unions and the leagues. Whichever it is, as the power of the commissioner to discipline begins to emerge as an important term in collective bargaining, it is helpful to trace the history of this power and understand its evolution.

III. THE BEST INTEREST CLAUSE AND THE POWER OF THE COMMISSIONER

A. Origins of the Best Interest Clause

The first commissioner of a major professional sports league[21] arose out of a controversy that threatened the integrity—and perhaps the continued existence of—MLB. The Chicago White Sox faced the Cincinnati Reds in the 1919 World Series and were favored to win; the Reds won the series five games to three.[22] Soon thereafter, details emerged that gamblers had bribed eight players from the White Sox to throw the World Series.[23] While there had been rumors of players being involved in gambling in baseball

17. Bukowski, *supra* note 11, at 117; *see also* NAT'L BASKETBALL ASS'N & NAT'L BASKETBALL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT art. VI, § 8 (executed July 29, 2005), *available at* http://www.nbpa.org/cba/2005 [hereinafter NBA COLLECTIVE BARGAINING AGREEMENT] (requiring players who commit violent acts off the court to possibly undergo counseling, after a clinical evaluation, to address such behavior).

18. *See* Korin Miller, *Charles Barkley Arrested on Suspicion of DUI*, N.Y. DAILY NEWS, *available at* Dec. 31, 2008, http://www.nydailynews.com/gossip/2008/12/31/2008-12-31_charles_barkley_arrested_on_suspicion_of.html (referring to Barkley's famous quote "A million guys can dunk a basketball; should they be role models?", which led to Nike's 1993 "I am not a role model" advertising campaign).

19. Holly M. Burch & Jennifer B. Murray, *An Essay on Athletes as Role Models, Their Involvement in Charities, and Considerations in Starting a Private Foundation*, 6 SPORTS LAW. J. 249, 250-55 (1999).

20. Kim & Parlow, *supra* note 5, at 585. Commissioners also require background checks and implement dress codes to help further this role model image. *Id.*

21. It is generally accepted that the four major American professional sports leagues are the NBA, NFL, NHL, and MLB.

22. *See* Jonathan M. Reinsdorf, *The Powers of the Commissioner in Baseball*, 7 MARQ. SPORTS L.J. 211, 219 (1996).

23. *See* Robert I. Lockwood, Note, *The Best Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Forefront in the NBA*, 15 SPORTS LAW. J. 137, 141-44 (2008).

generally, few thought it would reach the magnitude and significance of throwing a World Series.[24] The reality shook the public's confidence in baseball to its core, and the baseball club owners acted swiftly to save baseball.[25]

The owners decided to consolidate power in the hands of a newly created Commissioner and approached Judge Kenesaw Mountain Landis about the position.[26] Landis was willing to accept the position, but only if he possessed unbridled authority.[27] The owners needed someone of Landis's integrity and reputation to re-instill the public's confidence in baseball.[28] Consequently, the owners drafted a governing document, which would later become the Major League Agreement, detailing the newly created position of Commissioner and the near absolute power that the position enjoyed.[29] Landis approved the wording of the document—both with regard to the Commissioner and more generally—and became the first Commissioner of baseball.[30]

The vast majority of the Commissioner's power stems from his "best interests" power.[31] The Major League Agreement gave the Commissioner the authority to investigate actions by anyone in baseball that he deemed "detrimental to the 'best interests' of

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24. *See* Reinsdorf, *supra* note 22, at 219-20. The Chicago White Sox team of this era earned the nickname the "Black Sox" due to this infamy. *See* Paul Finkelman, *Baseball and the Rule of Law*, 46 CLEV. ST. L. REV. 239, 245 (1998).

25. *See* Reinsdorf, *supra* note 22, at 220.

26. *See* Craig F. Arcella, *Major League Baseball's Disempowered Commissioner: Judicial Ramifications of the 1994 Restructuring*, 97 COLUM. L. REV. 2420, 2430 (1997). Judge Landis was a well known figure to baseball, as he was the presiding judge in the antitrust case, Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922). Due to Landis's efforts, the National League and Federal League negotiated a settlement in the case. *See* Ted Curtis, *In the Best Interests of the Game: The Authority of the Commissioner of Major League Baseball*, 5 SETON HALL J. SPORT L. 5, 6 (1995). Interestingly, only the National League's Baltimore franchise did not accept the settlement, and thus, the Federal League sued the Baltimore team. This case made its way to the U.S. Supreme Court, and the Court's decision ultimately provided MLB with its antitrust exemption. *See generally Fed. Baseball Club of Baltimore*, 259 U.S. at 200.

27. Shayna M. Sigman, *The Jurisprudence of Judge Kenesaw Mountain Landis*, 15 MARQ. SPORTS L. REV. 277, 304 (2005).

28. Peter G. Neiman, *"Root, Root, Root for the Home Team": Pete Rose, Nominal Parties, and Diversity Jurisdiction*, 66 N.Y.U. L. REV. 148, 148 n.7 (1991). This did not, however, stop the owners from attempting to limit the powers of the commissioner right before the final drafting session of the document that was to ultimately become the Major League Agreement. The owners attempted to add two clauses that would have limited the Commissioner's otherwise absolute authority. The first clause would have transformed the Commissioner's ability to suspend or remove an owner for actions that were "detrimental to the best interests" of baseball to the mere ability to recommend such a suspension or removal. *See* Reinsdorf, *supra* note 22, at 223. The second clause would have limited the Commissioner's role to one of a tiebreaker for such issues brought before the Advisory Committee, instead of being able to rule on all matters before the Committee. *See id.* At the final drafting session, Landis threatened to not become commissioner when presented with the owners' proposed changes. The owners quickly relented, and Landis became the Commissioner of baseball, endowed with absolute authority. *See id.*

29. *See* Reinsdorf, *supra* note 22, at 221.

30. *See id.*

31. *See* Matthew A. Foote, *Three Strikes and You're (Not Necessarily) Out: How Baseball's Erratic Approach to Conduct Violations Is Not in the Best Interest of the Game*, 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 6-7 (2009). Interestingly, the scope of the Commissioner's power—albeit more limited at the time—can actually be seen to have predated the official position of Commissioner. In 1919, the Boston Red Sox sold pitcher Carl Mays to the New York Yankees after he left the field during the middle of the game—without the permission or instruction of his manager or team. *See* Bukowski, *supra* note 11, at 109. When he caught wind of the sale of Mays, American League President Byron "Ban" Johnson suspended Mays for leaving his team. *See id.* Before the uniting of the leagues under Commissioner Landis, the American and National Leagues had their own presidents that oversaw their respective operations. *See id.* The Yankees challenged Johnson's suspension in *American League Baseball Club of N.Y. v. Johnson*, 179 N.Y.S. 498 (1919), and the court held that Johnson could suspend or otherwise discipline a player only for actions taken during the course of the actual playing of a game.

baseball."[32] Moreover, the commissioner could take "preventative, remedial or punitive action" against those acting against these "best interests."[33] The Commissioner also served as the final arbiter of disputes arising in baseball—between the league and clubs, between players and clubs, etc.[34] To ensure the absolute authority of the Commissioner, the Major League Agreement dictated that all clubs were bound by the Commissioner's decisions and that they waived the right to challenge such decisions in court, regardless of how severe the penalty imposed.[35] While the MLB Commissioner no longer enjoys this type of absolute authority,[36] he still has significant power—as do the commissioners in the other major professional sports leagues—to act in the best interest of his sport, including punishing athletes for misbehavior committed off the court or field.

B. Sources of the Best Interest Power in the NBA and NFL

The broad power afforded professional sports league commissioners through the leagues' respective best interest clauses stems, in large part, from the league constitutions, bylaws, and CBAs.[37] Included in these general powers—as described further below—is the power of each league's commissioner to discipline athletes for inappropriate actions committed off of the court or field.[38] These governing documents contractually bind most of the individuals involved in professional sports, as the players (through their union) and

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32. *See* Reinsdorf, *supra* note 22, at 221.

33. *See id.* The Major League Agreement allowed the Commissioner to take punitive measures, such as imposing a $5,000 fine (not an insignificant amount in 1921) and making a player ineligible to play in the league. *See id.* at 221-22.

34. *See* Matthew B. Pachman, Note, *Limits on the Discretionary Power of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1415 (1990).

35. *See id.* Since that time, despite the waiver of the right to recourse in the judicial system, courts have considered cases involving actions taken by the Commissioner pursuant to his best interest power, though only when the Commissioner has exceeded his authority. *See* Reinsdorf, *supra* note 22, at 222.

36. *See generally* Reinsdorf, *supra* note 22 (detailing the various amendments to the Commissioner's power since the adoption of the Major League Agreement); Pachman, *supra* note 34, at 1416-17 (detailing changes made to the powers of the MLB Commissioner over time); Curtis, *supra* note 26, at 12-31.

37. RAY YASSER ET AL., SPORTS LAW CASES AND MATERIALS 379-80 (6th ed., LexisNexis 2006); *see also* MAJOR LEAGUE BASEBALL CONST. § 2 (amended 2005) (providing the MLB Commissioner with authority to discipline athletes who act in a way that is "not in the best interests of baseball"); NAT'L BASKETBALL ASS'N CONST. & BYLAWS art. XXXV(d) (1989) [hereinafter NBA CONST. & BYLAWS] (enabling the NBA Commissioner to discipline "any Player who, in [the Commissioner's] opinion, shall have been guilty of conduct prejudicial...or detrimental to the [NBA]"; NAT'L HOCKEY LEAGUE BYLAWS § 17.3(a) (1990) (authorizing the NHL Commissioner to punish an athlete "whether during or outside the playing season has been dishonorable, prejudicial to or against the welfare of the League or the game of Hockey"); NAT'L FOOTBALL LEAGUE CONST. & BYLAWS art. VIII (amended 1999) [hereinafter NFL CONST. & BYLAWS]; NFL MGMT. COUNCIL & NFL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT app. C, ¶ 15 (2006) [hereinafter NFL COLLECTIVE BARGAINING AGREEMENT] (permitting the NFL Commissioner to punish an athlete who acts in a manner that is "detrimental to the League or professional football"). The NFL Collective Bargaining Agreement grants the Commissioner power to discipline players to protect "the integrity of the sport"—a phrase synonymous to the "best interest of the sport."

38. *See* Kim & Parlow, *supra* note 5, at 575; *see also* MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION 436 (1st ed. 2005) (explaining the commissioners' power to act in the best interest of their respective sport); Jason M. Pollack, Note, *Take My Arbitrator, Please: Commissioner "Best Interests" Disciplinary Authority in Professional Sports*, 67 FORDHAM L. REV. 1645 (1999) (analyzing the different professional sports leagues' commissioners' best interest powers).

the owners (through the league itself) negotiate and approve these documents.[39] In this regard, the interested parties in professional sports construct and bring their actions under the purview of the power of the commissioner. As one scholar notes, the power afforded a commissioner "represents an almost autonomous authority within the internal structure of the league, uncontrolled by its principal owners."[40] While MLB was the first to codify the best interest power in the Major League Agreement, the NBA and NFL eventually followed suit, granting their respective commissioners the broad power contained in this type of best interest clause.

The first NBA Commissioner did not enjoy the same broad authority that MLB Commissioner Landis did.[41] Instead, the NBA's first Commissioner,[42] Maurice Podoloff, did not have much formal power under the governing league documents.[43] In 1964, shortly after the NBA's second Commissioner took office—Walter Kennedy assumed the role in 1963—the NBPA was formed.[44] In 1971, the league owners granted the Commissioner a type of broad-reaching best interest power similar to the power enjoyed by the MLB Commissioner.[45] Some believe that the owners instituted the Commissioner's best interest power to "preserve the integrity of the league from the perceived evils of gambling."[46] There were several instances of problems with gambling and basketball—including the high-profile case, *Molinas v. NBA*[47] in 1961, which will be discussed below in Part IV—that preceded the vesting of the NBA Commissioner with this best interest power. To exercise his best interest power, the NBA Commissioner did not need a player to violate a league rule.[48] Instead, the Commissioner could use this power—based on his professional judgment—in a way that he deemed in the best interest of the NBA, limited only by contrary language contained in any of the league's governing documents or by due process concerns.[49]

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39. Ian Dobinson & David Thorpe, *What's Wrong with the Commissioner? Some Lessons from Downunder*, 19 SETON HALL J. SPORTS & ENT. L. 105, 111-12 (2009).

40. Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective*, 6 MARQ. SPORTS L.J. 65, 72 (1995). As will be discussed in more detail below, courts and arbitrators have placed certain restrictions on commissioners' seemingly unbridled authority. Moreover, a league's constitution, bylaws, and/or collective bargaining agreement can also serve to limit the commissioner's power. *See* Brian D. Showalter, *Technical Foul: David Stern's Excessive Use of Rule-Making Authority*, 18 MARQ. SPORTS L. J. 205, 206 (2007).

41. *See id.* at 209. The NBA was known as the Basketball Association of America (BAA) at the time Podoloff took office. *See id.*

42. The position at the time was titled "NBA President,", though it later became the NBA Commissioner in 1967. Mike Monroe, *The Commissioners*, NBA.COM, http://www.nba.com/history/commissioners.html (last visited Mar. 8, 2010).

43. *See* Showalter, *supra* note 40, at 209. Nevertheless, Commissioner Podoloff was able to successfully govern by using his influence to advance the league—most significantly, merging the BAA and the National Basketball League to form the NBA. *See id.*

44. *Id.*

45. *Id.* In addition to granting the Commissioner power to act in the best interest of the NBA, the owners gave the Commissioner more authority to manage the league in ways he did not previously enjoy. Lockwood, *supra* note 23, at 149.

46. Lockwood, *supra* note 23, at 147.

47. 190 F. Supp. 241 (S.D.N.Y. 1961).

48. Lockwood, *supra* note 23, at 147.

49. *Id.*

This best interest power survives in the NBA today,[50] and allows the NBA Commissioner to punish "any Player who, in [the Commissioner's] opinion, shall have been guilty of conduct prejudicial . . . or detrimental to the [NBA]."[51] This authority permits the NBA Commissioner to discipline players for their behavior off of the court. Moreover, the Commissioner also has another source of supplemental authority that allows him to punish players for off the field transgressions: the standard NBA player contract, which contains a "good moral character" clause.[52] This clause permits the team to terminate a player's contract if that player acts in a manner that is not consistent with the standards of good morals and citizenship.[53] The NBA Commissioner has also cited this clause in handing down discipline for player misbehavior.[54] The best interest power and "good moral character" clause have been described as granting the NBA Commissioner "the broadest authority" among the commissioners of the major professional sports leagues.[55]

Like the first NBA Commissioner, the first two NFL Commissioners did not enjoy the expansive best interest power that MLB Commissioner Landis did.[56] The NFL's third Commissioner, Pete Rozelle, was granted significant authority, due in part to his tremendous success in bringing financial solvency—and indeed, prosperity—to the league.[57] The owners gave Rozelle "full, complete, and final jurisdiction and authority over any dispute involving a member or members in the League."[58] Rozelle could also punish a player for conduct that he considered "detrimental to the integrity of, or public confidence in, the game of professional football."[59] Rozelle enjoyed this power without concerns of arbitration rights afforded the player, which was (and is) the case in other professional sports leagues.[60]

The NFL Commissioner today enjoys a great deal of authority to discipline a player who acts in a manner that the Commissioner deems "to be detrimental to the League or professional football."[61] However, an implicit limitation seems to exist within the NFL

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50. It is worth noting that one significant change to the NBA commissioner's best interest power has been to afford the players a grievance arbitration—a result that came about through the collective bargaining process. *Id.* at 161.

51. NBA CONST. & BYLAWS art. XXXV, § d. In addition, the NBA Commissioner "is entitled to promulgate and enforce reasonable rules governing the conduct of players on the playing court"—which is very broadly defined. NBA COLLECTIVE BARGAINING AGREEMENT art. VI, § 12, *noted in* Showalter, *supra* note 40, at 212-13. The NBA Commissioner can implement such rules by merely giving notice and consulting with the NBPA; he does not need to receive the organization's consent. In recent years, Commissioner David Stern has used this broad authority to implement various rules intended to control players' behavior both on and off the court, such as a dress code for players "engaged in team or league business" and prohibiting players from attending certain nightclubs. Showalter, *supra* note 40, at 210-12.

52. Moser, *supra* note 14, at 75.

53. Bukowski, *supra* note 11, at 110.

54. *See* Mike Wise, *Pro Basketball; Image Conscious NBA Suspends Iverson and Rider*, N.Y. TIMES, Oct. 4, 1997, at C8.

55. Showalter, *supra* note 40, at 212.

56. *See* Lockwood, *supra* note 23, at 146.

57. *Id.*

58. *Id.* (citing NFL CONST. & BYLAWS art. VIII, § 8.3(a) (1988)).

59. *Id.* at 147 (citing NFL COLLECTIVE BARGAINING AGREEMENT art. XI, § 1(a) (1993)).

60. *Id.* at 147.

61. NFL CONST. & BYLAWS art. VIII, § E; *see also* NFL COLLECTIVE BARGAINING AGREEMENT app. C, ¶ 15. For an argument against the NFL Commissioner having the authority to punish players for their actions off of the field under the NFL's various governing documents, *see* Marc Edelman, *Are Commissioner Suspensions Really Any Different From Illegal Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains*

League Constitution, as Article VIII, Section 8.13(B) requires the NFL Commissioner to secure the approval of the NFL Executive Committee in order to impose discipline beyond his express authority.[62] Nevertheless, this otherwise broad grant of authority affords the Commissioner great latitude in punishing players for transgressions—a power reinforced by the NFL CBA and the NFL's standard player contract.[63] In addition, similar to those powers afforded Rozelle, the NFL's current Commissioner, Roger Goodell, is not limited by an arbitration provision the way other professional sports league commissioners are with regard to their discipline and punishment of players.[64] Instead, players can only appeal the Commissioner's disciplinary measures to the commissioner or his designee.[65]

Even though Goodell enjoys this distinction, he chose to collaborate with the NFL Players' Association when developing the NFL Personal Conduct Policy (NFL PCP),[66] which grants him another supplemental source of authority for disciplining athletes.[67] The NFL PCP provides that "[a]ll persons associated with the NFL are required to avoid 'conduct detrimental to the integrity and public confidence in the National Football League.'"[68] This type of detrimental conduct includes sexual offenses, domestic violence, crimes related to steroids or other banned substances, dangerous activity that puts others' safety at risk, possessing a weapon in a workplace setting, and "conduct that undermines or puts at risk the integrity and reputation of the NFL."[69] In fact, a player acting in such a

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Trade, 58 CATH. U. L. REV. 631, 638 (2009).

62. Michael A. Mahone, Jr., *Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League's Revised Personal Conduct Policy*, 11 VAND. J. ENT. & TECH. L. 181, 191 (2008); *see also* Pachman, *supra* note 34, at 1418 (labeling this provision as a "significant departure" from the MLB Commissioner).

63. *See* NFL COLLECTIVE BARGAINING AGREEMENT app. C, ¶ 15, (permitting the NFL Commissioner to punish an athlete who acts in a manner that is "detrimental to the League or professional football"); *see also* Mahone, Jr., *supra* note 62, at 191-92.

64. *See* Lockwood, *supra* note 23, at 147.

65. *See* NFL COLLECTIVE BARGAINING AGREEMENT art. XI, §1 (stating that any discipline "may only be affirmed, reduced, or vacated by the commissioner").

66. *See* NFL PLAYERS ASS'N, PERSONAL CONDUCT POLICY (2008), *available at* http://www.nflplayers.com/about-us/Rules--Regulations/Player-Policies/Conduct-Policy/ [hereinafter NFL PCP]. While a previous NFL PCP came into existence in 2000—when the owners unilaterally gave then-NFL Commissioner Paul Tagliabue the explicit authority to punish players for transgressions committed off the playing field—Commissioner Tagliabue never exercised his authority under it. *See* Edelman, *supra* note 61, at 637. Moreover, the new version of the NFL PCP includes "longer suspensions, indefinite suspensions, and even the commissioner's right to suspend players for non-criminal behavior." *See id.* This difference, coupled with the manner in which the current version of the NFL PCP came to being—that is, through Commissioner Goodell's consultation with the NFLPA instead of being unilaterally imposed by the NFL owners—makes the new PCP distinct (for purposes of this article) from the previous version.

67. Adam B. Marks, *Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members By Not Fighting the Enactment of the Personal Conduct Policy*, 40 CONN. L. REV. 1581, 1584-85 (2008) (recounting the history of the development of the NFL PCP). The NFL PCP replaced the NFL's Violent Crime Policy—instituted in 1998—which allowed the NFL Commissioner to suspend and/or fine players charged with violent crimes. *See* Robert Ambrose, *The NFL Makes It Rain: Through Strict Enforcement of Its Policy, the NFL Protects Its Integrity, Wealth, and Popularity*, 34 WM. MITCHELL L. REV. 1069, 1086-87 (2008). The NFL Violent Crime Policy also required a wayward player to engage in counseling and a clinical evaluation. *See* Bukowski, *supra* note 11, at 110.

68. *See* NFL PERSONAL CONDUCT POLICY, *supra* note 66, at 1.

69. *Id.* at 2. Commissioner Goodell has suspended players under the NFL PCP for actions such as probation violations, alleged involvement in dog fighting (which the player, Michael Vick, later pled guilty to related criminal charges), and being the focus of a police investigation. *See* Marks, *supra* note 67, at 1583-84.

manner will be found in violation of the NFL PCP, even if the player's actions do not result in a criminal conviction.[70]

While the NFL PCP provides the NFL Commissioner with an additional source of authority for disciplining players for their misconduct, the document also contains a proportionality requirement.[71] The NFL PCP provides that "[t]he specifics of the disciplinary response will be based on the nature of the incident, the actual or threatened risk to the participant and others, any prior or additional misconduct (whether or not criminal charges are filed), and other relevant factors."[72] In this regard, whatever punishment the NFL Commissioner imposes—which can include a fine, suspension, banishment, counseling, or other education programs—must be proportional to the player's actions.[73] In addition, a disciplined athlete retains his right to appeal as provided in Article XI of the NFL Collective Bargaining Agreement and the NFL Constitution and Bylaws.[74]

Based on the best interest provisions contained in each league's constitution and bylaws, and the other supplemental sources of authority, the NBA and NFL Commissioners have broad authority to discipline players for their conduct off the court or field. However, as discussed further in Part IV, while courts have given commissioners' actions great deference, arbitrators have shown less deference in their treatment of commissioner punishment.

IV. COURTS' AND ARBITRATORS' TREATMENT OF COMMISSIONER PUNISHMENT OF ATHLETES

Given the broad power granted to commissioners under the professional sports leagues' respective best interest clauses, it is instructive to analyze the treatment of their powers by courts and arbitrators. Whether an athlete disciplined by the commissioner may appeal to an arbitrator, court, or the commissioner himself depends upon which league he is in.[75] Courts' treatment of commissioners' actions under the best interest clause of his respective league's governing documents seems to continue the original intent of this authority being plenary in nature.[76] On the other hand, arbitrators have been far more likely to reduce commissioner-imposed punishment—particularly based on a proportionality standard—which limits the expansive best interest power of the commissioners.

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70. *See* NFL PERSONAL CONDUCT POLICY, *supra* note 66, at 1.

71. Some scholars have challenged the validity and legal relevance of the NFL PCP, especially given its uncertain relationship to the NFL's other governing documents. *See* Edelman, *supra* note 61, at 638; Marks, *supra* note 67, at 1593-98. In particular, such critics cite the fact that the NFL PCP was not collectively bargained for, and instead, was unilaterally implemented by Commissioner Goodell—though only after consulting with, and receiving the support of, the NFLPA. *See* Marks, *supra* note 67, at 1581. However, to date, the NFL PCP has not been successfully challenged, and Commissioner Goodell has acted consistent with the analysis of his powers under the document as described above. Nor has the NFLPA taken any action when its players were fined or suspended. *See id.* at 1584-85.

72. NFL PERSONAL CONDUCT POLICY, *supra* note 66, at 2.

73. *See id.*

74. *See* NFL PERSONAL CONDUCT POLICY, *supra* note 66, at 3. Of course, a player's right of appeal is to the Commissioner, who is the person who issued the punishment in the first place.

75. *See* Pollack, *supra* note 38, at 1648-49 (discussing the differences in players' right of appeal in the major professional sports leagues).

76. *See* Wm. David Cornell, Sr., *The Imperial Commissioner Landis and His Progeny: The Evolving Power of Commissioners Over Players*, 40 NEW ENG. L. REV. 769, 772 (2006).

A. Deference to the Commissioner: The Court Cases

Most court cases involving commissioners' best interest powers do not involve a commissioner using his best interest power to discipline an athlete for misbehavior off the court or field. Nevertheless, those cases that have, and those cases involving the commissioner exercising his best interest authority in other contexts, demonstrate the likelihood that courts will continue to defer to, and uphold, discipline imposed by a commissioner against wayward players.

B. The Commissioner Usually Prevails

Early in the history of the best interest clause in professional sports, the Milwaukee American Association brought suit against MLB Commissioner Landis challenging his best interest authority.[77] The dispute arose when the St. Louis Cardinals sent outfielder Fred Barnett—after several reassignments and optionings—to Milwaukee of the minor league American Association, while reserving the option to recall him back to the major league team.[78] MLB rules mandated that teams had to first place a player on waivers—allowing other clubs the opportunity to sign that player—before sending him down to the minor leagues.[79] However, an exemption existed for teams that had purchased a player outright for two years; the team would not need to place a player on waivers before sending him down to a minor league club.[80] In this case, the minor league club located in Wichita Falls had sold Barnett to St. Louis for $5,000—despite an offer of $10,000 from the Pittsburgh Pirates.[81] Commissioner Landis investigated and found that while St. Louis owner Phil Ball's ownership interest in the four teams that Barnett had been transferred back and forth between did not violate the Major League Agreement, it did allow Ball to keep the two-year waiver exemption on Barnett intact, thus keeping the player under his control and subverting the spirit of the waiver rule.[82] Accordingly, Commissioner Landis exercised his best interest authority by voiding Barnett's option to Milwaukee and requiring that Barnett either be returned to St. Louis and remain on the team for at least one year, transferred to another team not owned or controlled by St. Louis, or released unconditionally.[83] Ball filed suit claiming that Commissioner Landis did not have the authority to act in this manner. The court held in favor of the Commissioner, noting that "the commissioner is given almost unlimited discretion in the determination of whether or not a certain state of facts creates a situation detrimental to the national game of baseball."[84] This early case set the precedent,

77. *See* Milwaukee Am. Ass'n v. Landis, 49 F.2d 298 (N.D. Ill. 1931).

78. *See id.* at 299-300. Milwaukee and the other teams to which Barnett had been reassigned or optioned were either owned or controlled by the St. Louis club. *See id.*

79. *See* Curtis, *supra* note 26, at 10.

80. *See Milwaukee Am. Ass'n*, 49 F.2d at 301.

81. *See id.* at 300.

82. *See id.* at 302. The four clubs that Ball had an ownership interest in were located in St. Louis, Tulsa, Wichita Falls, and Milwaukee.

83. Curtis, *supra* note 26, at 11.

84. *See Milwaukee Am. Ass'n*, 49 F.2d at 303. The court enumerated a variety of circumstances that fell within the Commissioner's broad authority: "to keep the game of baseball clean, to promote clean competition, to prevent collusive or fraudulent contracts, to protect players' rights, to furnish them with full opportunity to advance in accord with their abilities and to prevent their deprival of such opportunities by subterfuge, covering or other unfair conduct." *Id.*

which has been followed by many subsequent courts, to give a high level of deference to commissioner actions pursuant to the respective league's best interest clause.[85]

A second instructive case did not involve the best interest clause—it predated the inclusion of such a clause in the NBA's governing documents—but is nevertheless relevant, as it demonstrates a similar deference to the NBA Commissioner to act in the best interests of the sport even without such a clause. In *Molinas v. NBA*,[86] NBA President Podoloff indefinitely suspended Jack Molinas for betting on his team, the Fort Wayne Pistons.[87] Molinas filed suit seeking an injunction to set aside his suspension and allow him to continue playing in the NBA.[88] Molinas claimed that he was not given notice and a hearing before being suspended and that the NBA President had no authority suspend him indefinitely.[89] The court upheld Podoloff's actions, explaining that the elimination of gambling from the NBA was an important justification for imposing such a punishment.[90]

In *Charles O. Finley & Co. v. Kuhn*,[91] the Seventh Circuit Court of Appeals afforded MLB Commissioner Bowie Kuhn a similar level of deference to that given Commissioner Landis in *Milwaukee American Association*. In the case, Oakland Athletics owner Charles Finley had attempted to sell the contracts of Vida Blue, Rollie Fingers, and Joe Rudi—all-star players that the team could not afford to resign when their contracts expired at the end of the season.[92] Citing his best interest authority, Commissioner Kuhn blocked the sale of these players' contracts.[93] Commissioner Kuhn reasoned that allowing the sale of such contracts to stand would jeopardize the integrity of the game and the public's confidence in it.[94] The court upheld Commissioner Kuhn's denial of the attempted sale of the players' contracts, relying on the best interest clause. In particular, the court noted that the MLB Commissioner "has been given broad power in unambiguous language," and traced the amendments to the Major League Agreement to demonstrate that this broad authority is what the owners intended.[95]

Finally, the court in *Atlanta National League Baseball Club, Inc. v. Kuhn*[96] again afforded the MLB Commissioner great deference in acting pursuant to his best interest powers. In the case, San Francisco Giants star outfielder Gary Matthews was planning to become a free agent when his contract expired at the end of the 1976 season.[97] At the time,

85. This case was in stark contrast to precedent predating Commissioner Landis's tenure. For example, in *American League Baseball Club of N.Y. v. Johnson,* 179 N.Y.S. 498 (N.Y. Sup. Ct. 1919), the court held that the three-person governing entity of the league—the National Commission—did not have the power to discipline a player for breaking his contract with a team because the player's actions were not in the performance of his duties. *See id.* at 501-02. In reading the National Commission's powers so narrowly, the court limited the scope of the disciplinary power of the governing entity of the league to only those actions that players took on the field. *See id.* at 504.

86. 190 F. Supp. 241 (S.D.N.Y. 1961).

87. *Id.* at 242.

88. *Id.*

89. *See* Jeffrey Standen, *The Beauty of Bets: Wagers as Compensation for Professional Athletes*, 42 WILLAMETTE L. REV. 639, 645 n.30 (2006).

90. *Molinas*, 190 F.Supp. at 244.

91. 569 F.2d 527 (7th Cir. 1978).

92. *See id.* at 530-31.

93. *See id.* at 531.

94. *Id.*

95. *Id.* at 534.

96. 432 F. Supp. 1213 (N.D. Ga. 1977).

97. Lewis Kurlantzick, *The Tampering Prohibition and Agreements Between American and Foreign Sports*

the team who most recently had a player under contract retained exclusive rights to negotiate with that player.[98] On October 20, 1976, Atlanta Braves owner Ted Turner made a comment to San Francisco Giants owner Bob Lurie—in front of several members of the media—that he "would do anything to get Gary Matthews and that he would go as high as he had to."[99] These comments then appeared in the next day's newspaper in San Francisco, and Lurie filed a complaint with MLB Commissioner Bowie Kuhn shortly thereafter.[100] Commissioner Kuhn determined that Turner was violating MLB's tampering rules and suspended him for one year.[101] Turner filed suit seeking to enjoin the Commissioner from taking such action.[102] The court upheld Commissioner Kuhn's actions, finding "ample authority to punish plaintiffs in this case, for acts considered not in the best interests of baseball."[103] The court in this case, as those before it, recognized an almost unbridled power that flowed to the Commissioner through the best interest clause and accorded the Commissioner great deference in acting pursuant to it.

C. Cases Where the Commissioner Failed

However, not all court cases have demonstrated this type of deferential treatment of commissioners' exercise of their best interest powers. For example, in *Riko Enterprises, Inc. v. Seattle Supersonics Corp.*,[104] the court held that the NBA Commissioner did not have the authority to penalize a team for violating the NBA constitution by transferring the team's draft pick that year to another team.[105] In the case, the then-Seattle Supersonics[106] negotiated a contract with former NBA player John Brisker, who had previously been playing in the rival American Basketball Association (ABA) despite the fact that the Philadelphia 76ers owned his sole negotiating rights.[107] The NBA Commissioner found that the Supersonics had violated the NBA constitution—specifically, the "simple principle of fair play"—fined them $10,000, and gave the team's first round draft pick to the 76ers.[108] The Commissioner pointed to his best interest power in justifying this punishment.[109] However, the court disagreed, finding that the Commissioner had exceeded his authority by forcing the Supersonics to forfeit their draft pick.[110] The court held that only the NBA's

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Leagues, 32 COLUM. J.L. & ARTS, 271, 290-91 (2009).

98. *Id.* at 291.

99. *Kuhn*, 432 F. Supp. at 1217.

100. *Id.*

101. *Id.*

102. *See id.* at 1218.

103. *Id.* at 1220.

104. 357 F. Supp. 521 (S.D.N.Y. 1973).

105. *See id.* at 525.

106. In 2008, after a dispute with the City of Seattle, the owner of the Seattle Supersonics moved to Oklahoma City and the team became known as the Oklahoma City Thunder. *See* Greg Johns & Angela Galloway, *Sonics are Oklahoma-Bound*, SEATTLE POST-INTELLIGENCER, July 3, 2008, http://www.seattlepi.com/basketball/369313_trial03.html.

107. *See Riko*, 357 F. Supp. at 522. Although they were a rival league at the time, the ABA later merged with the NBA. *See* Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729, 771 n.180 (1987).

108. *See Riko*, 357 F. Supp. at 523.

109. *See id.* at 525.

110. *See id.* at 524-25. The court also seemed displeased by the Commissioner's refusal to conduct a hearing to allow the Supersonics an opportunity to address the charges against them—this was particularly egregious in the court's mind, given that the Commissioner was acting as arbitrator for the dispute. *See* Celeste M. Hammond, *The*

board of directors had the authority under the NBA's constitution to impose the punishment of denying a team their draft pick.[111] In this regard, the court found that the Commissioner's best interest authority was not as expansive as other courts, discussed above, had determined.

Another case that stands out as not following the deferential line of cases described above is *Professional Sports, Ltd. v. Virginia Squires Basketball Club, Ltd.*[112] In the case, the San Antonio Spurs had attempted to purchase the contract of star player George Gervin from the Virginia Squires for $225,000.[113] The ABA Commissioner refused to allow the sale, pointing to ABA bylaws that allowed the Commissioner to arbitrate and settle disputes between league clubs related to player contracts.[114] The court acknowledged that while the Commissioner had the authority to settle disputes between clubs, no dispute existed in this matter, since the clubs were in agreement on the terms of the sale of Gervin's contract.[115] The court thus held that the Commissioner's authority did not extend to disputes that were created by the Commissioner himself, as was the case here.[116] The court also rejected the Commissioner's reliance on his best interest power because he took action without providing notice and a hearing.[117]

The case of Pete Rose also provides an interesting example of when a court has ruled against a commissioner's best interest power. In 1989, after receiving information about Rose's alleged gambling—including on MLB games—Commissioner Bart Giamatti instructed his chief investigator to look into, and report on, the allegations.[118] Based on his chief investigator's report that Rose had indeed bet on MLB games, Commissioner Giamatti told Rose that Giamatti himself would investigate the allegations based on his best interest authority and scheduled a hearing to discuss the investigation.[119] Rose demanded that Commissioner Giamatti recuse himself, alleging that the Commissioner had already prejudged his guilt.[120] When the Commissioner refused to do so, Rose filed suit seeking to enjoin against Commissioner Giamatti from holding the hearing.[121] The court granted Rose a temporary injunction—delaying MLB's ability to hold a hearing for at least a few weeks—on the basis that the Commissioner had prejudged Rose.[122] While Commissioner Giamatti and Rose agreed to a resolution of their dispute—where the Commissioner suspended Rose for life but allowed him to be eligible to apply for reinstatement after one year, and in turn, Rose dropped his lawsuits against the Commissioner—the case demonstrated another situation where a court ruled against a commissioner despite his acting pursuant to the best interest clause.[123]

(Pre) (As) Sumed "Consent" of Commercial Binding Arbitration Contracts: An Empirical Study of Attitudes and Expectations of Transactional Lawyers, 36 J. MARSHALL L. REV. 589, 593-94 (2003).

111. *See Riko*, 357 F. Supp. at 525.

112. 373 F. Supp. 946 (W.D. Tex. 1974).

113. *See id.* at 948.

114. *See id.* at 949.

115. *See* Mitchell Nathanson, *The Sovereign Nation of Baseball: Why Federal Law Does Not Apply to "America's Game" and How It Got That Way*, 16 VILL. SPORTS & ENT. L.J. 49, 82-83 (2009).

116. *See Prof'l Sports*, 373 F. Supp. at 950.

117. *See id.* at 951.

118. *See* Curtis, *supra* note 26, at 27.

119. *See id.*

120. *See id.*

121. *See id.*

122. *See id.* at 27-28.

123. *See id.* at 28.

Finally, the *Chicago National League Ball Club v. Vincent*[124] case is also demonstrative of courts' refusal to grant deference to a commissioner when his actions exceed the scope of his authority. In the case, the MLB owners voted 10-2 in favor of correcting certain geography issues that had arisen over the decades of MLB expansion and team relocations by realigning four teams in the National League.[125] Under the realignment plan, the Chicago Cubs and St. Louis Cardinals would move from the National League Eastern Division to the National League Western Division, and the Atlanta Braves and the Cincinnati Reds from the National League Western Division to the National League Eastern Division.[126] However, the Chicago Cubs exercised their veto right under the MLB Constitution to block the realignment.[127] MLB Commissioner Fay Vincent stepped in and unilaterally decided to realign some of the teams in the National League, including moving the Cubs to the National League Western Division.[128] The Cubs filed suit seeking an injunction against the Commissioner's realignment plan, and the court granted the injunction.[129] The court noted that the Commissioner's best interest power, though expansive, was limited by Article VII of the Major League Agreement, which provided an express means for resolution with regard to the voting provisions in the National League Constitution.[130] Soon after the parties settled the dispute, Commissioner Vincent resigned under pressure from the owners.[131]

These cases demonstrate that while some courts are willing to give commissioners great deference when they act according to their best interest powers, others will overturn commissioners' actions if they exceed the scope of their authority. This theme is even more prevalent in the arbitration decisions involving commissioner actions pursuant to their best interest power.

D. Limitations on Commissioners' Power: The Arbitration Decisions

Commissioners have not been afforded the same level of deference by arbitrators that they have by the courts. The Steve Howe case is illustrative. MLB Commissioner Vincent suspended the oft-troubled Steve Howe for life when he entered an *Alford* plea to charges of possessing and attempting to purchase cocaine—constituting his seventh recreational drug violation since he began his professional baseball career.[132] Howe had been suspended for each of his previous violations and had even avoided a lifetime suspension on his sixth offense when Commissioner Vincent—who replaced Commissioner Kuhn—reinstated Howe under rigid conditions that focused on Howe attending an ongoing drug rehabilitation

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124. No. 92-C-4398, 1992 U.S. Dist. LEXIS 11033 (N.D. Ill. July 23, 1992), *excerpted in* PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 1, 28-32 (2004), *withdrawn and vacated*, 1992 U.S. Dist. LEXIS 14948 (N.D. Ill. Sept. 24, 1992) (after the parties agreed to settle the dispute).

125. *See* Murray Chass, *Newly Empowered Owners Rescind Order to Realign*, N.Y. TIMES, Sept. 25, 1992, http://www.nytimes.com/1992/09/25/sports/baseball-newly-empowered-owners-rescind-order-to-realign.html?pagewanted=1.

126. *See id.*

127. *See* Curtis, *supra* note 26, at 29-30.

128. *See* Michael J. Willisch, *Protecting the "Owners" of Baseball: A Governance Structure to Maintain the Integrity of the Game and Guard the Principals' Money Investment*, 88 NW. U. L. REV. 1619, 1621-22 (1994).

129. *See* Lydia Lavelle, *From the Diamonds to the Courts: Major League Baseball v. the Commissioner*, 21 N.C. CENT. L.J. 97, 114-17 (1995).

130. *Id.* at 115-16.

131. *See* Depak Sathy, *Reconstruction: Baseball's New Future*, 4 SETON HALL J. SPORT L. 27, 61 (1994).

132. *See* Pollack, *supra* note 38, at 1692-93.

program.[133] The Players' Association, on behalf of Howe, filed a grievance with the MLB arbitrator challenging Howe's lifetime suspension after his seventh offense.[134] The arbitrator reduced Howe's punishment to a one year suspension and a strict drug-testing program, stating that the severity of Commissioner Vincent's discipline was "without just cause."[135] The arbitrator recognized the importance of keeping illegal drugs out of the sport of baseball, but he also found that Commissioner Vincent's actions went beyond the reasonable range of discretion given the Commissioner regarding drug offenses.[136] This was particularly so, reasoned the arbitrator, given that he viewed the punishment as exceeding the severity of Howe's drug violations, especially factoring in Howe's history of mental illness.[137] This proportionality theme has arisen in several arbitration decisions involving commissioner action pursuant to the best interest clause and serves as a distinct limitation to that power, at least in the arbitration forum.

Arbitrators in the NBA have also treated the commissioner's decisions with less deference than courts have. For example, then-Golden State Warriors star Latrell Sprewell assaulted coach P.J. Carlesimo during practice on December 1, 1997, and was suspended by NBA Commissioner Stern for one year.[138] Sprewell appealed the Commissioner's punishment to an arbitrator, who reduced the suspension from eighty-two games—one full season—to sixty-eight games (the remainder of that NBA season).[139] In explaining his decision, the arbitrator pointed to the proportionality theme discussed above. He stated that the year-long suspension exceeded the seriousness of Sprewell's ill-advised action; thus, the punishment did not match the transgression when viewed in light of the circumstances.[140] In this regard, though the reduction was not that significant—less than twenty percent of the original punishment meted out by Commissioner Stern—the case marked yet another instance of an arbitrator affording a commissioner less deference in the exercise of his best interest power.

Finally, the case involving former MLB pitcher John Rocker offers an example of an arbitrator considering the MLB Commissioner's disciplining of a player for actions committed off the field, pursuant to his best interest power.[141] As part of his feud with New York baseball fans, Rocker made racist, homophobic, and other insensitive comments to a *Sports Illustrated* reporter.[142] MLB Commissioner Bud Selig responded with a series of disciplinary measures: suspending Rocker from the beginning of MLB's 2000 spring training through games played up until May 1, 2000; mandating that Rocker pay $20,000 to the National Association for the Advancement of Colored People (NAACP) or another

133. *See id.*

134. *See* Major League Baseball Players Ass'n v. Comm'r of Major League Baseball (Steve Howe Arbitration Decision), *in* UNDERSTANDING BUSINESS AND LEGAL ASPECTS OF THE SPORTS INDUSTRY 2000 VOL. 1, at 579, 582-83 (PLI Intellectual Prop., Course Handbook Series No. G-591, 2000).

135. *Id.* at 583.

136. *See id.* at 626, 631.

137. *See id.* at 626-31.

138. Nat'l Basketball Players Ass'n *ex rel.* Sprewell v. Warriors Basketball Club, *in* UNDERSTANDING BUSINESS AND LEGAL ASPECTS OF THE SPORTS INDUSTRY 2000 VOL. 1, at 469, 481-82 (PLI Intellectual Prop., Course Handbook Series No. G-591, 2000).

139. *Id.* at 574.

140. *See id.*

141. *See* Major League Baseball Players Ass'n v. Comm'r of Baseball (John Rocker Arbitration Decision) *in* UNDERSTANDING BUSINESS AND LEGAL ASPECTS OF THE SPORTS INDUSTRY 2001 VOL. 1, at 765 (PLI Intellectual Prop., Course Handbook Series No. G-638, 2001).

142. *See id.* at 769.

organization devoted to promoting diversity; and requiring Rocker to attend a diversity sensitivity and training program.[143] The Players' Association, on behalf of Rocker, filed a grievance with the MLB arbitrator challenging Commissioner Selig's punishment.[144] Despite Rocker's protestations, the arbitrator recognized the Commissioner's authority—through the best interest clause—to punish a player for actions the athlete committed off the field that were speech-related and concerned non-criminal behavior.[145] The arbitrator, however, did not find the Commissioner's best interest power to be unlimited. Instead, the arbitrator stated that while the Commissioner has a "reasonable range of discretion," the punishment dispensed must be on par with the offense committed, considering the circumstances involved.[146] Given this standard, the arbitrator found Rocker's punishment to be excessive and reduced Rocker's suspension to fourteen games and his fine to $500.[147] In particular, the arbitrator noted that precedent in the Commissioner's punishment of wayward players made Rocker's punishment stand out. In the past, the Commissioner had imposed discipline equal to or greater than Rocker's only in cases of repeat drug offenders committing additional, serious drug violations.[148] Recognizing this context, the arbitrator found no convincing explanation as to why Rocker's punishment should rise to the same level and thus held that the punishment did not meet the requisite proportionality requirement.[149]

These cases demonstrate that commissioners have not fared as well in arbitration as they have in the courts, with regard to having their actions taken pursuant to their respective best interest clause—in particular, disciplinary measures—upheld on appeal. However, though less deferential, these cases still show that commissioners have broad best interest powers to discipline athletes for their misbehavior off the court or field. This still significant, though not unlimited, power becomes even more relevant for the NBPA and the NFLPA when considered in light of the protections it receives through the collective bargaining process.

E. The Collective Bargaining Process and the Power of the Commissioner

As one scholar notes, "[w]hile the constitution of a league may purport to give its commissioner unlimited authority to impose discipline, that authority may be curtailed or subject to outside review as a result of the collective bargaining process and provisions incorporated into the collective bargaining agreement."[150] Indeed, "[w]hile the League Constitution will provide helpful guidance in interpreting the commissioner's authority, the CBA is the 'supreme governing authority' concerning employment" in professional sports leagues.[151] These observations underscore the importance of the collective bargaining process in defining the parameters of the commissioner power—including the power to

143. *See id.* at 770. Rocker was required to fulfill all aspects of the punishment before he would be allowed to play again.

144. *See id.* at 769.

145. *See id.* at 802-03.

146. *See id.* at 804.

147. *See* Major League Baseball Players Ass'n, *supra* note 141, at 805-06. The arbitrator did, however, leave the diversity sensitivity and training program requirement intact.

148. *See id.* at 805.

149. *See id.*

150. Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L.J. 167, 171-72 (1995).

151. Mahone, Jr., *supra* note 62, at 192.

discipline players. Moreover, this importance is only amplified given the special legal protections provided CBAs, as described further below.

The National Labor Relations Act (NLRA) provides for the collective bargaining process that allows the respective leagues' owners and players' unions to negotiate the rules and regulations of the relationship between the two sides.[152] In the seminal case *American League of Prof'l Baseball Clubs v. Ass'n of National Baseball League Umpires*,[153] the National Labor Relations Board (NLRB) established its jurisdiction over professional sports leagues.[154] Despite a string of cases holding that MLB was not engaged in interstate commerce,[155] the NLRB held that Congress intended for the NLRA to apply to MLB.[156] In doing so, the NLRB applied the NLRA to professional sports, allowing players to unionize and the players' union to negotiate the terms of employment and other related subjects for their members through the collective bargaining process.[157]

Due to this case, certain requirements of the collective bargaining process must be met to protect the validity of the resultant CBA, and indeed, the longevity and strength of professional sports leagues. For example, the substance of the negotiations between the respective league and the players' union must include certain mandatory subjects of collective bargaining, including hours, wages, and working conditions.[158] For professional sports leagues, the power of the commissioner is a mandatory subject of collective bargaining.[159] Disciplinary measures and grievance procedures are also mandatory subjects

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152. 29 U.S.C. § 151-169 (originally enacted in 1935); *see also* 29 U.S.C. § 159(d) ("to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment").

153. Am. League of Prof'l Baseball Clubs v. Ass'n of Nat'l Baseball League Umpires, 180 NLRB 190 (1969).

154. *See id.* at 191.

155. *See* Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922); Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953); Flood v. Kuhn, 407 U.S. 258 (1972).

156. *See Am. League of Prof'l Baseball Clubs*, 180 NLRB at 191. Indeed, the NLRB scoffed at this notion, originally established in *Fed. Baseball Club of Baltimore, Inc.*, and subsequently upheld on *stare decisis* grounds in *Toolson* and *Flood*. In this regard, the NLRB acted in a manner consistent with what the U.S. Supreme Court acknowledged was the case, but which it refused to establish by overturning precedent. *See* Joshua M. Kimura, *The Return of the Natural: How the Federal Government Can Ensure that Roy Hobbs Outlasts Barry Bonds in Major League Baseball*, 16 SPORTS LAW. J. 111, 135 (2009). However, the Supreme Court had previously held that other professional sports were engaged in interstate commerce. *See* Radovich v. Nat'l Football League, 352 U.S. 445, 451-52 (1957). Interestingly, before that decision, the NFL had refused to bargain with the NFLPA; when faced with the threat of an antitrust lawsuit after *Radovich*, the league started negotiating with the NFLPA through collective bargaining. *See* Marks, *supra* note 67, at 1587.

157. Melanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS LAW. J. 189, 191-92 (2003). Like other employee unions, players' unions are established when (1) the union can demonstrate a substantial allegiance among the players; (2) the union petitions the NLRB to hold a secret ballot election; and (3) if the union garners a majority of the players' votes, the NLRB certifies the union as the exclusive bargaining agent of all of the players. *See* Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 IND. L.J. 1589, 1589 (2008). As the exclusive representative of the players, the union has a duty of fair representation that ensures the union represents all of its members "fairly, impartially, and in good faith." *See* Stiglitz, *supra* note 150, at 173 (citing Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 204 (1944)).

158. Michael J. Redding & Daniel R. Peterson, *Third and Long: The Issues Facing the NFL Collective Bargaining Agreement Negotiations and the Effects of an Uncapped Year*, 20 MARQ. SPORTS L. REV. 95, 98 (2009).

159. *See* Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048, 1061 (1996) [hereinafter *Out of Bounds*]. Other mandatory subjects for collective bargaining in professional sports include free agency, the draft, salary caps, grievances, club discipline, the standard players' contract, base

in a typical professional sports league's CBA.[160] If the league or the players' union refuses to negotiate on a mandatory subject of collective bargaining, or if the commissioner unilaterally implements a mandatory subject, such circumstances constitute a violation of the duty to collectively bargain and results in an unfair labor practice.[161] However, a commissioner can make unilateral changes that do not affect the "wages, hours, and other conditions of employment."[162] Both sides are also required to negotiate in good faith.[163] Finally, the collective bargaining must be conducted through bona fide, arms-length negotiations.[164] Assuming these requirements are met, and the two sides can reach an agreement, this negotiation process usually leads to a finalized CBA.[165]

The CBA is significant for numerous reasons, generally and specifically to professional sports leagues and the power of a commissioner. More generally, CBAs—and the included terms and conditions of employment—enjoy special protection from antitrust laws. As one scholar has noted, "[t]here is an inherent conflict between labor laws and antitrust laws."[166] Labor laws aim to further collective bargaining and agreement between unions and multi-employer bargaining units.[167] Labor laws seek this process because of an underlying belief that without collective action—through unionization and collective bargaining—workers will be unable to obtain fair market value for their services.[168] Therefore, labor law statutes "were enacted to enable collective action by union members to achieve wage levels that are higher than would be available on the free market."[169] On the other hand, antitrust laws prohibit restraint on trade or commerce, including in labor markets, because of the underlying belief that collusion among competing businesses creates pricing and market conditions that hurt consumers.[170]

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salaries, and other related topics. *See, e.g.*, Christian Dennie, *From Clarrett to Mayo: The Antitrust Labor Exemption Argument Continues*, 8 TEX. REV. ENT. & SPORTS L. 63, 72 (2007) (surveying some of the mandatory subjects of collective bargaining); *see generally* Ryan T. Dryer, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267 (2008) (providing an overview of some of the key terms of collective bargaining in professional sports). There are also non-mandatory subjects of collective bargaining that the two sides can choose to discuss and whether or not to negotiate. *See* James Gray Pope, *Class Conflicts of Law II: Solidarity, Entrepreneurship, and the Deep Agenda of the Obama NLRB*, 57 BUFF. L. REV. 653, 681 (2009).

160. *See* Stiglitz, *supra* note 150, at 168-69.

161. *See* Showalter, *supra* note 40, at 218.

162. Colin J. Daniels & Aaron Brooks, *From the Black Sox to the Sky Box: The Evolution and Mechanics of Commissioner Authority*, 10 TEX. REV. ENT. & SPORTS L. 23, 32 (2008) (citing 29 U.S.C. § 158(d)).

163. Walter T. Champion, Jr., *"Mixed Metaphors," Revisionist History and Post-Hypnotic Suggestions on the Interpretation of Sports Antitrust Exemptions: The Second Circuit's Use in Clarett of a Piazza-like "Innovative Reinterpretation of Supreme Court Dogma"*, 20 MARQ. SPORTS L. REV. 55, 67 (2009).

164. *See* Jeffrey Hoffmeyer, *Fourth Down and an Appeal: The Nonstatutory Exemption to Antitrust Law in* Clarett v. National Football League, 13 SPORTS LAW. J. 193, 199 (2006).

165. *See* George T. Stieful, III, Comment, *Hard Ball, Soft Law in MLB: Who Died and Made WADA the Boss?*, 56 BUFF. L. REV. 1225, 1229 (2008).

166. Sean W.L. Alford, *Dusting Off the AK-47: An Examination of NFL Players' Most Powerful Weapon in an Antitrust Lawsuit Against the NFL*, 88 N.C.L. REV. 212, 223 (2009).

167. *See id.*

168. *See* Michael C. Harper, *Multiemployer Bargaining, Antitrust Laws, and Team Sports: The Contingent Choice of a Broad Exemption*, 38 WM. & MARY L. REV. 1663, 1692 (1997).

169. Brown v. Pro Football, Inc., 518 U.S. 231, 253 (1996) (Stevens, J., dissenting).

170. *See* Harper, *supra* note 168, at 1692; *see also* Sherman Antitrust Act, 15 U.S.C. § 1 (1890) ("[e]very contract, combination ... or conspiracy, in restraint of trade or commerce ... is declared to be illegal"); Marc Edelman & Brian Doyle, *Antitrust and "Free Movements" Risks of Expanding U.S. Professional Sports Leagues Into Europe*, 29 NW. J. INT'L L. & BUS. 403, 413-15 (2009) (describing antitrust laws related to labor restraints).

Tension arises between these two areas of law as multi-employer bargaining oftentimes involves all of the employers for a specific group of workers, thus restraining the workers' ability to negotiate for employment in the free market.[171] Due to this conflict, courts and legislatures have developed both statutory and nonstatutory exemptions that prevent courts from applying antitrust laws to the collective bargaining process and any resultant CBA.[172] In this regard, these exemptions protect labor laws from the wrath of antitrust regulation, thus favoring the policy goals of labor laws—specifically, allowing collective action in the form of collective bargaining to achieve better wages for workers in that field than individuals in the free market might garner.[173] The most relevant exemption for professional sports leagues is the nonstatutory exemption. For the nonstatutory exemption to apply, a court must apply a three-prong test. First, the restraint that would otherwise violate antitrust laws must "primarily affect[] only the parties to the collective bargaining relationship."[174] Second, the restraint must involve a mandatory subject of collective bargaining.[175] Finally, the collective bargaining—including the restraint at issue—must have been accomplished through arms-length bargaining.[176] Assuming that all three parts of the test are met, the restraint at issue will be exempt from antitrust laws.

All professional sports leagues, except MLB, fall within the scope of antitrust laws.[177] Given that a commissioner's disciplining of an athlete—which can include fines, suspensions, or even banishment from the league—affects the demand for the player's services and could potentially have significant economic effects on the player, commissioner punishment of players constitutes a restraint that would otherwise violate antitrust laws.[178] However, because the commissioner's best interest authority—and other sources of authority such as the standard player's contract—affects only those parties in the collective bargaining relationship (that is, the players and owners), commissioner punishment handed out pursuant to this best interest power qualifies for the nonstatutory exemption and thus is immune to antitrust laws.[179]

The significance of the CBA can also be seen through its role as the definitive governing document regarding the terms and conditions of players' employment. Because of the CBA's hallowed status, the league cannot unilaterally change its terms and conditions without engaging in the collective bargaining process.[180] In this regard, when the power of the commissioner is limited or curtailed through the CBA, it cannot be unilaterally expanded without engaging in collective bargaining. Though not specifically involving the

171. *See* Alford, *supra* note 166, at 223.

172. *See id.* at 223-24.

173. *See Brown*, 518 U.S. at 253 (Stevens, J., dissenting).

174. Mackey v. Nat'l Football League, 543 F.2d 606, 614 (1976).

175. *See id.*

176. *See id.*

177. *See* John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703, 705 (1977); *see also Fed. Baseball Club of Baltimore*, 259 U.S. at 200 (establishing MLB's antitrust exemption); *Toolson*, 346 U.S. at 356 (upholding MLB's antitrust exemption); *Flood*, 407 U.S. at 258 (upholding MLB's antitrust exemption); *Radovich*, 352 U.S. at 447 (holding that professional sports leagues, other than MLB, were engaged in interstate commerce, and therefore, were not exempt from antitrust laws).

178. *See* Weistart, *supra* note 177, at 705-06.

179. *See Out of Bounds*, *supra* note 159, at 1061-62. *But see* Edelman, *supra* note 61, at 641-57 (analyzing whether the NFL PCP violates antitrust laws because it was not explicitly part of the collective bargaining process).

180. *See* Stiglitz, *supra* note 150, at 173. However, as noted above, the commissioner—or a league's owners—can make unilateral changes that do not involve the mandatory subjects of collective bargaining. *See* Daniels & Brooks, *supra* note 162, at 32.

CBA in each case, the *Riko Enterprises, Inc.*, *Professional Sports, Ltd.*, and *Chicago National League Baseball Club* cases discussed above provide pointed examples where courts have held that the commissioner's powers were limited by other provisions in the governing documents, and therefore the commissioner had over-stepped his authority by acting in the manner he did.

Two cases from the NFL provide examples that involve courts holding that a commissioner exceeded his authority based on the limiting provisions contained in the CBA. In *National Football League Players Ass'n v. National Labor Relations Board*,[181] NFL owners sought to unilaterally implement a new rule that automatically fined a player for leaving the bench area during a fight on the field.[182] The court held that the owners' promulgation and implementation of the rule constituted an unfair labor practice in violation of the NLRA because it was a unilateral change to the CBA.[183] In the second case, Commissioner Rozelle, acting pursuant to his best interest authority, sought to unilaterally implement a new drug testing program that included random drug-testing.[184] In the case, while the arbitrator ruled that the Commissioner retained broad authority under the best interest power, he noted that the NFL CBA's Article XXXI limited the Commissioner's authority because it precluded all random drug-testing.[185] The arbitrator thus barred Commissioner Rozelle from implementing the new drug testing program because it had not been part of the collective bargaining process, thus constituting a change in the terms and conditions of employment.[186]

These cases demonstrate that courts and arbitrators will rule against a commissioner—even when he is acting under his best interest authority—when their actions exceed the limitations put on the commissioner's authority, as set forth in the CBA or another governing document. In this regard, the stakes become ever-greater for the NBPA and NFLPA with respect to their respective upcoming CBA renegotiations and the possibility of liming the commissioner's power to punish players for misbehavior off the court or field during the period covered by the new CBA.

F. Implications for the Upcoming CBA Renegotiations

Given the legal protections provided the power of the commissioner to discipline in the CBA, the NBPA and NFLPA may focus some of their renegotiation efforts on amending the commissioner's power. There are several reasons why the unions may do so—some more obvious than others. On the obvious side, as commissioners increase the severity of their punishments for transgressions committed off the court or field, offending players lose more and more money due to fines and the loss of salary that accompanies suspensions.[187] Since most professional athletes have a very limited window of time to

181. 503 F.2d 12 (8th Cir. 1974).

182. *Id.* at 13.

183. *See id.* at 17.

184. *See* Ethan Lock, *The Legality Under the National Labor Relations Act of Attempts by National Football League Owners to Unilaterally Implement Drug Testing Programs*, 39 U. FLA. L. REV. 1, 12-13 (1987).

185. *See* Mark M. Rabuano, *An Examination of Drug-Testing as a Mandatory Subject of Collective Bargaining in Major League Baseball*, 4 U. PA. J. LAB. & EMP. L. 439, 450-51 (2002).

186. *See* David J. Sisson & Brian D. Trexell, *The National Football League's Substance Abuse Policy: Is Further Conflict Between Players and Management Inevitable?*, 2 MARQ. SPORTS L.J. 1, 8-9 (1991).

187. *See* Marks, *supra* note 67, at 1597 (noting that Adam "Pacman" Jones lost $1.3 million in salary to suspensions, while Chris Henry lost more than $200,000).

make significant salaries playing their sport, the incidence of more severe punishments handed down by the commissioner erodes a base of earnings that many professional players depend upon for life after their athletic careers. It is understandable, then, why many players may push their unions to limit this broad commissioner power.

Another obvious reason why these unions may negotiate with the leagues over the power of the commissioner to discipline is the persistent question of whether a league—through its commissioner—should punish athletes for actions taken off of the court or field. This questions breaks down into two key subparts or sub-questions. First, is it appropriate for leagues to punish players for criminal acts committed off of the court or field before the player has been found guilty in a court of law?[188] As detailed above, a commissioner's authority to punish is not constrained by the need for a guilty plea or verdict in a court of law; the commissioner can punish a player for his actions off the court or field that he believes are not in the best interest of the sport.[189] However, this approach runs afoul of our societal notions of innocent until proven guilty. Those concerns, of course, are mitigated by the fact that professional sports leagues are voluntary, private organizations whose terms and conditions of employment are set through collective bargaining. Nevertheless, the players may push their unions to negotiate to amend the commissioner's power due to this concern.

The second sub-question is whether leagues should be disciplining athletes for non-criminal behavior committed off the court or field. As detailed above, former players John Rocker and Dennis Rodman, and former coach John Calipari were suspended and/or fined for making racially insensitive comments to the media. While ill-advised, such comments did not violate any laws. However, under each commissioner's best interest authority, the MLB Commissioner—in the case of Rocker—and the NBA Commissioner—in the cases of Rodman and Calipari—handed down punishment in response. As one scholar has noted, "[t]here is a real risk that the definition of proper conduct will be drawn so narrowly as to infringe upon the political, religious, or social prerogatives of the players."[190] Some have even viewed commissioners' disciplining of athletes for misbehavior off the court or field in a much more nefarious light, suggesting that there is "evidence of a conscious effort to truncate player autonomy under the guise of social authority."[191] In addition to facing potential discipline for non-criminal acts, players also face new rules that attempt to control their personal actions. For example, in 2007, the NBA mandated that its players not visit certain nightclubs that league security determined to be ill-suited for its players to attend.[192] Players violating this policy are subject to a significant fine.[193] In this regard, players may feel as though the league has too much control over their personal lives and may want that aspect of the commissioner's power reigned in.

There are other less-obvious, but equally-important reasons why the players' unions may push for reform in the area of a commissioner's power to punish. The first has to do with procedure. In professional sports leagues, the commissioner—or his designee—

188. *See* Bukowski, *supra* note 11, at 111.

189. For example, NFL Commissioner Roger Goodell suspended Cincinnati Bengals' wide receiver Chris Henry after he was arrested four times, even though he was never convicted of any of the alleged crimes. *See* Lockwood, *supra* note 23, at 164.

190. Weistart, *supra* note 177, at 722.

191. Lockwood, *supra* note 23, at 139; *see also* Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819, 858 (2006).

192. *See* Showalter, *supra* note 40, at 212.

193. *See id.*

investigates, conducts the hearing (if one is held at all), and imposes the punishment for transgressions committed off of the court or field—with little oversight of the integrity of the process or the decision.[194] Scholars have criticized this model of a commissioner sitting as accuser, judge, and jury because it gives rise to perceived, if not real, bias.[195] Indeed, the case involving Pete Rose and MLB Commissioner Bart Giamatti demonstrates this issue, as the court granted Rose a temporary injunction because it determined that the Commissioner had prejudged Rose's guilt.[196] Moreover, without procedural protections or punishment guidelines, this disciplinary approach lacks uniformity and consistency and may be riddled with arbitrariness.[197] In this regard, players' unions may seek to provide more procedural protections—most likely through grievance procedures—to protect players from perceived or actual bias and inconsistency or arbitrariness in the current system.

Finally, players' unions may seek to negotiate on the power of their commissioner to discipline wayward athletes in order to avoid the commissioner instituting the equivalent of a personal conduct policy (PCP) in their league without it being collectively bargained. While the NFLPA consulted with NFL Commissioner Roger Goodell regarding the NFL PCP—indeed, they did agree to it—they have been roundly criticized for not insisting that the policy be collectively bargained.[198] However, this collaboration between Commissioner Goodell and the NFLPA could also be viewed as a harbinger of things to come with regard to including such PCPs in the collective bargaining process. If such cooperation signals that both the leagues and the players' unions understand the importance of addressing misbehavior off of the court or field that creates public image problems for the league and its players, then this may encourage both sides to reach agreement through collective bargaining to address this increasing problem. In this regard, the NBPA and NFLPA may have an incentive to work with their respective commissioners to include player conduct policies in the CBA so that they will not face the commissioner unilaterally implementing such a policy, and then be forced to sue over his authority to do so—on ground that it was an unfair labor practice since it was not part of the CBA. Moreover, as detailed above, if a PCP is a part of the CBA, then it will serve to limit the best interest power of the commissioner to discipline players for transgressions committed off of the court or field. In this regard, by incorporating a PCP—or more explicit limitations to the commissioners' best interest authority to punish athletes—into the CBA, players' unions can protect against this expansive power and provide for better, or at least clearer, parameters for such punishment.[199]

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194. *See* Dobinson & Thorpe, *supra* note 39, at 120.

195. Linda S. Calvert Hanson & Craig Dernis, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?*, 6 SETON HALL J. SPORT L. 127, 162-63 (1996).

196. *See* Curtis, *supra* note 26, at 27-28.

197. *See* Kim & Parlow, *supra* note 5, at 596; *see also* Dobinson & Thorpe, *supra* note 39, at 120-21.

198. *See generally* Edelman, *supra* note 61, at 631; Mahone, Jr., *supra* note 62, at 181; Marks, *supra* note 67, at 1581.

199. One other possibility may be for the NBPA and NFLPA to push for more disciplining to fall to the teams instead of the league or the commissioner. While teams currently have some authority to impose disciplinary measures on their players, the players' unions may have good reason to push for a shift from commissioner-imposed punishment to more team-based disciplining. *See* Stiglitz, *supra* note 150, at 179-80 (discussing how many believe that teams are far less likely to punish wayward players because they fear that such punishment will provide a disincentive for free agents to sign with their team in the future). Understandably, a situation like this where the power to discipline exists but is not often exercised—which is not currently the case with the commissioner—may have great appeal to the players. However, one can imagine the reticence of commissioners and owners to move to this type of disciplinary approach. *See id.*

V. CONCLUSION

These various impetuses for negotiating on, and perhaps altering, the power of the commissioner to discipline wayward players for actions committed off the court or field may or may not prove to be fruitful. Both leagues face difficult economic times, with drops in league revenue and teams losing money, standing in stark contrast to the years of significant economic growth that marked much of the past decade.[200] In fact, due to the economic recession and declining revenues, NBA Commissioner David Stern recently proposed a rather controversial reduction in the percentage of revenues allocated to the players in the new CBA: currently, the players receive 57% of basketball related income,[201] while Commissioner Stern proposed this become 45% under the new CBA.[202] This may create a situation similar to what the NBPA faced in the 1960s and 1970s when its focus was on providing economic gains for the players, rather than negotiating harder on other employment-related matters such as the Commissioner's best interest authority.[203] In this regard, players' unions may need to use the issue of the power of the commissioner to discipline as a bargaining chip with their respective leagues in order to gain the revenue concessions that will likely be their top priority.

However, players' discontent with the current situation can only be resolved through the collective bargaining process, for once a commissioner's power is ensconced in the CBA, the players have little recourse to challenge the punishment—beyond whatever grievance procedures are allowed pursuant to the CBA. If the players want to alter this broad commissioner power to discipline—beyond the constraints of the proportionality requirements imposed by arbitrators and any limitations set by the respective league's governing documents—the renegotiations of the NBA's and NFL's CBAs provide a unique opportunity to do so, at what many feel may be an appropriate or advantageous time.

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200. *See* Ken Berger, *Head Straight to Gate for Sign of Weakness in NBA Money Machine*, CBSSPORTS.COM, July 8, 2009, http://www.cbssports.com/nba/story/11934840 (noting that the NBA was expecting a drop of between 2.5% and 5% in basketball related income for the league for the 2009-10 season); Brian Karpuk, *Will There Be An NBA Lockout in 2011?*, NEWS BURGALAR, June 3, 2009, http://newsburglar.com/2009/06/03/nba-lockout-2011/ (discussing rumors that more than half of NBA teams lost money in the 2008-09 season).

201. "Basketball Related Income" is defined as the aggregate operating revenues acquired by the NBA or one of its subsidiaries. *See* NBA COLLECTIVE BARGAINING AGREEMENT art. VII, § 1(a), 1(b).

202. Frank Hughes, *NBA Expected to Take Hard Line in First Proposal to Union for New CBA*, SPORTSILLUSTRATED.COM, Jan. 29, 2010, http://sportsillustrated.cnn.com/2010/writers/frank_hughes/01/29/labor.strife/index.html. In fact, Commissioner Stern may also attempt to redefine what constitutes basketball related income. *See id.*

203. *See* Lockwood, *supra* note 23, at 149-50.

Advice for Drafting a New NFL Collective Bargaining Agreement

WAYNE SCHIESS*

SUMMARY

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I. INTRODUCTION

Before the parties reach a new agreement and assign their lawyers to draft it, I offer some advice for improving the NFL Collective Bargaining Agreement. I won't address substantive content. I will focus only on legal drafting as reflected in the layout, language, and punctuation in the agreement. I will apply the principles of modern legal drafting, called "standard English," by one expert[1] and "contemporary commercial drafting" by another.[2]

I start with layout—both strengths and weaknesses—and then mention a dozen drafting concerns in the language and punctuation.

II. LAYOUT STRENGTHS

The version of the Agreement I read was not a typical legal document with Times New Roman 12-point type and one-inch margins at the top, bottom, left, and right. That's a good thing because typical legal-document layout is not conducive to sustained reading,[3] and the Agreement is 240 pages long.

Instead, the Agreement was in PDF format and laid out in the style of a book or booklet. To make the Agreement look book-like and remain readable, the following layout techniques were used effectively:

The text was fully justified.

Books, newspapers, magazines, and nearly all professionally prepared texts are fully justified. Full justification creates neat vertical lines on the left and right margins and gives the document a professional look.[4]

The margins were wide.

The margins in the Agreement were one inch at the top and bottom and nearly two inches on the left and right. The result was a body text with readable line length of 60 to 70 characters.[5] If the margins had been placed at one inch on the left and right, the line length

1. KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING xxvi (2d ed. 2008).

2. TINA L. STARK, NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE 8 (2003).

3. *See* Ruth Anne Robbins, *Painting With Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ASSN. LEG. WRITING DIRS. 108, 122–23 (Fall 2004).

4. Matthew Butterick, *Typography for Lawyers*, http:/www.typographyforlawyers.com (last visited Nov. 12, 2009).

5. *Id.* (suggesting a readable line-length range of 50–90 characters).

would have been harder on readers[6] and would have made the document look more crowded.

The hyphenation function was on.

Often, when lawyers fully justify the text in a legal document, the result has odd gaps and spaces, which document designers call "rivers."[7] Some obvious things can help reduce gaps: smaller type and longer lines.[8] But both those may be undesirable. Another technique is to turn on the automatic-hyphenation function, which will break long words on the right margin. (Some sophisticated document designers may take additional steps to manage the justified spacing of individual characters, words, and lines.[9] Lawyers often cannot afford the time and must rely on basic word processing.) Still, the Agreement used hyphenation effectively and had no distracting gaps or rivers of white space.

The text used a readable, serifed typeface.

The Agreement was printed in a serifed typeface, which, for a text of substantial length, is slightly more readable than a sans serif typeface.[10] Headings and subheadings were clearly set off with boldface or italics or both—no underlining, a vestige of the typewriter.[11]

Generally the layout and format of the PDF booklet were excellent and far better than typical legal documents.

III. LAYOUT WEAKNESSES

Using tabs instead of indentation

The formatting had a few glitches. There wasn't enough use of indentation; the drafters used tabs instead. So numbered and lettered provisions looked like this:

> (af) "Rookie" means a person who has never signed a Player Contract with an NFL Club.

This was instead of a neater version,[12] like this:

> (af) "Rookie" means a person who has never signed a Player Contract with an NFL Club.

Other formatting glitches concerned the choices for numbering and lettering the sections and subsections.

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6. Robbins, *supra* note 3, at 122.

7. ROBIN WILLIAMS, THE PC IS NOT A TYPEWRITER 45–46 (1995).

8. WAYNE SCHIESS, BETTER LEGAL WRITING: 15 TOPICS FOR ADVANCED LEGAL WRITERS 29–30 (2005).

9. *See* ROBIN WILLIAMS, THE NON-DESIGNER'S TYPE BOOK: INSIGHTS AND TECHNIQUES FOR CREATING PROFESSIONAL-LEVEL TYPE 38, 119, 140 (1998).

10. MICHÈLE M. ASPREY, PLAIN LANGUAGE FOR LAWYERS 244–45 (3d ed. 2003).

11. WILLIAMS, *supra* note 7, at 25; Butterick, *supra* note 4.

12. BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES 21 (1996) (reprinted in 169 F.R.D. 176); JOSEPH KIMBLE, LIFTING THE FOG OF LEGALESE 152 (2006); Stark, *supra* note 2, at 18–19.

Numbers instead of paired letters

The Agreement should have used numbers in the definitions section instead of letters. By using letters, the drafters had to resort to paired letters ("af") as seen in the previous example. That usage is odd but is a minor point.

Unnumbered provisions

The Agreement contained several unnumbered sections or subsections. For example, Article IX, Section 7, had two paragraphs, neither lettered. It would have been a simple thing to letter them "a" and "b" for ease of reference: "Article IX, Section 7(b)." Instead, users must refer to "Article IX, Section 7, the second paragraph." Again, a minor point, but drafters shouldn't leave unnumbered provisions.[13]

Roman numerals

It was an unfortunate choice for the drafters to use Roman numerals for the article numbers. There are so many articles in the Agreement that readers will have a hard time figuring out the article numbers, especially large ones. For example, the agreement has LX articles. What does that mean? It means 60. But using the Arabic numeral "60" would have been a lot easier to understand. And then there's article XLIV. Got it yet? It's 44. The choice of Roman numerals in place of Arabic numerals may have no legal consequences, but for ease of reference, Arabic numerals are far superior.[14]

A glitch in defining

The drafters used a typical but lazy convention in defining parties: they named two alternatives for a party name. For example, in the preamble,[15] the parties are defined as follows:

- the National Football League Management Council ("Management Council" or "NFLMC")
- the National Football League ("NFL" or "League")

This is not ideal. This convention tells the reader "We're not going to be careful enough to refer to a party consistently. We might use either of these names, so you keep track." The better practice is to pick one defined name and use it consistently.[16]

IV. WORDING PROBLEMS

The Agreement avoided the most archaic and nonsensical legalese, like *witnesseth*,[17] *know all men by these presents*,[18] and *wherefore premises considered*.[19] Thank you. But the Agreement did retain some outdated and unnecessary archaisms.

13. GARNER, *supra* note 12, at 24.

14. WAYNE SCHIESS, PREPARING LEGAL DOCUMENTS NONLAWYERS CAN READ AND UNDERSTAND 17 (2008).

15. See the Exhibits for a rewritten preamble.

16. *See* REED DICKERSON, MATERIALS ON LEGAL DRAFTING 104–05 (1981).

Archaic words

The agreement used several archaic legalisms that are unnecessary and vague and that have no place in modern legal drafting:

- the management Council will be bound **hereby**[20]
- all subjects covered **herein**[21]
- mailing copies **thereof**[22] to the parties
- (**hereinafter**[23] referred to as a "grievance")
- any decision of an arbitrator pursuant **thereto**[24]

One commentator has said of these archaic words that they "can be dropped from the legal vocabulary without any loss of precision, and with a gain in clarity."[25] For each of these words, the better approach is to specify what you are referring to.[26]

- the management Council will be bound by **this Agreement**
- all subjects covered in **this Agreement**
- mailing copies of **the written notice** to the parties
- ("grievance")
- any decision of an arbitrator pursuant to **Article IX**

Misuse of shall

The agreement consistently uses *shall* unnecessarily,[27] as in the following constructions:

- to the extent that any differences exist between this booklet and the original signed agreement maintained by the parties, the original **shall** control
- as used in this agreement, the following terms **shall** have the following meanings
- the provisions of the stipulation and settlement agreement . . . **shall** supersede any conflicting provisions

Perhaps the drafters thought it was necessary to draft these provisions for future application. It was not. "[L]awyers wrongly tend to think that, because contracts and

17. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 938 (2d ed. 1995).

18. THOMAS R. HAGGARD, CONTRACT LAW FROM A DRAFTING PERSPECTIVE 27 (2003).

19. IRWIN ALTERMAN, PLAIN AND ACCURATE STYLE IN COURT PAPERS 56 (1987).

20. HOWARD DARMSTADTER, HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING 6 (2002).

21. ADAMS, *supra* note 1, at 246.

22. BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 191 (2d ed. 2006).

23. ADAMS, *supra* note 1, at 12–13.

24. DAVID MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE 187 (1982).

25. *Id.*

26. ADAMS, *supra* note 1, at 246.

27. Joseph Kimble, *The Many Misuses of* Shall, 3 SCRIBES J. LEG. WRITING 61 (1992) (discussing *shall* and its correct and incorrect uses in legal drafting).

statutes apply into the future, they should be written in the future tense."[28] But contract provisions speak at the moment of their application.[29] Each of these constructions, and dozens of other like them, would be better without *shall*:

- to the extent that any differences exist between this booklet and the original signed agreement maintained by the parties, the original controls
- as used in this agreement, the following terms have the following meanings
- the provisions of the stipulation and settlement agreement . . . supersede any conflicting provisions

If *shall* is to be used at all—and some advocate that we banish *shall* entirely from legal drafting[30]—then it should be used only to mean "has a duty to," as a way to impose a duty or obligation on a party.[31] The Agreement uses it correctly in this way in some places:

- the Accountants **shall** [have a duty to] resolve a dispute . . .
- The NFLPA **shall** [has a duty to] provide and publish a list of agents . . .

Future

Besides *shall*, future drafting shows up in the Agreement in other places where it isn't necessary[32]:

- the NFLPA **will have** the right to conduct three meetings . . .
- this **will not apply** to a suspension

These should be rewritten in the present tense as follows:

- the NFLPA **has** the right to conduct three meetings . . .
- this **does not apply** to a suspe nsion

Inconsistency in words of obligation

In some places the Agreement uses the word *will* to impose an obligation; in some places it uses *must*; in some places it uses *shall*:

- The NFLPA and the Management Council will use their best efforts . . .
- Any active player who is not a member in good standing of the NFLPA must . . . pay . . .
- The NFLPA shall provide and publish a list of agents . . .

Consistency is a key to successful drafting: "Always say the same thing the same way."[33] The Agreement could have been more consistent in the language it used to impose

28. Kimble, *supra* note 27, at 61, 64–65.

29. *Id.*

30. Michele M. Asprey, Shall *Must Go*, 3 SCRIBES J. LEG. WRITING 79 (1992).

31. ADAMS, *supra* note 1, at 32; GARNER, *supra* note 17, at 940; Kimble, *supra* note 27, at 61; STARK, *supra* note 2, at 15–16.

32. STARK, *supra* note 2, at 14–15. *But see* ADAMS, *supra* note 1, at 63 (advocating present tense for policies that apply when the contract becomes effective and the use of *will* for language of policy related to future events).

33. DICKERSON, *supra* note 16, at 104–05.

obligations. "The most important single principle in legal drafting is consistency."[34] So pick *shall* or *must* for obligations and stick with it.

Such and said as demonstrative adjectives

The Agreement uses *such* and *said* as demonstrative adjectives in many places where *the*, *this*, *that*, *these*, or *those* would work.[35] Using *such*[36] and *said*[37] in the way the Agreement does is retrograde.

- If there is no resolution of the matter within seven days, then the Club will, upon notification of the NFLPA, suspend the player without pay. **Such** suspension will continue . . .
- the custodians of the documents made a good faith effort to obtain (or discover the existence of) **said** documents . . .

This would be just as clear, and less archaic, like this:

- If there is no resolution of the matter within seven days, then the Club will, upon notification of the NFLPA, suspend the player without pay. **The** suspension will continue . . .
- the custodians of the documents made a good faith effort to obtain (or discover the existence of) **those** documents . . .

That and which

The Agreement uses *which* in many places where *that* would have been correct.[38]

- no meeting will be held at a time **which** [that] disrupts a coaches team schedule
- the Club may specify the events **which** [that] create an escalation of the discipline
- a complete list of the discipline **which** [that] can be imposed

None of the three examples here seems likely to create genuine ambiguity, but for an agreement of this import, with sophisticated legal counsel drafting it, we should hold the drafters to high standards. Getting *that* and *which* right is something the drafters should be able to do.

And/or

The Agreement uses *and/or* in many places. Drafting experts are against *and/or*,[39] but the courts have said it best:

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34. *Id.* at 168.

35. LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 129 (1993) (said); RICHARD WINCOR, CONTRACTS IN PLAIN ENGLISH 30-31 (1976) (such).

36. CARL FELSENFELD & ALAN SIEGEL, WRITING CONTRACTS IN PLAIN ENGLISH 145 (1981).

37. ROBERT C. DICK, LEGAL DRAFTING 140 (2d ed. 1985).

38. ADAMS, *supra* note 1, at 223; BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE 806 (3d ed. 2009); WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 59 (4th ed. 2000).

A "much condemned conjunctive-disjunctive crutch of sloppy thinkers . . . ."[40]

A "befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of some one too lazy or too dull to express his precise meaning . . . ."[41]

It "lends itself . . . as much to ambiguity as to brevity."[42]

The "abominable invention, 'and/or,' is as devoid of meaning as it is incapable of classification . . . ."[43]

For example:

- In any hearing provided for in this Article, a player may be accompanied by counsel of his choice **and/or** a representative of the NFLPA.
- Any player **and/or** the NFLPA must present an injury grievance in writing . .

To avoid potential confusion, these provision could be revised as follows:

- In any hearing provided for in this Article, a player may be **accompanied by counsel of his choice, a representative of the NFLPA, or both.**
- Any player **or** the NFLPA must present an injury grievance in writing . . .

(The immediately preceding revision treat *and* can be implied in *or*[44] as used here. It would make no sense if a player or the NFLPA could present an injury grievance but that if both presented the grievance it would be invalid.)

In the event

One easy edit that can help streamline the language in the Agreement and any drafted document is to use *if* for *in the event that.*[45] So this:

- **In the event that** a player under contract is fined . . .

Would be much better as this:

- **If** a player under contract is fined . . .

Problems with sentence length

The Agreement contains many sentences of tremendous length, some running to hundreds of words. For example, Article IV, section 2,[46] contains a sentence of 250 words.

39. J.K. AITKEN, PIESSE'S THE ELEMENTS OF DRAFTING 81 (9th ed. 1995); DICK, *supra* note 37, at 104; BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES 112–13 (2000). *But see* ADAMS, *supra* note 1, at 209 (suggesting that *and/or* has legitimate uses but that "a or b or both" is generally better).

40. Raine v. Drasin, 621 S.W.2d 895, 905 (Ky. 1981).

41. Employers' Mut. Liab. Ins. Co. of Wis. v. Tollefsen, 263 N.W. 376, 373 (Wis. 1935).

42. Ex Parte Bell, 122 P.2d 22, 29 (Cal. 1942).

43. Am. Gen. Ins. Co. v. Webster, 118 S.W.2d 1082, 1084 (Tex. Civ. App.—Beaumont 1938, writ dism'd).

44. GARNER, *supra* note 17, at 57.

45. RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 12 (5th ed. 2005).

46. See the Exhibits for a rewritten version of Article IV, section 2.

Some have asserted that a sentence of that length "isn't meant to be read."[47] Many legal-drafting and legal writing experts recommend shorter sentences for drafted documents. [48]

Yes, I could have been kinder to the drafters in counting words per sentence if I had stopped at each semicolon; that would make the single sentence here into three sentences. But the longest would still be 140 words. Granted, the drafters and primary readers of the Agreement are lawyers, who may be accustomed to long sentences and who get paid to construe complicated texts. Still, even for lawyers, long sentences are hard to read.[49]

Unnecessary provisos

The agreement uses provisos, which are criticized as vague and ambiguous.[50] Provisos are usually phrased as *provided that*, *provided, however, that*, or *provided further that.* Mostly, those phrases are unnecessary. For example,

- this agreement represents a complete understanding of the parties . . . including the provisions of the NFL Constitution and bylaws; provided, **however, that** if any proposed change . . .

You can omit *provided, however, that* and begin a new sentence with *if*:

- this agreement represents a complete understanding of the parties . . . including the provisions of the NFL Constitution and bylaws. **If** any proposed change . . .

Inconsistent serial comma

Sometimes the Agreement uses a comma before the conjunction in a series of three or more items:

- The orientation will include only information on the Career Planning Program, the Chemical Dependency Program, the NFLPA Agent Certification System, and other information contained in this Agreement
- Neither the NFL or any Club shall be liable for any salary, bonus, or other monetary claims of any player

But sometimes it does not:

- [If] a player has not paid any initiation fee, dues or the equivalent service fee . . .

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47. FELSENFELD & SIEGEL, *supra* note 36, at 23.

48. ADAMS, *supra* note 1, at 359; PETER BUTT & RICHARD CASTLE, MODERN LEGAL DRAFTING: A GUIDE TO USING CLEARER LANGUAGE 153 (2d ed. 2006); GARNER, *supra* note 12, at 1; THOMAS R. HAGGARD, LEGAL DRAFTING IN A NUTSHELL 184 (2d ed. 2003).

49. Peter Butt, *Modern Legal Drafting*, 23 Stat. L. Rev. 12, 22 (2002) ("Errors are harder to find in dense, convoluted prose. . . . Errors . . . are more easily discerned when sentences are short and text is broken down into more easily comprehensible units."). *See also* Adams, *supra* note 1 at xxv (stating that legalese makes a contract hard to negotiate—which is the lawyer's job—and that legalese makes it more likely that a contract will contain a flaw).

50. GARNER, *supra* note 17, at 710; HAGGARD, *supra* note 48, at 129–31. *See also* ADAMS, *supra* note 1, at 282–84 (pointing out the imprecision of provisos).

- because of race, religion, national origin or activity . . .

Experts on legal drafting recommend the full complement of serial commas.[51] But whether the drafters of the Agreement prefer to use the final serial comma or not, they should be consistent.[52]

V. CONCLUSION

We should not be too hard on the drafters of the current NFL Collective Bargaining Agreement. After all, the drafting weaknesses in the Agreement are common throughout transactional documents.[53] Many legal drafters continue to use outdated language, vague terms, ambiguous phrases, long sentences, and retrograde conventions.[54] This is partly because legal drafting is often not taught in law schools,[55] partly because many lawyers learn legal drafting only from the forms they inherit,[56] and partly because—even when lawyers know better—it costs time and money to update existing forms.

But we can all do better, and the drafters of the Agreement surely can. After reading this article, a second step would be to obtain two excellent sources on modern legal drafting:

- KENNETH A. ADAMS, A MANUAL OF STYLE FOR CONTRACT DRAFTING (2d ed. 2008).
- TINA L. STARK, NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE (2003).

Then begin implementing, slowly but consistently, the drafting advice here and in those sources.

By implementing the changes recommended in this article and other sources, the drafters of the new NFL CBA would bring the language and layout of the document much more in line with the standards of modern legal drafting. They would improve readability for themselves and for the users of the Agreement. And they would set an example for other drafters.

VI. EXHIBITS

I've offered here three before-and-after provisions that reflect how the Agreement could be drafted using modern principles of legal drafting.[57]

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51. BARBARA CHILD, DRAFTING LEGAL DOCUMENTS: PRINCIPLES AND PRACTICES 398–99 (2d ed. 1992); BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE 15–16 (2d ed. 2002); Haggard, *supra* note 48, at 150–51; Kimble, *supra* note 12, at 157–58; GEORGE W. KUNEY, THE ELEMENTS OF CONTRACT DRAFTING 44 (2003).

52. DICKERSON, *supra* note 16, at 104–05, 168.

53. ADAMS, *supra* note 1, at xxv–xxvi.

54. *Id.* at xxv–xxvi.

55. Louis N. Schulze, Jr., *Transactional Law In The Required Legal Writing Curriculum: An Empirical Study Of The Forgotten Future Business Lawyer*, 55 CLEV. ST. L. REV. 59, 62, 72 (2007); Joseph Kimble, *How to Mangle Court Rules and Jury Instructions*, 8 SCRIBES J. LEG. WRITING 39, 59 (2001–2002).

56. ADAMS, *supra* note 1, at xxviii.

57. Concerns that the revisions have altered the substantive content should be directed to Wayne Schiess at The University of Texas School of Law. Those concerns should be viewed as caused by gaps in Schiess's knowledge of collective bargaining and not as weaknesses of modern drafting principles.

Preamble before

PREAMBLE

This agreement, which is the product of bona fide, arm's length collective bargaining, is made and entered into as of the 8th day of March, 2006, in accordance with the provisions of the National Labor Relations Act, as amended, by and between the National Football League Management Council ("Management Council" or "NFLMC"), which is recognized as the sole and exclusive bargaining representative of present and future employer member Clubs of the National Football League ("NFL" or "League"), and the National Football League Players Association ("NFLPA"), which is recognized as the sole and exclusive bargaining representative of present and future employee players in the NFL in a bargaining unit described as follows:

1. All professional football players employed by a member club of the National Football League;

2. All professional football players who have been previously employed by a member club of the National Football League who are seeking employment with an NFL Club;

3. All rookie players once they are selected in the current year's NFL College Draft; and

4. All undrafted rookie players once they commence negotiation with an NFL Club concerning employment as a player.

Preamble after

Date

Parties

The Council: The National Football League Management Council, recognized as the exclusive bargaining representative of present and future employer-member Clubs of the National Football League (NFL).

The NFLPA: The National Football League Players Association, recognized as the exclusive bargaining representative of present and future employee players in the NFL.

The NFLPA is a bargaining unit described as

1. All professional football players employed by a member club of the NFL;
2. All professional football players previously employed by a member club of the NFL who are seeking employment with an NFL Club;
3. All rookie players once they are selected in the current year's NFL College Draft; and
4. All undrafted rookie players once they begin negotiating an NFL Club for employment as a player.

This Agreement represents bona fide, arm's length collective bargaining.

Article 5, Section 1, before

ARTICLE V
UNION SECURITY

Section 1. **Union Security:** Every NFL player has the option of joining or not joining the NFLPA; provided, however, that as a condition of employment commencing with the execution of this Agreement and for the duration of this Agreement and wherever and whenever legal: (a) any active player who is or later becomes a member in good standing of the NFLPA must maintain his membership in good standing in the NFLPA; and (b) any active player (including a player in the future) who is not a member in good standing of the NFLPA must, on the 30th day of following the beginning of his employment or the execution of this Agreement, whichever is later, pay, pursuant to Section 2 below or otherwise to the NFLPA, an annual service fee in the same amount as any initiation fee and annual dues required of members of the NFLPA.

Article 5, Section 1, after

Article 5

Section 1. Union Security.

(a) Every NFL player can join or not join the NFLPA.

(b) Once this Agreement is signed, and for as long as it lasts and is legal, these two conditions of employment apply:

(1) Any active player who is or becomes a member in good standing of the NFLPA must maintain his membership in good standing in the NFLPA.

(2) Any active player (including a player in the future) who is not a member in good standing of the NFLPA must pay the NFLPA an annual service fee in the same amount as the initiation fee and annual dues required of NFLPA members. The service fee is due on the 30th day after the beginning of employment or the signing of this Agreement—whichever is later—and must be paid under Article 5, Section 2, or to the NFLPA.

Article IV, Section 2, before

Section 2. **No Suit:** The NFLPA agrees that neither it nor any of its members, nor agents acting on its behalf, nor any member of its bargaining unit, will sue, or support financially or administratively, or voluntarily provide testimony or affidavit in, any suit against, the NFL or any Club with respect to any claim relating to any conduct permitted by this Agreement, the Settlement Agreement, or any term of this Agreement or the Settlement Agreement, including, without limitation, the Articles concerning the College Draft, the Compensatory Draft, the Option Clause, the Entering Player Pool, Veterans With Less Than Three Accrued Seasons, Veteran Free Agency, Franchise and Transition Players, the Final Eight Plan, Guaranteed League-wide Salary, Salary Cap and Minimum Team Salary, and the Waiver System, and provisions applicable to the trading of players; . . .

Article IV, Section 2, after

2. No Suit.

(a) The NFLPA, its agents, its members, and its bargaining-unit members will not sue the NFL or any Club. The NFLPA, its agents, its members, and its bargaining-unit members will not financially or administratively support or voluntarily provide testimony or affidavit in any suit against the NFL or any Club.

(b) Section 2(a) applies only to suits for claims relating to any conduct permitted by this Agreement and its terms or the Settlement Agreement and its terms.

(c) Section 2(b) applies to conduct permitted by any of these: the Articles concerning the College Draft, the Compensatory Draft, the Option Clause, the Entering Player Pool, Veterans With Less Than Three Accrued Seasons, Veteran Free Agency, Franchise and Transition Players, the Final Eight Plan, Guaranteed League-wide Salary, Salary Cap and Minimum Team Salary, the Waiver System, provisions that apply to the trading of players, or any other similar or dissimilar item.

Laws of Race/Laws of Representation: The Construction of Race and Law in Contemporary American Film

CYNTHIA D. BOND*

"Racial imagery is central to the organi[z]ation of the modern world."
-Richard Dyer, *White*

"[T]his utterly inevitable species of schizophrenia is but one of the many manifestations of the spiritual and historical trap, called racial, in which all Americans find themselves, and against which, some of us, some of the time, manage to arrive at a viable and honorable identity."
-James Baldwin, *The Devil Finds Work*

ABSTRACT

Popular film has a lot to teach us about social narratives of law. Both law and film are story-telling, narrative systems. Accordingly, films about law are "overdetermined" in terms of narrative: they are stories about stories. Race is also a narrative system in which visual representation is key. The significance of the visual apprehension of race is deeply relevant to the legal construction of race as well. For example, in early citizenship cases and racial "passing" cases which persisted through the latter part of the 20th century. Since society constructs racial categories in large part by visual identification and experience, all visual media, including film, necessarily participate in the constitution of race. Thus, films do not simply depict supposedly free-standing, objective, racial categories naturalized by the dominant discourse, but instead actually participate in the creation of race. As part of standard Hollywood practice, the mainstream film audience is constructed through identification with a norm of "whiteness." Since that audience, when viewing a law film, is actively involved in constituting the law as part of its spectatorship, it follows that mainstream films construct law from the perspective of white privilege. The consequences and effects of this cinematic construction of law are many. This article discusses three main effects: 1) the raced construction of the lawyer-hero; 2) the denial or displacement of the law's role in constructing race and race-based discrimination; and 3) the suppression or revision of politics and political history.

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SUMMARY

I. A PREFACE FROM HISTORY'S WATERSHED

Within hours of the soul-stirring and nation-lifting election of Barack Obama as president, journalists and pundits were announcing the demise of all prior notions of race in America. Andrew Sullivan called Obama's election the "death of the identity politics of race."[1] Rachel Maddow of MSNBC news exhorted viewers to "laugh" at anyone who asserted "old," pre-Obama, ideas about the role of race and racial oppression in America.[2]

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[1] Andrew Sullivan, *Barack Obama for President*, THE ATLANTIC, Nov. 3, 2008, http://andrewsullivan.theatlantic.com/the_daily_dish/2008/11/barack-obama-fo.html.

[2] *The Rachel Maddow Show* (MSNBC television broadcast Nov. 5, 2008).

Commentators, including Roland Martin of CNN, half-jokingly speculated that Rev. Jesse Jackson, televised weeping at Obama's election-day rally in Chicago's Grant Park, was crying because he was "out of a job."[3]

Finding evidence that old narratives and representations of race were very much alive was as simple as scanning the next day's reader comments on Henry Louis Gates, Jr.'s article, "In Our Lifetime," lauding Obama's victory, on "The Root" website.[4] Remarkably, even the day after the jubilation of Obama's victory, bloggers were back at sniping over age-old biases regarding the persistence of slavery and white guilt.[5] Or consider hapless Lindsay Lohan's characterization of Obama as "our first colored president" in a post-election interview.[6] Or RNC chairman nominee Chip Saltsman's "Barack the Magic Negro" Christmas CD.[7] Or a Greenwich Village bakery's sale of "drunken negro cookies" in "honor" of Obama's inauguration.[8]

Is Obama's election and presidency a "game-changer" as to issues of race in America? In some ways, undoubtedly yes. But the historic nature of Obama's ascendance does not obliterate or transcend the vast history of race and racial representation in America.[9] Time will tell how the Obama presidency effects racial representation and myth. But to expect his presidency to undo hundreds of years of complex and deeply embedded attitudes about and images of race in this country is to vastly overburden it.

It is important to remember that despite, for example, the growing rate of Latino immigration to the United States,[10] and the growing numbers of black professionals and elites over the last 30 years,[11] pop culture representation of non-whites has not improved in simple lockstep.[12] While we may not have the Stepin Fetchit of the 1920's and 30's,[13] we

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[3] *The Situation Room* (CNN television broadcast Nov. 5, 2008).

[4] Henry Louis Gates, Jr., *In Our Lifetime*, THE ROOT, Nov. 4, 2008, http://www.theroot.com/views/our-lifetime.

[5] *Id.*

[6] *Lindsay Lohan Calls Obama "First Colored President?"* THE HUFFINGTON POST, Nov. 11, 2008, http://www.huffingtonpost.com/2008/11/11/lindsay-lohan-calls-obama_n_143087.html.

[7] Rebecca Sinderbrand, *RNC Chairman Candidate Defends 'Barack the Magic Negro' Song*, CNN, Dec. 26, 2008, http://www.cnn.com/2008/POLITICS/12/26/rnc.obama.satire/

[8] *Fox New York News* (Fox television broadcast Mar. 4, 2009).

[9] Robert L. Harris, Jr. & Rosalyn Terborg-Penn, *The End of Black History?*, COLUM. U. PRESS BLOG, Jan. 22, 2009, http://www.cupblog.org/?p=508.

[10] Although "Latino" is not easily constructed as a purely "racial category," I include it here since it is often popularly considered as such in the United States. *See* Alberto Sandoval-Sanchez, JOSE CAN YOU SEE: LATINOS ON AND OFF BROADWAY 11-17 (U. of Wis. Press 1999) (describing the origin and definition of the words "Latino" and "hispanic" within the context of racial categories). As Mae M. Ngai argues, "[U]nlike Euro-Americans, whose ethnic and racial identities became uncoupled during the 1920s, Asians' and Mexicans' ethnic and racial identities remained conjoined. The legal racialization of these ethnic groups' national origin cast them as permanently foreign . . . these racial formations produced 'alien citizens' . . ." IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 7-8 (Princeton U. Press 2004). *See* Section III *infra* for discussion of definitions of "race." The conflation of narratives of nation and race is on display in the rhetoric of the so-called "birther movement," which questions whether or not Obama is an American citizen. *See e.g., see* www.stoptheaclu.com, for example.

[11] Mark Lowery, *The Rise of the Black Professional Class*, BLACK ENTERPRISE, Aug. 1, 1995, at 43.

[12] New York Times' film reviewers Manohla Dargis and A.O. Scott recently declared that pop culture prepared America for a black leader. *How the Movies Made a President*, N.Y. TIMES, Jan. 18, 2009, at AR1. This argument is simplistic in its assertion that cinematic representations of race work by straight forward cause and effect. (This also implies that there has not been any popular racist backlash to Obama's campaign and election which is simply not the case.) As I argue below, narratives of race are more complex than the simple presence or absence of non-white actors. We cannot be certain that white acceptance of a non-white president will result in more expansive attitudes towards all non-whites, rather than exemplifying the white attitude that *some* African-Americans are exemplary, "transcending their race" due to some extraordinary gift (or by simply being "the good

have the Chris Tucker of today's *Rush Hour* films.[14] While we may no longer have the passive "geishas" of the days of Anna May Wong,[15] we have the passive "lotus blossom" of the character Hatsue Miyamoto in *Snow Falling on Cedars*.[16] Finally, and perhaps more significantly, representations of "whiteness" and presumptions about "white privilege" have changed even less.[17]

It is impossible to determine, as of yet, whether Obama's presidency, despite its transcendence of a racial barrier, will make a significant, lasting break with popular representations and attitudes about non-white people more broadly, beyond just the elite of society.[18] The campaign itself was certainly rife with raced[19] characterizations in the mainstream media and elsewhere.[20] Despite the superficially groundbreaking developments of Obama's campaign, as well as Hillary Clinton's and Bill Richardson's campaigns, the mainstream media proved itself largely incapable of avoiding reproducing unexamined biases regarding race and gender. Part of this blindness came from a predictable inability to

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black)." *See* GWENDOLYN AUDREY FOSTER, PERFORMING WHITENESS: POSTMODERN RE/CONSTRUCTION IN THE CINEMA 8 (State University of New York Press 2003) (discussing cinematic narratives of "the good black"). This notion has allowed "whites" for some time to overlook their own deeply embedded perceptions of race, instead gauging their attitudes by their affection for a distant celebrity. Spike Lee personified this phenomenon in DO THE RIGHT THING (Forty Acres and Mule Filmworks 1989), in the character of Pino (John Turturro), who defends his tacit racism by naming the black basketball stars he admires. In the mainstream media discourse surrounding the Obama campaign, the rhetoric of "the good black" was performed in Newsweek Editor Jonathan Alter's comment about Obama: "We were expecting Jesse Jackson [Sr.] and we got Will Smith." *Hardball with Chris Matthews* (MSNBC television broadcast Oct. 16, 2008).

[13] *See* www.imdb.com for filmography. *See also* Donald Bogle, TOMS, COONS, MULATTOES, MAMMIES AND BUCKS: AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILM 40 (Continuum 4th ed. 2001) (depicting the 1930's "archetypal coon").

[14] RUSH HOUR (New Line Cinema 1998).

[15] *See* www.imdb.com for filmography. *See* also Keith Aoki, *Is Chan Still Missing?: An Essay About the Film 'Snow Falling on Cedars' and Representations of Asian Americans in U.S. Films*, 7 UCLA ASIAN PAC. AM. L.J. 30 (2001) (examining stereotypes of Asian women in U.S. film).

[16] SNOW FALLING ON CEDARS (Universal Pictures 1999).

[17] HERNÁN VERA & ANDREW M. GORDON, SCREEN SAVIORS: HOLLYWOOD FICTIONS OF WHITENESS 193 (Rowman & Littlefield Publishers, Inc. 2003) (arguing that even while images of non-whites in film may have improved over the years, images of "whites" have remained unchanged).

[18] And of course I leave entirely aside as beyond the scope of this article the question of whether Obama's presidency will have significant impact on racial inequality in the United States and globally. As Angela Davis says, "[T]here's a model of diversity as the difference that makes no difference, the change that brings about no change." Gary Younge, *We Used to Think There Was a Black Community*, THE GUARDIAN (London), Nov. 8, 2007, at 10.

[19] I use the words "raced" or "racialized" throughout this article, mostly avoiding the loaded term "racist" for two reasons. First, the term "racist" has become both vague with overuse and charged with emotional meaning; it is a word that may lead to oversimplification of my argument. Second, as D. Marvin Jones notes, to speak in terms of racism "...conceives of the difficulty as a problem of ethos—in the moral sphere. The problematic of race locates it as a problem of world view, structured by historical narratives that transform our picture of experience." *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO L.J. 437, 489. The word "racism" tends to point to individual people, whereas the notion of a "raced" or "racialized" society points to larger social forces. As Jones notes, "[R]ace is not so much a category but a practice: *people are raced*." *Id.* at 440. This article takes as a given that society, and thus its participants, are steeped in racialized views of social reality. I posit this as a social 'default' position, but one capable of being resisted. See Section IV *infra* on notions of resistant spectatorship.

[20] One of the more overt examples of this was when George Stephanopoulos asked Barack Obama whether his "coolness" on the campaign trail was a "black thing." *This Week* (ABC Television Broadcast May 11, 2007). Or consider the Chaffey Community Republican Women Federated organization which circulated images of what money under an Obama presidency would look like. The image of the "money" in question is labeled "United States Food Stamps," and bears an image of Obama's head, a bucket of Kentucky Fried Chicken, a rack of ribs, the Kool-Aid Man and watermelon. *See* Michelle DeArmond, *Inland GOP Mailing Depicts Obama's Face on Food Stamp*, THE PRESS ENTERPRISE, Oct. 16, 2008, http://www.pe.com/localnews/inland/stories/PE_News_Local_S_buck16.3d67d4a.html.

self-scrutinize.[21] And while media discussions of voting patterns have devolved to a demographic accounting along race (and occasionally gender and class) lines for many electoral seasons now, the mantras of "the black vote," "the Latino vote," and "the white working-class vote" were offered as irrefutable categories for evaluation,[22] their legitimacy purportedly sponsored by the entry of "non-normative" candidates into the race.

Whatever opportunities for racial equality or for a "post-racial" society[23] Obama's presidency may represent, the run-up to it (and subsequent events[24]) reveals the persistence of the discourse of race that is, in part, acted out through representation. As narratives of race were performed on a highly publicized national stage and presented as "newly"[25] relevant to the office of the presidency, we were reminded of the crucial place of these narratives in daily life, even in the midst of history-making events.

II. INTRODUCTION

While film scholars may debate whether mainstream Hollywood cinema[26] creates social values or merely reflects social values,[27] or even creates and *then* reflects social values,[28] films inarguably resonate with their socio-historical-economic moment.[29] "Culture shapes media even as media shapes culture."[30] In addition to social influences,

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[21] For example, the only (arguably) mainstream critique of Stephanopoulos' comment came from Comedy Central's *The Daily Show*.

[22] There was a notable category offered by pundits in the 2008 election: "the white male vote." Perhaps this represents an advance in raced political discourse: recognition of whiteness as a position rather than a default assumption of voter identity. In contemplating the candidacies of Clinton and Obama, one pundit interviewed on NPR's *All Things Considered* opined, "[W]hite men [voters] don't know what to do." As a woman voter listening to this pronouncement, it was difficult to avoid a kind of "welcome to the club" feeling.

[23] *See* Hua Hsu, *The End of White America*, THEATLANTIC, Jan./Feb. 2009, at 48, available at http://www.theatlantic.com/doc/200901/end-of-whiteness (analyzing the possibilities of a "post-racial" society in the context of U.S. Census Bureau projections that current racial minorities in the United States will be in the majority by 2042).

[24] *See e.g.*, the media coverage of the arrest of Henry Louis Gates, Jr. in Cambridge, Massachusetts on July 16, 2009.

[25] Of course race is always already present in any aspect of American national discourse, whether acknowledged or not. Race was relevant when predominantly white men ran for president. However, as I argue in Section IV *infra*, "whiteness" typically goes unmarked as a constructed racial position with its own set of assumptions and myths.

[26] By "mainstream Hollywood cinema" I mean films that are produced in the United States with relatively large budgets, with the intent to capture broad commercial appeal, and to gross significant box office returns. *See* Section II *infra* for more on my definition of mainstream film.

[27] *See* Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91 (2005) for an excellent discussion of one aspect of the debate between the Frankfurt School and the Birmingham School of criticism on cultural reception.

[28] *See* ROBERT RAY, A CERTAIN TENDENCY OF THE HOLLYWOOD CINEMA: 1930 – 1980 68 (Princeton Univ. Press 1985) ("[B]y helping to create desires, by reinforcing ideological proclivities, by encouraging certain forms of political action (or inaction), the movies worked to create the very reality they then 'reflected.'")

[29] This is not to suggest that all films merely and simply reproduce the attitudes of their times. To be sure, this "reflection" is varied and complex and can encompass matters of film style and film narrative. In addition, films may be more or less conscious of or critical of the context of their making. *See* DAVID BLACK, LAW IN FILM: RESONANCE AND REPRESENTATION 56-83 (Univ. of Ill. Press 1999) on the difference between films which reflect social values and films which critique social values.

[30] Kwame Anthony Appiah, *No Bad Nigger: Blacks as the Ethical Principle in the Movies*, *in* MEDIA SPECTACLES 77, 86 (Marjorie Garber, Jann Matlock, & Rebecca L. Walkowitz eds., N.Y. Routledge 1993).

mainstream film has as one of its major influences its *own* history[31], which it reproduces and revisits in the endless playing out of narratives that have circulated in cinema for years.[32]

If we accept that films are in some way affected by, or are in dialogue with, the culture of their making we should not expect that commercial films made in a highly-racialized[33] culture would do anything but reproduce that ideology.[34] Accordingly, there is nothing particularly groundbreaking or even informative about noting that mainstream Hollywood films are consistently vehicles for hegemonic depictions of race.[35]

Sixty-five years ago, Theodor W. Adorno and Max Horkheimer argued that the mass art produced in a capitalist society (at the time, films, radio, magazines) merely extends the ideology of that society.[36] Far from an escape from, or an aesthetic transcendence of, daily life, the consumption of mass culture continues the ideological work of capitalism in its indoctrination and pacification of spectators:

> The old experience of the movie-goer, who sees the world outside as an extension of the film he has just left . . . is now the producer's guideline. The more intensely and flawlessly his techniques duplicate empirical objects, the easier it is today for the illusion to prevail that the outside world is the straightforward continuation of that presented on the screen. [37]

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[31] However, to historically situate film is not to ignore narratives of race, ethnicity, gender, class, etc. on historical grounds. It is common for new students of film to deflect any critique of the social attitudes of older films by simply referring to the film's age. The defense goes something like: "But film X was made in 1935 [any early-mid 20th century date will do] and *everybody* was racist/sexist/homophobic/etc. back then." This is problematic for a number of reasons, three of which are key to this discussion. First, this argument assumes that there was no critical or oppositional reading of the film at the time of the film's creation. Note this argument is typically phrased in terms of a universal subject—"*everybody* was racist"—yet most who argue this elide the existence of culturally marginalized spectators. Even the most cursory examination of the events surrounding the release and re-release of D.W. Griffith's THE BIRTH OF A NATION (D.W. Griffith Corp. 1915), for example, reveal substantial contemporaneous critique and condemnation of the film's astonishing racism. See THOMAS CRIPPS, SLOW FADE TO BLACK: THE NEGRO IN AMERICAN FILM (Delta ed., Oxford Univ. Press 1977) (2000). *See also* James Baldwin, THE DEVIL FINDS WORK 65 (Delta reprinted 2000) ("Liberal white audiences applauded when Sidney, at the end of [THE DEFIANT ONES] jumped off the train in order not to abandon his white buddy. The Harlem audience was outraged, and yelled, *Get back on the train, you fool!*"). Second, this approach avoids analyzing the *how* of the depiction of social attitudes, thus short-circuiting an understanding of both the film's history and its place in contemporary narratives concerning the same social issues. Finally, this argument assumes that these biased attitudes no longer exist today, but are mere incidents of the distant past.

[32] RAY, *supra* note 28 at 68 ("[T]he course of the American Cinema's evolution was always influenced less by external, real-world events than by the self-perpetuating momentum of its own tradition."); *see also* DAVID BORDWELL & KRISTEN THOMPSON, FILM ART (8th ed. McGraw-Hill 2006) (the standard "Film 101" textbook, which discusses the recursive nature of narrative in film.)

[33] *See supra* note 19 for a discussion of the use of the word "racialized."

[34] As K. Anthony Appiah argues, *supra* note 30, films that reflect a racist culture are merely symptoms of that culture and thus do not necessarily merit even a boycott. But when films "reinforce" cultural racism, they should be condemned. *Id.* at 85. That said, since, as Barbara Flagg argues, we contribute to the construction of race everyday, it may not be easy to separate a film which reflects racism from one which reinforces racism. *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 970 (1993).

[35] That is, depictions that seek to support ideas of white supremacy and authority. *See* VERA & GORDON, *supra* note 17; FOSTER, *supra* note 12.

[36] Theodor W. Adrno & Max Horkheimer, *The Culture Industry: Enlightenment as Mass Deception*, *in* DIALECTIC OF ENLIGHTENMENT 126 (John Cumming trans., Continuum 2001). This text was first published in 1944.

[37] *Id.* Horkheimer and Adorno's pointed critique of cultural production as a business (having spent time in Los Angeles, they had ample evidence of this to observe) reads as eerily prescient of today's highly-commodified culture industry in which the weekend's movie box office receipts are often the subject of news reports on

If Horkheimer and Adorno's premise is accepted,[38] what is the value of so-called "symptomatic" readings of individual films—that is, analyses of films that see them as symptoms of various cultural attitudes, myths, narratives, etc., held by the dominant culture of their creation? Is there any social or intellectual utility in analyzing dominant cultural products for reliable evidence of predictable social attitudes that perhaps find their more dangerous expression in the social, political, and economic life of a society? Must not such readings always render predictable expressions of culturally dominant paradigms? And again, what is the intellectual and heuristic value of that reading given the clear commercial origin and intent of most films that see mass distribution?

The preliminary answer to these admittedly rhetorical questions is yes, we are likely to find predictably hegemonic narratives in hegemonic Hollywood texts, but it is important to analyze such films for the cultural values they construct, reflect, and re-circulate. "We tend to dismiss the cinema as mere entertainment; yet it has profound effects, shaping our thinking and our behavior."[39] And, in an increasingly image-laden culture, visual critical thinking is key to a complete interpretation of cultural meaning.[40] Even the most cursory survey of YouTube offerings, for example, reveals how mainstream films are endlessly re-imagined, remade, and re-circulated.[41] Thus, critical readings of mass-produced texts foster a broader cultural understanding.[42]

In Part III of this article, I will examine the interlocking narratives of race, law, and film, attempting to trace the myriad overdeterminations that echo back and forth between these three systems of meaning. In Part IV, I will discuss mainstream Hollywood film's construction of law from the perspective of "white privilege"[43] and how this structures

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television and the internet, as well as fodder for seemingly every run-of-the mill cocktail party. But of course, what we have seen in its major flowering—the media monopolies, vertical integration of cultural products, multiplying media distribution channels—had already begun in the expansion of mass produced culture of the mid-1940s.

[38] And it has been critiqued, especially from the perspective of audience reception. Some argue that cultural consumers are not merely passive and in fact reappropriate mass culture for their own use, thus participating in the creation of popular culture. *See* discussion of the Birmingham School of criticism in Mezey & Niles, *supra* note 27. However, even granting that spectators have some agency in how they consume and reinterpret mass culture, it is still possible to analyze cultural artifacts for their ideological content, and perhaps even to discern if not the intent of their producers, then the overall effect of their organization of formal elements, regardless of their reception.

[39] VERA & GORDON, *supra* note 17, at 8.

[40] What follows will hopefully prove this point. However, I am conscious of asserting this to an audience of legal scholars. A recognition of the significance of representation, mass and popular culture, and analysis thereof has been perhaps slower to come to legal education and scholarship than to other academic fields. Within legal pedagogy there are still significant differences of opinion about what it means to teach law and what it means to ask legal questions (Does this mean purely theoretical, doctrinal training? Where do law and society courses belong in the institution? etc.). Some members of the law school community view the study of popular culture and its intersection with law as "trivial," somehow outside of "real" legal questions. But a growing number of legal scholars are writing about the deep interdependence between law and mass culture. *See e.g.*, ORIT KAMIR, EVERY BREATH YOU TAKE: STALKING NARRATIVES AND THE LAW (U. of Michigan Press 2001); FRAMED: WOMEN IN LAW AND FILM (Duke Univ. Press 2006); Austin Sarat, *Imagining the Law of the Father: Dread, Loss, and Mourning in The Sweet Hereafter,* 34 LAW & SOC'Y. REV. 3 (2000); RICHARD SHERWIN, WHEN LAW GOES POP (U. of Chi. Press 2002); Jessica Silbey, *Videotaped Confessions and the Genre of Documentary,* 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 789 (2006).

[41] *See* Mezey & Niles, *supra* note 27 (discussing the interplay between mass culture and popular culture).

[42] In fact, some critics have argued that superficially "trivial," commercial films provide special cultural information that is not as readily available in so-called "art films." *See* Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law & Inequality in Popular Film,* 15 LEG. STUD. FORUM 242 (1991).

[43] *See* Vincent Rocchio's discussion of this concept, especially in the context of the film MISSISSIPPI BURNING (Orion Pictures Corp. 1988). VINCENT F. ROCCHIO, REEL RACISM: CONFRONTING HOLLYWOOD'S CONSTRUCTION OF AFRO-AMERICAN CULTURE 99-113 (Westview Press 2000).

character subjectivity in and audience identification with film. In Part V, I will focus on three main, but by no means exclusive, narrative effects of the construction of law from this white perspective. Finally, in Part VI, I will examine the possibility of critiquing narratives of race within mass culture by briefly surveying three films that critically position narratives of law and race, marking and/or decentering whiteness.

But first, a few words on what this article will *not* cover. For no clearly defensible reason, I will not discuss the multitude of scripted television shows devoted to law. One rationale for this is, despite the fact that film and television are both visual media, they have sufficiently distinct histories and narrative and stylistic systems to merit separate discussion.[44] And though I began with the news media, I will make only passing reference to it throughout, though it is arguably one of society's key forums of racial visual signification. There are many rich readings of racial narratives implicit in the representation of "real-life" events. There is a lot of wonderful scholarship in this area[45] and certainly room for much more, just not in this article.

III. FILM, LAW, AND RACE: OVERDETERMINING NARRATIVES

A. Definitions

I need to first define the terms I am working with, terms most people undoubtedly use without feeling the need of definition: film, law, and race. However, it is important to note at the outset that this article intends to analyze how these terms define *each other* in their interrelationship. Accordingly, at this point I will define them with a distinctness that is somewhat artificial.

1. Film

I focus largely on mainstream, commercial film: mass-distributed, Hollywood films that seek to make a profit.[46] I use fiction film; that is, films that tell stories rather than more formally abstract films or documentary films.[47] There are always exceptions in cinema, as

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[44] In addition, some critics argue that legal narratives significantly differ in film and TV, with television being even less willing than film to critique the legal system it portrays. *See* Mezey & Niles, *supra* note 27.

[45] *See e.g.*, PHILLIP BRIAN HARPER, ARE WE NOT MEN: MASCULINE ANXIETY AND THE PROBLEM OF AFRICAN-AMERICAN IDENTITY (Oxford U. Press 1996); READING RODNEY KING/READING URBAN UPRISING (Robert Gooding-Williams ed., Routledge 1993); ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA (U. of Chi. Press 2001); STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION (N.Y.U. Press 2003).

[46] I also mean films that are made in the "invisible style" of classic Hollywood. *See* Ray, *supra* note 28, at 32. That is, through editing techniques which create time and space continuities, films create a visual "reality" that audiences have learned to read without recognizing disjunctions in editing cuts, etc. (unless of course the film draws attention to editing through its stylistic choices). *See, e.g.*, MOULIN ROUGE! (Bazmark Films 2001). A mainstream film shot in the classic style seems to simply "be" rather than be the product of a carefully strategized set of choices. Jean-Louis Baudry has called this film's "denial of difference." *Ideological Affects of the Basic Cinematographic Apparatus,* in FILM THEORY AND CRITICISM 355, 359 (6th ed. 2004). (While Ray limits his study to films made before 1980, many contemporary films employ editing and stylistic techniques of the classic period such as continuity editing, and the "shot-reverse shot" which synchronizes a character's gaze with the audience).

[47] Documentary films also tell stories, but may merit a separate analysis with their arguably stronger pull towards being truth-based. *See* Regina Austin, *The Next "New Wave": Law-Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 809 (2006).

in life,[48] but my goal in establishing these parameters is to construct a body of what we might call "socially normative" films to analyze. The questions I ask here may have very different answers if posed in the context of so-called "art films" or truly independent cinema where economic constraints exist and audiences differ.[49]

I utilize mainstream films for a number of reasons. First, my inquiry is not whether film is capable of presenting race critically; that is, as a problematic rather than a set of assumptions and biases.[50] There is nothing inherent in the medium to suggest that it cannot. Rather, my emphasis is on the circulation of narratives of race in the dominant culture.[51] Second, whether film scholars and cineastes like it or not, the vast majority of U.S. filmgoers will have their only cinematic experience watching Hollywood product. Since I am interested in examining socially normative representation, it seems to make sense that I limit my study this way. Third, despite a large apparatus of critical film scholarship (albeit still rather limited in legal studies), the majority of filmgoers watch films with a relatively blind eye to the ideology they embody. We would expect most viewers to be able to identify the oft-cited racism in *The Birth of a Nation*.[52] But can we have similar confidence that those same viewers are capable of detecting the persistence of, for example, the "black mammy" theme in American film, in which black characters exist solely to take care of white characters?[53] As filmmaker Issac Julien said in a lecture at Harvard, "while the left refuses to take Hollywood cinema seriously, the right uses these media images to secure a symbolic order that is difficult to dislodge."[54]

My teaching of film to law students informs my fourth reason for choosing to analyze mainstream film.[55] With few exceptions, my students do not initially take readily to analyzing the ideology behind their entertainment.[56] While I try to encourage them to track the source of their pleasure (or displeasure) with a film rather than wholly accepting or rejecting it, it is hard work getting them to look beneath the orchestrated surface of the film to the values and ideology implicit in it. Critical analysis can be a difficult project for anyone analyzing film. But legal training, with its strict boundaries between culture and

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[48] That is, not all films that are produced for major distribution receive it, nor are all films that achieve box office "success" always produced under conventional Hollywood conditions.

[49] *See* discussion *infra* Part VI.

[50] *See* JACQUELINE NAJUMA STEWART, MIGRATING TO THE MOVIES: CINEMA AND BLACK URBAN MODERNITY (U of Cal. Press 2005) (discussing the idea of race as a problematic rather than a static category); *see also* Jones quote, *supra* note 18.

[51] This is not to say all viewers of such films are members of the dominant culture or, even if they are, are incapable of reading mass culture critically. *See infra* Part IV for more on resistant readings of dominant culture.

[52] THE BIRTH OF A NATION (D.W. Griffith 1915).

[53] One aspect of this phenomenon was dubbed the "magic negro" motif, which appears in movies such as THE LEGEND OF BAGGER VANCE (Allied Filmmakers 2000), where mystical golf caddie Will Smith appears out of nowhere to help Matt Damon get his game back. *See* David Ehrenstein, *'Magic Negro' Returns*, THE LOS ANGELES TIMES, Mar. 19, 2007, at A13. I would include in these "black mammy" films HITCH (Columbia Pictures Corp. 2005), in which Will Smith again counsels white folks (this time on their love lives), THE BUCKET LIST (Storyline Entertainment 2007), in which Morgan Freeman teaches Jack Nicholson how to be sick and how to recover his family (and of course Nicholson survives whereas Freeman dies), and MAN ON FIRE (Fox 2000 Pictures 2004), in which Denzel Washington sacrifices himself to save a rich white girl.

[54] As quoted in Ruth Elizabeth Burks, *Back to the Future: Forrest Gump and the Birth of a Nation*, 15 HARV. BLACKLETTER L.J. 83, 86 (1999). While I agree with Julien that many people dismiss mainstream film as too shallow to require analysis, within academia many cultural critics clearly take mainstream film seriously as a site of ideology. *See, e.g.*, HENRY GIROUX, BREAKING INTO THE MOVIES: FILM AND THE CULTURE OF POLITICS (Basil Blackwell Press 2002).

[55] K. Anthony Appiah rightly asserts that academics' cultural readings are motivated by "the needs of our teaching, our concern to bring texts to the classroom to teach." Appiah, *supra* note 30 at 87.

[56] *See* VERA & GORDON, *supra* note 17, at 193 (discussing pedagogical challenges to teaching about race in film).

legal rules, between rationality and emotion, between the visual and the textual, makes such analysis more challenging for law students than, for example, undergraduates in a humanities department.[57] Accordingly, a critique of mainstream cultural representations of race, while perhaps old hat in some academic settings,[58] is still unfinished business in the law school context. Finally, while law and film scholarship has many fine practitioners,[59] it is still a fledgling enterprise. Studies of race and law in film are even more scarce.[60] I seek to expand these studies beyond an assessment of racial stereotypes and bring to bear theoretical tools from other disciplines to dig deeper into the problematic of racialized representation.[61]

Finally, a note about representation and reality: while I critique the ideology represented by fiction film narratives, it is not a call for more "realism" or "accuracy" in film. Part of film narrative is inevitably condensation, suggestion, metaphor, and myth. These techniques are not inherently "bad." But while fiction films don't purport to be "truthful," they seek to create a kind of reality that audiences will accept as valid. Accordingly, it is fair game to judge film's construction of reality.[62] While this article critiques the ideology of representations of race in film, it does not propose the "corrective" didacticism conjured by people who favor the epithet "politically correct." Rather, as I show in the final section of this paper, films can be more self-conscious in constructing narratives of race without being preachy, Pollyanna, or dull.

2. Law

I use the term "law" here to encompass not simply legal rules themselves as they appear in cases and statutes, or the performance of legal rules and procedure in a courtroom, but also law as an overall system of social order.[63] I will mostly discuss popular images of law and legal processes as they appear in film. While actual law and legal history may be relevant to analyze the choices filmmakers make in structuring their stories, I am not so much interested in pointing out inaccurate representations of law for the sake of clarifying the law,[64] but rather to ask what ideological purpose those inaccuracies serve in the film narrative. As Norman Rosenberg notes, "Hollywood's major goal has never been to dispense correct lessons in legal procedure or to devise legally viable solutions for everyday problems."[65] That said, "[T]he representation of law within any motion picture

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[57] For an excellent example of a law and film pedagogical guide for law students, *see* James R. Elkins, *Pedagogical Film Reading, or, "What Does This Film Teach?"*, LAWYERS AND FILM, http://myweb.wvnet.edu/~jelkins/film04/reading-2.html (last visited Apr. 4, 2010).

[58] *See, e.g.*, MARK REID, REDEFINING BLACK FILM (U. of Cal. Press 1993) (arguing that film scholarship overemphasizes images of blackness in white produced and directed mainstream films rather than examining films where black people control film production).

[59] For example: Austin Sarat, Jessica Silbey, Orit Kamir, and James Elkins.

[60] *See, e.g.*, articles by Regina Austin, Margaret Russell, Taunya Lovell Banks, Keith Aoki.

[61] This is by necessity an interdisciplinary project, and accordingly, I draw here from the fields of literary theory, cinema studies, and cultural studies.

[62] *But see* BLACK, *supra* note 29, at 141-56 (arguing that readings of films which seek to "correct" them factually risk missing the representational terms inherent in the medium).

[63] The system of rules and meaning at stake in this analysis are from the American legal system.

[64] *See* BLACK, *supra* note 29, for a discussion of the theoretical limitations of this type of law and film scholarship.

[65] Norman Rosenberg, *Looking For Law in All the Old Traces: The Movies of Classical Hollywood, The Law, and the Case(s) of Film Noir*, 48 UCLA L. REV. 1443, 1448 (2001). While I will frequently look beneath Hollywood's intentions, it is important to remember that, as Rosenberg says, the conventions of depicting law in

has always mattered to commercial filmmakers."[66] Hollywood's self-conscious attention to legal narratives may offer yet another reason to plumb cinematic legal narratives for dominant ideology.

Finally, while I will use the expression "the law" throughout this article, I do not mean to suggest that there is one unitary or monolithic law that predates and transcends the various social matrixes of those subjects who experience the legal system, or that transcends the representation of law. That is, the law's narratives are constructed from myriad points of view, and how the law appears will depend, among other things, on the positionality of the interpreter.[67] In this article, I seek to show how mainstream cinema flattens these multiplicities of perspective into one, which I argue is the perspective of "white privilege."

3. Race

"Race can be understood as the historically contingent social systems of meaning that attach to elements of morphology and ancestry."[68] What has long been asserted as the objective, biological fact of race and racial categories—and still frequently legitimized as such in the dominant discourse, whether implicitly or explicitly—is in fact a narrative developed through a combination of law and conventions of visual identification.[69] "Racial categories are neither objective nor natural, but ideological and constructed."[70] Put more simply, "[t]he truth is that there are no races . . . ."[71]

This article will examine narratives of race through the relational discourse between notions of "whiteness" and "non-whiteness" as they are enacted in film.[72] Until relatively recently, discussions about and analyses of race tacitly avoided any discussion of "whiteness": "Indeed, to say that one is interested in race has come to mean that one is interested in any racial imagery other than that of white people."[73] While it frequently still

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commercial film involve a vastly different practice than the law as it exists in legal practice. Thus, analyzing films by law's terms will not reveal anything about the representational terms or meanings of films themselves.

[66] *Id.* at 1449.

[67] *See* LAW'S STORIES (Peter Brooks & Peter Gerwitz eds., Yale U. Press 1996).

[68] IAN F. HANEY LÓPEZ, WHITE BY LAW 10 (2d ed., N.Y.U. Press 2006).

[69] *See id.*; Robert Westley, *First-Time Encounters: 'Passing' Revisited and Demystification As a Critical Practice*, 18 YALE L. & POL'Y REV. 297 (2000).

[70] *See* Jones quote, *supra* note 18.

[71] Kwame Anthony Appiah, *The Uncompleted Argument: DuBois and the Illusion of Race* in *"Race," Writing, and Difference*, 12 CRITICAL INQUIRY 21, 35 (1985).

[72] One of the ironies of writing about race is that no matter how carefully one uses language, some form of racial reification results. While this article proceeds from the by now well-established concept that race is a construction (*see infra* Part III), to discuss race I must still use a language that demarcates race. In choosing to predominantly adopt the terms of "white" and "non-white," I follow scholars like Haney López, *supra* note 68, who emphasizes the key categories in the legal construction of race are "white" and "non-white," not the racial categories that most people commonly use (i.e. Asian, black, Latino, etc.). I also join my esteemed colleague Cecil J. Hunt, II in his concern over the inaccuracy of phrases like "people of color," preferring to use "non-white" in recognition of the construction of "whiteness" as privilege. *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477 (2006). *See also* RICHARD DYER, WHITE 11 (Routledge 1997). For purposes of typographic simplicity, I do not follow Skip Gates' 'RACE', WRITING AND DIFFERENCE (Univ. Chi. Press 1985), and quote the word "race" every time it appears, though I applaud this strategy for keeping the reader ever mindful of the constructed nature of race. In one draft of this paper, I quoted every use of the words "white" and "whiteness," but that necessitated that I quote every racial term, which resulted in a confusing thicket of punctuation. I ask the reader to bear in mind that all of these terms mark constructs, not real biological or cultural fact.

[73] DYER, *supra* note 72, at 1.

remains "invisible,"[74] the idea of whiteness is crucial to strategies of racial representation, and recognition of this idea is now commonplace in the relevant scholarship.[75] The persistent lack of recognition of "whiteness" as a constructed racial category sponsors the notion of whiteness as the neutral "default" position of human consciousness: "As long as race is something only applied to non-white peoples, as long as white people are not racially seen and named, they/we [whites] function as a human norm. Other people are raced, we are just people."[76] Thus, it is important to remember that *all* narratives of race are constructed, including "whiteness." As Gwendolyn Audrey Foster observes in her study of the cinematic construction of whiteness, it has taken " . . . a great deal of time and effort to define and maintain whiteness."[77]

In 1998, a scholar writing on race and representation noted, "America dreams of race in black and white."[78] While this has changed somewhat over the last ten years with increased recognition of Latino immigration and recent narratives of a "post-racial" society, there is still evidence that the popular imagination frequently continues to focus on the black-white binary.[79] Thus, many of my case studies here deal with that pervasive dynamic.

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[74] For example, much of the recent presidential campaign coverage focused on race as an issue of blackness, not of *white interpretations* of blackness.

[75] Some writers were theorizing "whiteness" as early as the late 1980s. *See e.g.* Richard Dyer, *White,* 29 SCREEN 44 (1988); Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies,* originally published in 1988, reprinted in CRITICAL WHITE STUDIES (Richard Delgado & Jean Stefanic eds., Temple U. Press 1997). (Though arguably James Baldwin's essays on film, *The Devil Finds Work* (Delta 2000), originally published in 1976, began to explicitly theorize whiteness). By the mid-1990s, "white studies" were in full swing, arguing that "whiteness" had been too long absent from discussions of the narrative of race, often forming the unannounced "backdrop" against which racial categories were projected. *See, e.g.*, DYER, *supra* note 72; VERA & GORDON, *supra* note 17. For a collection of representative articles, *see* CRITICAL WHITE STUDIES. *See also* RACE TRAITOR MAGAZINE (John Garvey ed.) (no longer publishing); articles collected in NOEL IGNATIEV & JOHN GARVEY, RACE TRAITOR (Routledge 1996). White studies can go a long way towards exposing the assumptions underlying unacknowledged white privilege. And, as Stephanie Wildman argues in *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245, 246 (2005), despite the development of critical theories of "whiteness", "White privilege persists. Identifying the reasons for the persistence of white privilege is a necessary precursor to combating it." While critical white studies have offered much to the understanding of racial narratives, it is important to realize that, as Eric Arnesen argues, the "withering away of whiteness" requires much more than simply "whites imagin[ing] the abdication of white privilege. *Whiteness and the Historians' Imagination*, 60 ILWCH. 3 (2001). In addition, it is important to not let the focus on "whiteness" sponsored by critical white studies simply become another tool for keeping "whiteness" as the central, "originary" position against which everything "non-white" will be judged. Making "whiteness" more "self-conscious" is not alone enough to de-center it.

[76] DYER, *supra* note 72, at 1. Recent pop cultural phenomena show the possible praxis of white studies. See e.g. Weird Al Yankovic, *White & Nerdy*, on STRAIGHT OUTTA LYNWOOD (Volcano Entertainment 2006)(spoofing Chamillionaire's hit *Ridin'* on THE SOUND OF REVENGE (Universal Records 2005)). In reality television shows like *The White Rapper Show* (VH1 television series 2007) and *Black & White* (FX television series 2006), "whiteness" is marked as a distinct racial category rather than an assumed, "transparent" positionality. In the former show, white contestants are ensconced in the South Bronx where they meet hip-hop legends, and compete for the $100,000 prize and title of "Best White Rapper." In *Black & White*, two middle class families, one identified as black and the other as white, live together and discuss race, while periodically venturing forth in full make-up meant to enable them to "pass" as the "opposite" race. Similarly, websites like Stuff White People Like, http://stuffwhitepeoplelike.com (last visited Feb. 5, 2010) self-consciously (if humorously) seek to construct "whiteness" as a culture. *See also* CHRISTIAN LANDER, STUFF WHITE PEOPLE LIKE: THE DEFINITIVE GUIDE FOR THE UNIQUE TASTE OF MILLIONS (Random House 2008). Note that most of these media productions focus on the black/white binary rather than a broader notion of race's constructedness.

[77] FOSTER, *supra* note 12, at 7.

[78] Robert S. Chang, *Dreaming in Black and White: Racial-Sexual Policing in The Birth of a Nation, The Cheat, and Who Killed Vincent Chin?*, 5 ASIAN L.J. 41, 42 (1998).

[79] This is not to say there are not many good reasons to examine the specifics of this relationship, given America's history of African slavery, etc.

Overall, there certainly is validity in discussing the representation of particular minority groups separately.[80] In focusing on the construction of whiteness and non-whiteness in law films, I seek in part to track legal constructs of race more broadly.[81] I undoubtedly sacrifice attention to some of the specific dynamics of racial representation in my case studies by choosing this route.

For the sake of brevity and focus, I somewhat artificially separate narratives of race from the co-constitutive narratives of gender, class, and sexual orientation. Nor do I discuss the interplay of nation and race, key to representations of people whose national origin has been reduced in the United States to notions of race.[82] While I do not spend much time on these other elements of constructed identity, clearly they play an important part in the overall narrative of race.[83]

It is sometimes argued that to speak about race at all is to legitimize it as having objective content, thus reinforcing its semiotic power. One certainly needs to be deeply self-conscious[84] about how one speaks about race since to speak about it is to constitute it as a reality.[85] As Barbara Fields suggests, we create race every day; it is not simply a product of the past.[86]

On my more pessimistic days, the project of a white person discussing white cinematic discourse and law seems a hopelessly closed and circular enterprise in a closed and circular hegemony. I reassure myself with the words of Kwame Anthony Appiah who notes that "reading race in our culture—high or low, popular or elite—is a large and

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[80] *See, e.g.*, Margaret Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 ASIAN PAC. AM. L.J. 4, 5 (1995) ("Asians occupy unique cultural spaces: spaces that cannot be readily reduced to the racial experiences of other non-whites within the U.S.") *See also* Chang, *supra* note 77, at 43-44 ("Persons of Asian ancestry were judicially constructed as racially distinct from whites; in that sense, we exist as a racial "Other" to whites. However, this doesn't capture the sense in which persons of Asian ancestry were also constructed as a foreign "Other" to (white) Americans.") This interweaving of notions of nation and race is also relevant to Latinos in the U.S. *See also* NGAI, *supra* note 10.

[81] *See infra* Part III.B

[82] *See* NGAI, *supra* note 10.

[83] *See* FOSTER, *supra* note 12, for an excellent discussion of the interplay between gender, sexual orientation and race.

[84] Part of the self-consciousness required in a discussion of race is the need to acknowledge one's own positionality in critiquing race.

[85] Some information about me is in order: I write as a culturally-designated white woman working within legal academia. I have in the past written on issues of race in the context of African-American literature. *See e.g.*, THE PEN IS OURS: A LISTING OF WRITINGS BY AND ABOUT AFRICAN-AMERICAN WOMEN BEFORE 1910 (Cynthia D. Bond & Jean Fagan Yellin eds., Oxford University Press 1991); *Language, Speech and Difference in Their Eyes Were Watching God, in* ZORA NEALE HURSTON: CRITICAL PERSPECTIVES PAST AND PRESENT (Henry Louis Gates, Jr. K. Anthony Appiah eds., Amistad Media Ltd. 1993).Though my Southern parents and grandparents never told me, I discovered in a family genealogy somewhat recently that my ancestors owned enslaved Africans in Virginia and Georgia. I agree with Prof. Haney López that legal scholarship regarding issues of race should be as important to scholars identified as white as it may be to scholars identified as "non-white." Haney López says: "For the most part, White scholars have been reluctant either to produce or to engage intellectually this emergent race-based scholarship . . . Whatever its origins, this white silence has resulted in the accumulation of a body of race-conscious scholarship that focuses almost exclusively on people of color and on the epistemological importance of being a minority." *See* HANEY LÓPEZ, *supra* note 68, at 14-15. (Haney López made this observation in the 1996 edition of WHITE BY LAW (N.Y.U. Press), and left it in the 10th anniversary edition, though there has been an increase in white scholarship on whiteness during that time. Haney López does note the emergence of white studies in both editions).

[86] Barbara Fields, *Slavery, Race and Ideology in the United States of America,* 181 NEW LEFT REVIEW 95 (1990).

difficult enterprise . . . ."[87] Accordingly, this article offers an inevitably partial analysis of the representational issues it addresses.[88]

B. Narratives of Law, Narratives of Film, Narratives of Race

At first glance, law does not appear to bear any formal similarity to film.[89] The former is, after all, a system of rules and their enforcement concerning real life events. The latter is often conceived of as a world of creative fantasy with no "real" outcome in the audience's lived experience. Setting aside for now the notion that films may affect audience attitudes, both law and film are story-telling, narrative systems.[90] The narrative connection between law and film is perhaps most clearly evident in trial films,[91] which are stories about stories: the broader plot of the film tells a story, which encompasses the story the lawyer depicted in the film tells at the trial. However, given the pervasiveness of law in society, it is fair to say that law plays a role in just about every aspect of life, and thus is reflected, however indirectly, in many popular culture representations.[92]

Thus, films about law may have a "double narrativizing" effect, which, while not drawing attention to itself, produces interesting analytical opportunities regarding the nature of narrative itself. Another way of saying this is that narrative functions in films about law are "overdetermined."[93] Thus, law films reveal much about the narratives both constructing and surrounding the law.[94]

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[87] Appiah, *supra* note 30 at 77.

[88] Nor do I think all film theory need be monolithically capable of answering every question about every film, *see* David Bordwell. On the merits of "mid-range" film theory that need not neatly account for every aspect of a film. CONTEMPORARY FILM STUDIES AND THE VICISSITUDES OF GRAND THEORY IN POST-THEORY: RECONSTRUCTING FILM STUDIES (David Bordwell & Noel Carrol eds., U. of Wis. Press 1996).

[89] That is, beyond the content relation of films *about* law, such as the standard courtroom drama.

[90] BLACK, *supra* note 29, at 34 et. seq. While the extent of narrative in law may be debatable (for example, is a sales contract truly "narrative"?), most would agree that courtroom trials are narrative; that they circulate around the telling of a story, or stories. *See* LAWS STORIES (Peter Brooks & Paul Gewirtz eds., Yale U. Press 1998).

[91] While it may be easier to track legal themes in movies that focus on legal processes, such so-called courtroom dramas, notions of social order and law are relevant across a broad number of films and film genres. For example, Westerns are largely concerned with the tensions between individual freedom and the expansion of systems of law. *See* Timothy P. O'Neill, *Two Concepts of Liberty Valance: John Ford, Isaiah Berlin, and Tragic Choice on the Frontier*, 37 CREIGHTON L. REV. 417 (2004) (analyzing narratives of law and civilization in Westerns). Detective movies usually revolve around the relationship between crime, the police and private legal actors. Action films have at their core the tension between following legal processes to achieve justice and the individual's desire for vigilante solutions. *See infra* Part V.A for a discussion of the "outlaw hero." For the purposes of clarity, I will mostly focus on films that explicitly take law as their subject, but I agree with David Black's argument that the question of whether a film is "about law" is mostly a question of degree of screen time rather than a question of genre. *See* BLACK, *supra* note 29, at 55-83.

[92] *See* BLACK, *supra* note 29, at 58-62; *see also* CAROL CLOVER, GOD BLESS JURIES IN REFIGURING AMERICAN FILM GENRES: THEORY AND HISTORY (Nick Browne ed., U. of Cal. Press 1998) (arguing that de Toqueville's observation that law was a pervasive American narrative is still true today).

[93] "Overdeterminations" refers to a system of meaning within which any signifying element may have more than one source of meaning. *See* BLACK, *supra* note 29, at 55, 58 (explaining overdetermination occurring in law films when the narrative elements in a courtroom drama emanate both from the film's narrative strategies *and* from the storytelling mechanisms in the trial which the film depicts); *see also* CLOVER, *supra* note 92 (discussing the "double trial" and other narrative techniques in cinematic courtroom dramas). Geoffrey Bennington offers the following explanation: "[T]he somewhere where you always start is overdetermined . . . by historical, political, philosophical, and phantasmatic structures that in principle can never be fully controlled or made explicit." Geoffrey Bennington (with Jacques Derrida), *Jacques Derrida* (Univ. of Chi. Press 1999).

[94] As Black argues, *supra* note 29, at 35-37, the recognition of shared narrative mechanisms in law and film is not to say they share the same social weight or effect. Narrative theorizing should not ignore the profound adjudicatory effect law has on people's lives. A criminal defendant's participation in the justice system, for

As suggested above, race is also a narrative system.[95] One key element in creating the narrative of race is representation. Indeed, "representation is at the heart of racism."[96] This is in part because "visuality" is key to the constitution of notions of race. "For the most part, racial recognition is a visual phenomenon. I see you and, by the very act of seeing, know that you are black, white, or Asian."[97]

The significance of the visual apprehension of race is deeply relevant to the *legal* construction of race as well. "It is perhaps safe to say that every other experience of racialization, including its documentary production within the law, has as its origin the visual apprehension of difference, which seemingly naturally and simultaneously is categorized as an apprehension of racial difference."[98] Ian Haney-López traces how this racial representation was (and arguably still is) central to the creation of the United States as a nation. The granting of United States citizenship required a court to explicitly adjudicate an applicant's race, as late in our history as 1952.[99] That is, courts had to decide whether or not the applicant was "white." In making this decision, courts relied not only on legal precedent, but also on one of two rationales: "common knowledge" of racial divisions or "scientific evidence" of racial divisions.[100]

Significantly, these cases relied on visual identification, whatever rationale the court applied.[101] In discussing the citizenship application of Ricardo Rodriquez, a Mexican national, the District Court of Texas for the Western District noted: "As to color, he may be classed with the copper-colored or red men. He has dark eyes, straight black hair, and high cheek bones."[102] Clearly, visual identification was key to establishing whiteness legally.[103]

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example, is certainly likely to have far greater impact on his life than his participation as an audience member at a film. Law's effect is more than merely "literary." *See also* Appiah, *supra* note 30 (emphasizing the necessity of distinguishing between representation and reality when theorizing about culture).

[95] As Haney López points out, race is in fact a discourse between various narratives: "[T]he construction of race is the construction of relationships." HANEY LÓPEZ, *supra* note 68, at 116. Robert Westley suggests this when he declares that "to be Black is to be visually overdetermined" by layers of social political and economic meaning *see supra* note 69, at 323.

[96] ROCCHIO, *supra* note 43, at 8.

[97] Westley, *supra* note 69 at 300. This visual dependency was famously encapsulated by Frantz Fanon's analysis of the words of a white onlooker: "Look, a negro!" FRANTZ FANON, BLACK SKIN, WHITE MASKS 109 (Grove Press 1967).

[98] Westley, *supra* note 69, at 323.

[99] Haney López has analyzed the Act of March 26, 1790, ch. 3 § 1,1 stat. 103, and its subsequent revisions. HANEY LÓPEZ, *supra* note 68, at 1 *et. seq*. He divides the history of racial prerequisites to naturalization into two periods: 1790-1870 and 1870-1952. In the second period, applicants designated as "black" and "white" were allowed to naturalize, whereas Chinese and most other non-whites were not. *Id.* at 43-44. This historical framework is not to suggest that race plays no part in contemporary immigration and naturalization issues. Haney López argues that the construction of America as a white nation persists in present day political discourse. *See id.* As recent evidence of this *see, e.g.,* Patrick J. Buchanan, *A Brief for Whitey*, Mar. 21, 2008, http://buchanan.org/blog/pjb-a-brief-for-whitey-969. What is fascinating about the early prerequisite cases is the unabashed explicitness of the judicial construction of "whiteness" under the 1790 Act. HANEY LÓPEZ, *supra* note 68, at 35-55.

[100] HANEY LÓPEZ, *supra* note 68, at 3-9. "'Common knowledge' rationales appealed to popular, widely held conceptions of races and racial divisions," whereas "scientific evidence" rationales were based on supposedly objective, technical, and specialized knowledge. *Id.* at 5. Initially, the courts chose one rationale or another, ultimately relying solely on "common knowledge" as a means of establishing "whiteness." Haney Lopez notes that the "social construction of the White race is manifest in the Court's repudiation of science and its installation of common knowledge as the appropriate racial meter of whiteness." *Id.* at 9.

[101] *Id.*

[102] In re Rodriquez, 81 F. 337 (W.D. Tex. 1897).

[103] The prerequisite cases are not the only instances in which United States courts have adjudicated "whiteness." Since then, courts have continued to adjudicate race. *See* Green v. City of New Orleans, 88 So. 2d 76

That said, it is important to bear in mind that legal narratives of race are not maintained by visual categorization alone. For example, as Robert Westley points out in his analysis of Louisiana's "Black Blood Law," which provided that one-thirty-second or less of "Negro blood" was required to be designated as white, the law extends its power beyond visual apprehension to maintain the boundaries of race.[104] Also consider the role of government accountings such as the U.S. Census, which ask responders to self-identify as to race and form the basis of many of our assumptions about race in this country.

Nor are racial narratives solely legal. As Vincent Rocchio argues, race is constructed in extra-legal forums as well, and "cannot be made to disappear through a series of laws. Racism functions in and through specific meanings and beliefs, a domain in which the law has little power to change or effect . . ."[105] Rather, concepts of race have complex, overdetermined sources of meaning. Race is "a way of relating to others, a way of conceiving ourselves," whose terms are "learned at our parents' knees and in our communities and culturally reinforced through religion, education, the workplace, and the media."[106]

Thus race is a construct, a categorization of people and cultural behavior sponsored by pseudo-empiricism, legal pronouncement, and deeply embedded experiential and linguistic habit. However, to say that race is a socially-constructed narrative is not to suggest that race doesn't matter in social discourse. As Haney-López says, "Races clearly exist in terms of fabricated attributes and failings."[107] While it is important to avoid viewing race as having objective content, to discuss race as it operates as a narrative system of meaning is not to lessen the violence it visits on all its participants; which, as with law, encompasses all members of society.

In a similar movement to the depiction of law in films, films are unavoidably overdetermined in their "depiction" of race.[108] Since society constructs race in large part by visual identification, all visual media, including film, necessarily participate in the constitution of race. Thus, films do not simply depict supposedly free-standing, objective racial attributes naturalized by the dominant discourse, but instead actually participate in the *creation* of race.[109] Thus, to analyze representations of whites and non-whites in mainstream, largely white-produced and directed[110] films is really to analyze a white point

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(La. Ct. App. 1956) (where the petitioner sought to have his foster daughter's birth certificate changed to designate her race as "black" rather than "white" so that he, a socially designated black man, could adopt her); *see also* Doe v. State, 479 So. 2d 369 (La. Ct. App. 1985) (holding that the Guillory family, which had been designated as "colored" on birth certificates, was not in fact "white" as petitioner argued).

[104] Westley, *supra* note 69, at 317. *See also* Jones, *supra* note 18, at 438 (arguing that race is still "the lens through which courts continue to view claims by blacks," analyzing high-profile incidents such as the L.A.P.D beating of Rodney King and subsequent trials, the Bernard Goetz trial, and the Boston murder of Carol Stuart by her husband Charles); Cecil J. Hunt II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 483, 487 (2006) (arguing that "the central mythological scaffolding upon which opposition to affirmative action is built is based on a juridical rhetoric of white innocence").

[105] ROCCHIO, *supra* note 43, at 5.

[106] VERA & GORDON, *supra* note 17, at 16. I would of course add "the law" to this litany.

[107] HANEY LÓPEZ, *supra* note 68, at 119 (noting that these racial characteristics are real, "exactly because they exist as a powerful ideology about the world.").

[108] *See* FOSTER, *supra* note 12. The choices films make about casting, setting, dialogue, and narrative both help construct racial narratives, and necessarily partake of social narratives of race, whether or not race is an explicit part of a film's plot and whether or not the film's cast is "racially diverse."

[109] Films do not, of course, wholly constitute race and racialized identity. Cinematic constitution of race is merely another strand in a large and complex social fabric of racial narrative. *See* HANEY LÓPEZ, *supra* note 68.

[110] VERA & GORDON, *supra* note 17, at 8. It is not necessary to examine the racial identity of these film personnel; rather, the formula of "whiteness" can be participated in and recreated regardless of racial identity.

of view, acted out through various racial masks.[111] Narratives of whiteness are simply "out there" as formulas to employ.[112]

So, for example, a character in a film who is presented as black is not simply a character in the film, but will also bear the particular overdetermined meanings that are socially attached to his "non-whiteness."[113] Thus, audience reaction to this character depends not only on what the film conveys about the character, through both the stylistic and narrative systems of the film, but is overdetermined by "external" social narratives of race which condition audience attitudes about the character's non-whiteness.[114]

This operation also must occur with white characters in films, but whereas mainstream Hollywood films typically mark non-white characters as having particular "racial content," the whiteness of characters typically goes unmarked.[115] As Barbara Flagg suggests, whiteness usually operates as a "transparent" category, as a sort of default normative position for subjectivity,[116] without being seen as a narrative of race as any other.[117] While theorists have helped mark the characteristics of whiteness in film,[118] it is safe to say that the majority of white film viewers see white screen characters as devoid of any particular *racial* significance, but rather as normative subjects with whom they identify.[119] Vera and

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Certainly non-white producers and directors can create movies that reproduce experience from an identifiably white point of view. An example is BRINGING DOWN THE HOUSE (Touchstone Pictures 2003), featuring Quen Latifah as star and executive producer. Latifah plays an ex-con who tricks Steve Martin into an date using the internet. She subsequently turns his house into a clichéd "ghetto" house party. The film reproduces biased assumptions towards African-Americans despite the participation at high levels of African-American filmmakers.

[111] *See* Jones, *supra* note 18, at 449 ("The white mask becomes a lens through which the eye/I may visualize itself at the center of the universe, hermetically sealed.") The metaphor of race as a mask has a long history. *See, e.g.*, W.E.B. DUBOIS, THE SOULS OF BLACK FOLK (Modern Library 2003) (originally published 1903); FANON, *supra* note 96; VERA & GORDON, *supra* note 17, at 150-51. While film actors may participate and contribute to the structuring of racial narratives, such a performance is strongly regulated by script, direction, lighting, costume and editing. *See* Baldwin, *supra* note 31, at 63 (arguing that some performances of black actors such as Sidney Poitier occasionally transformed films which otherwise had repugnant racial narratives).

[112] An example of this is the first two installments of the SCARY MOVIE series (Dimension Films 2000, 2001), co-produced by Wayans Brothers Entertainment, directed by Keenen Ivory Wayans, and written by Shawn and Marlon Wayans. In spoofing horror movies, SCARY MOVIE makes the "whiteness" of the genre visible. *See infra* Part V .

[113] Despite this overdetermination, the social meanings attached may be complex and multi-valent, (*e.g.*, BROTHER FROM ANOTHER PLANET (Anarchist's Convention Films 1985), or simplistic and predictably offensive (*e.g.* GONE WITH THE WIND (Selznick International Pictures 1936), or anything in-between. Those meanings may be interpreted differently depending on the spectators viewing the film. Note, however, that these social narratives are never truly external to signification as culture and its representation are intimately interrelated.

[114] This is not to suggest that all spectators will have the same attitudes to a character's "whiteness" or non-"whiteness." As I more fully discuss in Section IV *infra*, Manthia Diawara argues that spectators can resist the dominant readings of race that films present. *See* Manthia Diawara, *Black Spectatorship: Problems of Identification and Resistance,* in BLACK AMERICAN CINEMA (Manthia Diawara ed., Routledge 1993).

[115] Of course narratives of race are dependent on the interplay between depictions of whiteness and non-whiteness, thus I have artificially discussed these depictions separately to point out the invisibility of whiteness.

[116] "The most striking characteristic of whites' consciousness of whiteness is that most of the time we don't have any. I call this the *transparency* phenomenon: the tendency of whites not to think about whiteness . . ." Flagg, *supra* note 34 at 957. *See also* Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking,* 104 YALE L.J. 2009 (1995).

[117] This is not to suggest that films with non-white characters reveal their own participation in creating racial narratives. Rather, these films typically invite us to see race as relevant to the character's behavior and identity only when he or she is non-white.

[118] DYER, *supra* note 72; FOSTER, *supra* note 12; VERA & GORDON, *supra* note 17.

[119] *See* DYER, *supra* note 72. Such an interpretation may also depend on the gender, able-bodiedness and sexual orientation of on-screen characters. Dyer talks about the inability of "whites to discuss their own racial position without devolving to discussion of other racial categories, which are viewed as clearly 'other.'" My own

Gordon suggest that the invisibility of images of white privilege is key to its survival: "These images [of whiteness] bring about the 'misrecognition' of the true bases of the social relations being fictionalized. White privilege can only be exercised without guilt by denying its existence and by ignoring its historical origins and continuing injustice."[120]

As a function of white transparency, movies typically only signal that they are "about" race when they include several non-white characters or otherwise focus on issues that are constructed as confronting non-whites.[121] In reality, of course, race is an ever-present narrative in any film that depicts human beings[122] because race remains a dominant system of social organization, and because, as discussed above, race is in part a visual construct. So even a film that depicts only white people and does not explicitly make race part of its plot is unavoidably about race in part because it takes place and is viewed in a culture constructed around the narrative of race.[123] These narratives of race are already present in the filmgoer as well, predetermining aspects of the viewer's perception of the film.[124]

Since narratives of law and narratives of race are both dominant systems of social organization, on some level, all films can be said to implicate law and race.[125] In addition, since race is in part a legal construct, law films that address race are overdetermined in their representational strategies: any narrative of race necessarily springs from a narrative of law. Thus, the narratives of law and race are deeply relational and interdependent.[126]

Crucially, the overdetermined nature of the narratives of law and race in film is in large part invisible. Hollywood movies are particularly adept at making their meaning appear unsponsored, natural, and inevitable.[127] Similarly, in day-to-day discourse narratives of race are often treated as merely "natural" descriptions rather than social constructions.[128] In this sense, narratives of race tend to be seamless or invisible as they exist socially and

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experiences in the law and film classroom largely echo Dyer's experience. Foster describes her process of de-centering whiteness for her students as a process of ". . . mak[ing] whiteness strange and . . . engag[ing] in self-othering." *See* FOSTER, *supra* note 12, at 17.

[120] VERA & GORDON, *supra* note 17, at 15.

[121] *E.g.,* Civil Rights protests of the 1960s (MISSISSIPPI BURNING) and segregation in the U.S. military (SOLDIER STORY). I will discuss the representational strategies of these types of films in Section V *infra*.

[122] Even films which don't depict human beings implicate narratives of race. For example, animated films may code characters through dialogue, voicing, and plot in ways that play on audience's racial assumptions. (MADAGASCAR (Dreamworks SKG, 2005).

[123] As argued at note 91 *supra*, although all films can be said to implicate law since society is regulated by it, it may make sense to examine more sustained and self-conscious productions of a cinematic legal narrative. Similarly, in analyzing law films "about" race, it can be expedient to focus on films that make explicit surface claims about addressing race and its nexus with law.

[124] *See supra* Part II for a discussion of resistant spectatorship.

[125] These narratives may be more or less apparent given screen duration, and other factors. *See* BLACK, *supra* note 29.

[126] *See* BRYAN WAGNER, DISTURBING THE PEACE: BLACK CULTURE AND THE POLICE POWER AFTER SLAVERY 21 (Harv. U. Press 2009) ("Contrary to the claim that the black tradition is somehow unrepresentable, I am arguing that it is possible to detect the tradition's contours against the background conditions of its legal history. It is the history of law that gives us what we need to discern the tradition's ongoing self-predication.")

[127] Part of this ability emanates from the very nature of what has been dubbed the "classic" Hollywood style. RAY, *supra* note 28, at 32-55. While I focus much more on films' narrative choices in constructing race than on films' stylistic choices, things like lighting and costuming are key to racial narratives. For an excellent discussion of classic Hollywood's stylistic techniques (focusing especially on the role of lighting techniques in constructing race), *see* DYER, *supra* note 71, at 82-142

[128] *See supra* Part III. The dominant discourse of race tends to construct racial categories and impute essential attributes to those categories (*e.g.,* a socially designated white person may assume certain essential attributes of a socially identified Asian person simply on sight: "X exhibits Y behavior because he is Asian"). *See also* Jones, *supra* note 18; VERA & GORDON, *supra* note 17, at 12.

legally.[129] While lip service may be paid to recognition of racial stereotypes, the dominant discourse consciously or subconsciously usually takes for granted that racial categories have an inherent, quasi-biological truth to them. This discourse gives content to labels like "Latino voters," "Black women," etc.—content that is presumed to spring from a unitary, knowable racial identity.[130]

IV. MOVIE LAW IS "WHITE"

A. Audience Identification and the Creation of the White Legal Subject

Essential to the success of commercial cinema is its construction of identification between audience members and on-screen characters.[131] A good way to evaluate the ideology of mainstream film is to analyze the characters with whom the film asks the audience to identify. This is a direct path to unpacking the core values of a film.

In this process of creating audience identification with screen characters, commercial cinema, some critics argue, construct the audience as white.[132] Expanding on Laura Mulvey's groundbreaking argument that the projected audience for mainstream film is male,[133] Manthia Diawara argues that, whatever the socially-constructed race of a filmgoer, mainstream films present their narratives in ways that, implicitly or explicitly, garner identification with whites or whiteness.[134] In so doing, Diawara defines the spectatorial subject/object split as having a racial element rather than simply being a product of

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[129] *See* Flagg, *supra* note 34.

[130] *See* HANEY LÓPEZ, *supra* note 68, at 18 (quoting Virginia Dominguez: "[T]here is a willingness to recognize nature as the architect of racial distinctions, and man simply as the foreman who interprets nature's design").

[131] This is not to suggest that audience identification does not also play a role in non-mainstream film. Film theorists who apply psychoanalytic principles to film reception argue that films are deeply connected to the creation of subjectivity in audience members, often through the manipulation of identification with on-screen subjects. *See, e.g.*, ANNETTE KUHN, WOMEN'S PICTURES (Verso 1994) (explaining psychoanalytical concepts of identity formation and spectatorship as they apply to cinema).

[132] Diawara, *supra* note 114; *see also* Russell, *supra* note 42; VERA & GORDON, *supra* note 17, at 16 ("[M]ovies aim to address a mass audience through . . . narratives that will reverberate among the largest possible number of viewers. Most of these narratives deal with the way whites feel, think, and act.") *But see* JACQUELINE NAJUMA STEWART, MIGRATING TO THE MOVIES: CINEMA AND BLACK URBAN MODERNITY (U. of Cal. Press 2005) (arguing that film audiences cannot simply be constructed as white to understand identification dynamics in film). Some would argue the presumptive audience for commercial film is white (*see* Diawara), male (*see* LAURA MULVEY, VISUAL PLEASURE AND NARRATIVE CINEMA, in VISUAL AND OTHER PLEASURES (Ind. U. Press 1989), and heterosexual (*see* BELL HOOKS, IS PARIS BURNING?, in REEL TO REAL: RACE, SEX, AND CLASS AT THE MOVIES (Routledge 1996).

[133] *See* Mulvey, *supra* note 132. *But see* STEVE NEALE, MASCULINITY AS SPECTACLE, in FEMINISM & FILM (E. Ann Kaplan ed., Oxford U. Press 2000) (arguing that mainstream films also construct the masculine as object).

[134] Diawara, *supra* note 114, at 211-12. This is true even when films have multi-racial casts. For example, Lawrence Kasdan's GRAND CANYON (Twentieth Century-Fox 1991), with a pseudo-mystical message of unity obscures the politics of difference existing between Kevin Kline's character and Danny Glover's character. Also Consider MONSTER'S BALL (Lee Daniels Entertainment 2001), a film which, though beginning with a black working class family and a white working class family, kills off its two main black male characters (Sean Combs and Coronji Calhoun), and offers the final coupling of a black woman (Halle Berry) and a white man (Billy Bob Thornton) as the answer to racism.

psychoanalytic identity functions[135]: " . . . the dominant cinema situates black characters primarily for the pleasure of White spectators."[136]

Diawara takes as his case study the construction of audience identification in *The Birth of a Nation*, a film whose racial depictions remain notorious almost 100 years after its release.[137] While the film has several main characters who are non-white,[138] as well as large crowd scenes of non-white characters, identification throughout the film is forged between the audience and the white Cameron family.[139] What makes *The Birth of a Nation* an extraordinary example of audience identification,[140] Diawara argues, is that the white characters we are asked to identify with are former slave-owners who create the Ku Klux Klan as a heroic protector of the white women of the South.[141]

Diawara highlights the film's construction of a white audience by posing the question of how a black audience member would identify with *The Birth of a Nation* with its white Klan characters and its disparaging images of blacks as rapists, scheming "mulattoes," and incompetent politicians.[142] He argues that such a viewer would be forced to reject the identification dictated by the film.[143] This reading against the film's intended character identification marks what Diawara calls the "resistant spectator."[144] Crucially, this resistant spectator can be white as well as non-white; resistance is defined as the ability to resist the mechanisms of audience identification and analyze films critically rather than merely accepting them emotionally.[145]

While Diawara concerns himself with the relationship of black spectators to white-produced film, his concept of resistant readings of the "race" of films can easily be expanded to any spectator of any film narrative of race. In Keith Aoki's discussion of depictions of Asian-Americans in film, he performs resistant spectatorship as he analyzes the presumptive white audience constructed by commercial cinema, asking: "Why do filmmakers generally seem to assume that a mainstream audience wants, indeed needs, a white character as an avenue into any story about an Asian American, or for that matter any other minority community?"[146]

Margaret Russell reinforces that the construction of the dominant character on screen is crucial to the reinforcement of a dominant ideology in spectators.[147] Russell calls this the "dominant gaze."[148] She defines the dominant gaze as " . . . the tendency of mainstream culture to replicate, through narrative and imagery, racial inequalities and biases which

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[135] Diawara, *supra* note 114.

[136] *Id.* at 215.

[137] *Id.*

[138] Most of the main characters are played by whites in blackface.

[139] Diawara, *supra* note 114, at 212-14.

[140] This is in addition to the fact that it was the first full-length film in American cinema and the first film to be shown in the White House. *See* Margaret M. Russell, *Rewriting History with Lightning: Race, Myth and Hollywood in the Legal Pantheon*, in LEGAL REELISM 172 (John Denvir ed., U. of Ill. Press, 1996).

[141] Diawara, *supra* note 114.

[142] *Id.*

[143] *Id.*

[144] *Id.* at 211, 214-15. I oversimplify Diawara's argument somewhat for expediency's sake; he details the complex levels of identification that can occur between black/resistant spectators and white produced films.

[145] *Id.* at 214-15. This is a curious level of film analysis a spectator can reach, where the emotional manipulations of a film can be discerned or maybe even felt, but also analyzed critically. I would argue that attention to the emotional affect of film deepens an analysis of its ideology.

[146] Aoki, *supra* note 15, at 48. Although it is a question worth asking, Hollywood still clearly makes this assumption.

[147] Russell, *supra* note 42.

[148] *Id.*

exist throughout society."[149] The dominant gaze "subtly invites the viewer to empathize and identify with its viewpoint as natural, universal, and beyond challenge . . . ."[150] In fact, Gwendolyn A. Foster argues that film is particularly adept at maintaining whiteness: "Whiteness as a construct depends on myths and distortions. What better place than the cinema to define, create, and maintain such myths and distortions?"[151]

What makes the construction of a white subjectivity for audiences particularly significant in the context of law films is that law itself is the provenance of subjectivity. Law creates individual legal subjects in myriad ways: by defining when human life begins (e.g. *Roe v. Wade*), by determining individual rights (e.g. the United States Constitution), by determining who is a person for purposes of lawsuits (e.g. rules regarding standing and corporate identity), by deciding when a person is no longer a person (e.g. right-to-die decisions), or no longer has the right to exist (e.g. death penalty statutes).[152] Thus, there is another kind of overdetermination in law films: while films arguably activate processes of subjective identification by linking the gaze of the spectator to the gaze of the on-screen character,[153] the law also defines the individual through the notion of legal rights and proscriptions. Thus, the subjectivity of characters depicted in law films is overdetermined, emanating from multiple sources, both legal and extra-legal.

Narratives of race under law also are narratives of subjectivity and identity. Consider, for example, the Dred Scott decision, which held that people of African descent could not be United States citizens.[154] Or the alien land laws with the intent to forbid "foreign-born" United States inhabitants from being landowners.[155] It is "the mask of race," D. Marvin Jones argues, that divides between self and other under law.[156]

The viewer is essential to constituting the legal meaning of a film.[157] Jessica Silbey argues that law films create a particular type of spectatorship, one where audiences both critique *and* participate in constructing the legal system as "viewer-subjects."[158] The "viewer-subject" constructed by these films is a liberal legal subject who believes in individualism and the institution of law.[159] While Silbey's subject is asked to critique law's all-encompassing constitutive capabilities, ultimately he or she is not a resistant spectator in

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[149] *Id.* at 243. Analyzing images of African-Americans in film, Russell argues that the dominant gaze functions in 3 ways: (1) proliferation of degrading stereotypes; (2) marginalization or complete absence of indigenous perspectives on blacks' history and (3) co-optation of ostensibly 'racial themes' to capitalize on perceived trendiness. *Id.* at 245.

[150] *Id.* at 243.

[151] FOSTER, *supra* note 12, at 93.

[152] This is, of course, a short list. It does not suggest the myriad ways in which laws regulate daily life, which have significant effects on subjectivity. *See* Jones, *supra* note 19.

[153] *See* KUHN, *supra* note 131.

[154] Scott v. Sandford, 60 U.S. 393 (1856). Jones, *supra* note 19, argues that this notion of blacks as "anti-citizens" persists in more recent times, such as the Rodney King beating and subsequent trial of the L.A.P.D. officers.

[155] *See infra* Part V.B. for more on the alien land laws.

[156] Jones, *supra* note 19.

[157] Jessica Silbey, *Patterns of Courtroom Justice*, *in* LAW AND FILM 97, 116 (Stefan Machura & Peter Robson eds., 2001). Silbey tracks narrative and formal patterns in law films that induce in viewers particular expectations of their role in constituting the legal meaning of film, and by extension, the justice system. Silbey unapologetically focuses on courtroom dramas as a genre. *Id.* at 97. *But see* BLACK, *supra* note 90 (arguing against genre classifications).

[158] Silbey, *supra* note 157, at 98.

[159] *Id.*

Diawara's sense, since these law films resolve in a manner that elicits the viewer's reaffirmation of the validity of the legal system.[160]

Reading Diawara and Silbey together, it follows that mainstream films construct the white legal subject,[161] depicting the law from the perspective of white privilege. While I will develop specific case studies on how this works in the next section, briefly what this means is that legal machinations and outcomes in films are depicted as supporting the supremacy of whiteness.[162] Significantly, this is even the case in films that, on their surface, deplore racism and purport to champion the legal rights of non-whites. Thus the raced nature of the depiction of law can be vastly more difficult to read in these films than in films like *The Birth of a Nation*.

While arguments regarding the raced nature of law is beyond the scope of this article and already capably handled by other scholars,[163] it is clear that these popular culture images occur in the context of "real world" law, which has worked throughout history to support white privilege.[164] Thus, mainstream cinema has ample prefiguring and support for its white-centered narratives of law.

While I argue here that film helps construct race and its place in cultural attitudes about law, it does so in a discourse with larger cultural forces, including the legal system itself and people's experiences with that system. I echo Kwame Anthony Appiah's assertion: "I know that representations are also real, but we still need to keep a clear grip on the distinction between representations and the reality they represent."[165] But even though, as argued above,[166] the consequences of our "raced" legal system have a far more significant impact on our daily lives than the raced aspect of film, a representational feedback loop of sorts exists within the two narrative systems which reinforces the power of both.[167] Representations help shape the attitudes of legal actors, and actions within the legal field are re-imagined in popular culture representations.[168]

B. The White Subject and the Non-White Object in Film

White hegemony "works to define subjectivity itself as white."[169] Perhaps the most immediately obvious example of this in film is the preponderance of white legal subjects[170]

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[160] *Id.* at 115-16. While Silbey does not explicitly limit her analysis to mainstream commercial films, this mechanism of eliciting compliance with prevailing legal ideologies is a mainstay of such films. That being said, there is no reason that a spectator could resist a film's solicitation of unquestioning consent to the legal system it portrays, just as Diawara suggests can be done with resistance of racial narratives. Diawara, *supra* note 114. This article proposes some paths of inquiry to inform that resistance.

[161] Silbey, *supra* note 157; Diawara, *supra* note 114.

[162] Again, as discussed earlier, this is not any "real" or "biological" whiteness, but rather a constructed idea of "whiteness" and its value and superiority.

[163] *See e.g.,* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, et. al. eds., New Press 2001); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (Harv. U. Press 1991); THE DERRICK BELL READER (Richard Delgado & Jean Stefanic eds., N.Y.U. Press 2005).

[164] *See also* FOSTER, *supra* note 12, at 26-30 for a discussion of the persistence of narratives of race and white supremacy in contemporary politics.

[165] *See* Appiah, *supra* note 30, at 88.

[166] *See supra* Part III.

[167] Can there be any real doubt, for example, that the majority of white audience members viewing film depictions of criminals as African-American men experience a sense of "authenticity," given their experience of news reporting practices on African-American men in the context of crime? *See* HARPER, *supra* note 45; *see also* Jones, *supra* note 19, at 488-96. Most jurors have seen more movies than trials.

[168] SHERWIN, *supra* note 40.

[169] FOSTER, *supra* note 12, at 98 (emphasis added).

and the dearth of non-white legal subjects. This focus on white subjects is by no means unique to law films. Rather, "the range of human experience is denied to non-whites in a huge percentage of films."[171] Typically mainstream law films focus on white legal subjects without acknowledging the context of white privilege. Again, this preponderance of white legal actors is simply an extension of the focus on white subjectivity that characterizes mainstream film. This subjectivity is structured in a world where "[t]he judgment of Blackness [or non-whiteness] is fixed, immediate, irrevocable; the judgment of whiteness is ever subject to modification, revision, error."[172] This imagined fluidity of white identity, and imagined fixity of non-white subjects as defined primarily *as* non-white, sponsors mainstream film's fixation with white film characters.[173]

One example of this construction of subjectivity as white is that most law films have white lawyer protagonists.[174] And lawyers in mainstream films are usually authoritative and self-possessed agents who move the plot along. Whatever the foibles, imperfections, and challenges of these white lawyers, they command the viewer's full attention as heroic (or anti-heroic) central figures around whom the plot revolves.[175]

Concomitant with this depiction of white legal subjects is that most non-whites in law films appear as criminal defendants.[176] Thus, these characters are objects to be acted upon by the legal system, rather than subjects who can act within or against the system. Yet even these appearances by non-white actors as objects of law are minimal, and overwhelmingly limited in this context. And as with the preponderance of white legal actors, most films do not especially mark, much less critique,[177] this object status.

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[170] By subject here I mean a character who is self-directed, who motivates the action, and who the film action typically centers on. MULVEY, *supra* note 132. Obviously, this notion of subjectivity has resonance for the reinforcement of audience subjectivity through identification. *Id; see also* KUHN, *supra* note 131; Diawara, *supra* note 114.

[171] FOSTER, *supra* note 12, at 93.

[172] Westley, *supra* note 69, at 301.

[173] This is not to say that there is not a bald economic element to this: producers focus on their majority audience. Though this is presently white, most observers think that will cease to be the case within the next 50 years, with the projected demise of a "racial majority" in the United States. *See* VERA & GORDON, *supra* note 17, at 192. But again, following Aoki, *supra* note 15, why should filmmakers assume that even a white majority audience can only be won through identification with white characters?

[174] For a survey, *see* PAUL BERGMAN & MICHAEL ASIMOW, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES (Andrews McMeel 1996) which synopses Sixty-nine American law-themed films, of which only four arguably have a non-white protagonist (lawyer or other main character).

[175] *See infra* Part V.A for a discussion on the concept of the "heroic lawyer."

[176] The examples of non-white lawyers in mainstream law films are few: PHILADELPHIA (Clinica Estetico 1993) (Denzel Washington as attorney); A SOLDIER'S STORY (Columbia Pictures 1984) (Howard Rollins as military attorney); CLASS ACTION (Interscope Communications 1991) (Laurence Fishburne as sidekick attorney); LOSING ISAIAH (Paramount Pictures 1995) (Samuel L. Jackson as attorney). Only PHILADELPHIA and A SOLDIER'S STORY spend any significant time focusing on the non-white lawyers. Non-white criminal defendants abound. *See, e.g.*, MONSTER'S BALL (Lee Daniels Entertainment 2001); THE GREEN MILE (Castle Rock Entertainment 1999); TO KILL A MOCKINGBIRD (United Artists 1962); A TIME TO KILL (Regency Enterprises 1996); A SOLDIER'S STORY (Columbia Pictures Corporation 1984); LOSING ISAIAH (Paramount Pictures 1995), HURRICANE (Azoff Entertainment 1999); SNOW FALLING ON CEDARS (Universal Pictures 1999); ZOOT SUIT (Universal Pictures 1981); AMERICAN ME (Universal Pictures 1992); CHANGING LANES (Paramount Pictures 2002) (Samuel L. Jackson as civil defendant); AMISTAD (Dreamworks SKG 1997) (maritime law of property applied to Africans); 12 ANGRY MEN (Orion-Nova Productions 1957) (while the film clearly marks the defendant as "other," in the film's class-conscious narrative, he could arguably be read as lower class, though some commentators read him as Latino).

[177] For example, by commenting on racial period profiling in law enforcement, unequal sentencing based on race, unequal application of the death penalty. 12 ANGRY MEN is an exception to this in its explicit marking of the differential legal treatment of socially marginalized groups.

While the sheer appearance of non-white bodies on the screen may be significant,[178] the *how* of such representation is much more important than the simple existence of it.[179] The relevant questions about such representations must go much deeper than whether a character is portrayed "positively" or "negatively." For example, a film may have positive portrayals of non-white characters, yet not give them full focus or full subjectivity.[180] And of course, positive characterizations can be just as limiting and stereotypical as negative characterizations, so they alone do not necessarily mark true character subjectivity.[181] Rather, the more significant inquiry is whether "[w]hite discourse implacably reduces the non-white subject to being a function of the white subject, not allowing her/him space or autonomy, permitting neither the recognition of similarities or the acceptance of differences except as a means for knowing the white self."[182]

The dichotomy of white subject and non-white "object" discussed above interconnects with a key narrative at the core of many mainstream law movies: the conflict between law and justice. Examining this duality in the context of gender, Mark Tushnet argues that law is typically aligned with socially-dominant actors and justice with non-dominant "Other[s]."[183] "[L]aw is associated with the Dominant, usually the white male, and justice with the Other. The Dominant is regulated by rules whose rigidity must be tempered from the outside, by mercy and a case-specific particularism associated with justice."[184] The Other "may be an indigenous person, a woman, a man who somehow has escaped the bonds of the Dominant . . . ."[185] An Other frequently appears in a legal narrative as a criminal defendant, an object of the system.[186] "The Other cannot, however, easily become a subject

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[178] HOOKS, *supra* note 132; Aoki, *supra* note 15; Baldwin, *supra* note 31 (discussing reaction in minority communities to images of minorities in film and on TV).

[179] Nor do sheer numbers of white and non-white characters necessarily dictate a film's perspective on race. Though probably not a law movie by anyone's definition, THE ROYAL TENENBAUMS (American Empirical Pictures 2001) occasionally de-centers whiteness even though it contains only a few non-white characters. Royal Tenenbaum (Gene Hackman), the estranged patriarch of the family (and disbarred lawyer), provokes an argument with his ex-wife's new fiancé, Henry Sherman (Danny Glover), using racial epithets that are depicted as ugly, childish, and ultimately disempowering to him. In addition, Royal's quasi-colonial relationship with part sidekick, part retainer Pagoda (Kumar Pallana) is periodically decentered by Pagoda's comical stabbing of Royal with a penknife. (That said, arguably these brief scenes don't override the film's overwhelmingly white upper class milieu.)

[180] The perfect exemplar of this is Morgan Freeman, who almost always plays a virtuous character—including, notably, God—yet is rarely the main character in a film, instead frequently sharing the screen with a white character. This is the so-called "biracial buddy" formula. *See* ED GUERRERO, FRAMING BLACKNESS: THE AFRICAN AMERICAN IMAGE IN FILM 127-37 (Temple U. Press, 1993) (discussed more fully at Part V, *infra*); *see also* VERA & GORDON, *supra* note 17, at 154-80. Even when Freeman plays the most powerful being in the universe, such as in BRUCE ALMIGHTY (Universal Pictures 2003) and EVAN ALMIGHTY (Universal Pictures 2007), he occupies far less screen time and has less subjectivity attributed to him than the white main characters of the films (Jim Carrey and Steve Carrell, respectively).

[181] One thinks of Brock Peterson's character Tom in TO KILL A MOCKINGBIRD (United Artists 1962). While Peters does a fine acting job with the material he is given, the film depicts Tom as a virtuous, but almost childishly powerless man. We are told he is a father, but he is never shown with his children or in a position of patriarchal authority (a patriarchy which virtually defines lawyer Atticus Finch). This is the sort of purity trap that Kwame Anthony Appiah, *supra* note 30, at 83 discusses arguing that the figure of the "good negro" or "saint" in movies is offered up perhaps to "address the guilt of white audiences, afraid that black people are angry at them, wanting to be forgiven, seeking a black person who is not only admirable and lovable, but who loves white people back...."

[182] DYER, *supra* note 72.

[183] Mark Tushnet, *Class Action: One View of Gender and Law in Popular Culture*, in LEGAL REELISM 244, 244 (John Denvir ed., U. of Ill. Press 1996).

[184] *Id.*

[185] *Id.* at 247. Curiously, Tushnet does not explicitly mention a non-white person in his litany of "Others," but clearly minority racial identity fits the category.

[186] *Id.*

actively constructing the law inside the courtroom precisely because he or she stands for justice and against the law."[187] Thus, mainstream films' narrative framing of law versus justice further imbeds the connection between whiteness and legal subjectivity and the object status of non-white social actors.

While the connection of justice to non-white characters is a kind of valourization, it does not equate to true subjectivity. Ultimately, the focus must remain on the Dominant, typically the white male character: "Because popular culture finds it difficult to sustain a moral structure in which the subordinate is valued as much as the Dominant, those who use this trope must somehow reconcile the implicit valourization of the Other with the valourization of the Dominant that domination entails."[188]

Most films accomplish this simply by keeping the film's focus on main characters who are white, thus directing audience identification with white characters. And since most of the types of law narratives Tushnet discusses style justice as only possible *outside* the legal system, non-white characters are cast as ultimately external to the system; either incapable of prevailing through procedural law in court, outright criminal, or both.[189]

V. THREE NARRATIVE STRATEGIES FOR THE CONSTRUCTION OF "MOVIE LAW" FROM THE PERSPECTIVE OF WHITE PRIVILEGE

Narrative strategies for the cinematic construction of law from the perspective of white privilege are many. In this article, I will focus on three interrelated elements: the raced construction of the lawyer-hero; the denial or displacement of law's role in constructing race and race-based discrimination; and the suppression or revision of politics and political history.

A. The Raced Construction of the Lawyer-Hero

In mainstream film, the subtleties of character subjectivity and audience identification are boiled down to the phenomenon of the hero. The image of the hero is particularly crucial in law films because "[h]eroes are cultural signifiers who embody society's traditions. Their significance lies in the way that the laws of social existence are coded in the signifier of the hero. Hence, the hero functions as moral arbiter who seeks to guarantee the legal conditions of society."[190] Heroes, thus, *are* the law.

That is not to say that heroes always act within the confines of law. Rather, "[o]ne function of the hero in traditional cinema is the extension of society's boundaries and laws within acceptable outlines. The film hero is a settler on the frontier of change who colonizes the new territory in the name of the status quo."[191]

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[187] *Id.*

[188] *Id.* at 244.

[189] *See infra* Part V for detailed discussion and examples.

[190] Gladstone L. Yearwood, *The Hero in Black Film: An Analysis of the Film Industry and Problems in Black Cinema,* 5 WIDE ANGLE 42, 43 (1983).

[191] *Id.*

This seeming contradiction between the hero's simultaneous place as law's embodiment and as adventurer *beyond* law's confines represents a core thematic opposition in classic Hollywood film: the outlaw hero and the official hero.[192]

> Embodied in the adventurer, explorer, gunfighter, wanderer, and loner, the outlaw hero stood for that part of the American imagination valuing self-determination and freedom from entanglements. By contrast, the official hero, normally portrayed as a teacher, lawyer, politician, farmer or family man, represented the American belief in collective action, and the objective legal process that superseded private notions of right and wrong.[193]

Films in the classic Hollywood model maintain these two "contradictory traditions," frequently "blurring the lines between the two sets of heroes."[194] But despite the maintenance of both heroes simultaneously, "the national ideology clearly prefer[s] the outlaw."[195] Ray interprets the American love affair with the outlaw as suggestive of "an ideological anxiety about civilized life," a life represented by the official, law-abiding/law-embodying hero.[196]

The notion of the hero is central to films that explicitly take law as their subject. As Steve Greenfield argues, lawyer characters such as Atticus Finch[197] or "the young Mr. Lincoln,"[198] are the ultimate film heroes, standing up for the oppressed, and seen as above the community for doing so.[199] However, despite this heroic status, "[t]hese films . . . demonstrate that the cinematic lawyer will often freely flaunt the procedural rules and disregard client considerations in order to achieve a subjective notion of justice."[200]

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[192] RAY, *supra* note 28, at 58-59. Ray uses the past tense because he defines the classic period of Hollywood cinema as extending from 1935-1980, but many films made after 1980 continue the techniques and ideologies of the heyday of classic cinema. Most of the mainstream films I examine in this article are consistent with classic Hollywood Cinema.

[193] *Id.* at 59.

[194] *Id.* at 63, 64.

[195] *Id.* at 66. Again, while Ray limits this phenomenon to films produced in the "classic period," it persists in many films today. For example, consider the films released in the summer of 2008. These included several superhero narratives-- IRON MAN (Marvel Enterprises 2008), THE INCREDIBLE HULK (Marvel Enterprises 2008), HELLBOY II (Dark Horse Entertainment 2008), and HANCOCK (Columbia Pictures 2008)--, which garnered from respectable to strong box office returns. THE DARK KNIGHT (Warner Bros. Pictures 2008) stands out, not just for its record-breaking box office receipts, but also for its management of the official vs. outlaw hero trope. The plot sets up Gotham District Attorney Harvey Dent (Aaron Eckhart) as the official hero lawyer, cleaning up the city by prosecuting its criminals. Set against him is Batman (Christian Bale), whose crime fighting methods are that of a vigilante outlaw. While the audience is more drawn to Batman's pyrotechnics and Christian Bale's brooding energy, the film ends with the notion that Dent is the true hero the city needs, as he represents the due process of law. The loss of Dent at the end of the film is meant to be a tragedy, and is the catalyst for sending Batman out of Gotham as a hunted criminal. Batman chooses to accept responsibility for the recent spate of killings and goes on the lam to help reinforce Gotham's devotion to law over chaos. Resonating with Bush-era concerns about the erosion of constitutional rights, the film makes a strong case for an embrace of the order and justice implicit in the official hero.

[196] *Id.* at 60.

[197] TO KILL A MOCKINGBIRD (United Artists 1962).

[198] YOUNG MR. LINCOLN (Twentieth Century-Fox 1939).

[199] Steve Greenfield, *Hero or Villain? Cinematic Lawyers and the Delivery of Justice* in *Law and Film*, 28 J.L. & SOC'Y 25, 37 (2001).

[200] *Id.*

Thus, the cinematic lawyer's identity is comprised of both the skill and ability to manipulate legal rules and the power to ignore the law as he[201] sees fit. This lawyer-subject embodies the contradictions between the official and outlaw heroes. This duality establishes a narrative split between the lawyer and the institution of law. "Lawyers are shown as morally strong characters prepared to take great risk in defen[s]e of the concept of law or, more accurately, justice. Yet, the films portray the process of law as instrumental in the obstruction of justice."[202]

This distinction of the lawyer from the system supports the hero identification that mainstream films thrive on.[203] More importantly, the shift of focus from the system of law to the lawyer-subject neatly avoids any structural examination or critique of the system, or of the possibility that lawyers are agents for social change. "These films are telling us to have faith in the idea but not the system of law . . . these films are telling us to have faith in the lawyers themselves."[204]

Thus, while the raced nature of the cinematic lawyer hero goes unmarked in these films and in Greenfield's commentary,[205] the power of these lawyer characters emanates both from their whiteness[206] and their role as lawyers. Both positions put them in the role of Dominant. Almost without exception,[207] cinematic white lawyers are depicted as masterful at their craft.[208] This mastery is depicted in various ways, including: having sophisticated knowledge of intricate court procedure (e.g., James Stewart in *Anatomy of a Murder*;[209] Ron Silver as Alan Dershowitz in *Reversal of Fortune*[210]); using negative office politics to gain advantage (e.g., Tom Cruise in *The Firm*;[211] Ben Affleck in *Changing Lanes*[212]); arguing forcefully and eloquently in court and with adversaries (e.g., Gene Hackman in *Class Action*;[213] Orson Welles in COMPULSION;[214] Spencer Tracy and Fredric March in *Inherit the Wind*[215]); putting every resource, professional and personal, into zealously

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[201] I use the male pronoun intentionally here, in defining the dominant as typically male. *See* Tushnet, *supra* note 183, at 244.

[202] Greenfield, *supra* note 199, at 39.

[203] RAY, *supra* note 28, at 62 ("The outlaw mythology portrayed the law, the sum of society's standards, as a collective, impersonal ideology imposed on the individual from without").

[204] Greenfield, *supra* note 199, at 37-38.

[205] *Id.*

[206] Also, as mentioned above, their power also emanates from their maleness, able-bodiedness, straightness, etc. *See* FOSTER, *supra* note 12 (discussing the interplay between the narratives of race, gender, and sexual orientation).

[207] The film THE SWEET HEREAFTER (Alliance Communications Corp. 1997) is a notable exception to this pattern. For an excellent discussion of the fallible lawyer character in the film, *see* Sarat, *supra* note 40.

[208] Again, the examples are too numerous and familiar to require listing. *See* BERGMAN & ASIMOW, *supra* note 174. Even Paul Newman's character in THE VERDICT (Twentieth Century-Fox 1982), who is initially depicted as a washed-up alcoholic, regains his moral authority by the end of the film and competently conducts his trial.

[209] ANATOMY OF A MURDER (Carlyle Productions 1959).

[210] REVERSAL OF FORTUNE (Sovereign Pictures 1990). There certainly was a time when Alan Dershowitz would not be considered white in America because he is Jewish, and arguably that time is still with us. REVERSAL OF FORTUNE does highlight the stereotypes and "casual" anti-semitism Dershowitz encounters in his representation of Claus von Bulow. *See* MICHAEL ROGIN, BLACKFACE, WHITE NOISE: JEWISH IMMIGRANTS IN THE HOLLYWOOD MELTING POT (U. of Cal. Press 1996) (analyzing the use of blackface minstrelsy by early Jewish performers as an avenue to construct a white American identity); *see also* VERA & GORDON, *supra* note 17, at 1. While this article doesn't address the intersection between religious practice, nation, and race, arguably depictions of Jewish lawyers could be fodder for an interesting analysis.

[211] THE FIRM (Paramount Pictures 1993).

[212] CHANGING LANES (Paramount Pictures 2002).

[213] CLASS ACTION (Interscope Communications 1991).

[214] COMPULSION (Twentieth Century Fox Film 1959).

[215] INHERIT THE WIND (United Artists 1960).

pursuing a client's case (e.g., Matthew McConaughy in *A Time to Kill*[216]; Alec Baldwin in *Ghosts of Mississippi*[217]). Cinematic white lawyers frequently fight for what are depicted as social justice or moral causes (e.g., Gene Hackman in *Class Action*, Dustin Hoffman in *Runaway Jury*;[218] Gregory Peck in *To Kill a Mockingbird*; Alec Baldwin in *Ghosts of Mississippi*, etc.). And if such characters should lose or otherwise slip in competence, they manage to regain authority by the end of the film (e.g., *Adam's Rib*,[219] *The Verdict*, *Changing Lanes*). There is no final fall from grace for these characters; regardless of how they have manipulated the law to meet their own ends, at the end of the film, they remain the subject-center, intact as attorneys with their attendant power also intact.[220]

The characteristics imputed to the heroic cinematic lawyer align with what Richard Dyer has identified as the purported mythical characteristics or "spirit" of "whiteness."[221] As race is a concept dependent on embodiment[222] there is a corporeal element: "[T]he white spirit could both master and transcend the white body, while the non-white soul was the prey to the promptings and fallibilities of the body."[223] Dyer describes the corporeality attributed to whiteness as " . . . get up and go, aspiration, awareness of the highest reaches of intellectual comprehension . . . . A hard, lean body, a dieted or trained one, an upright, shoulders back, unrelaxed posture, tight rather than loose movement . . . ."[224] D. Marvin Jones argues that embodiment is also an inescapable element of the law's construction of race: "[T]he body remains the medium in which the significance of race is most dramatically seen in law."[225]

Dyer's description of the physicality of whiteness (and clearly he is describing white maleness in the passage quoted) is consistent with the performance of lawyering in cinema. In law films, these physical characteristics are depicted as inseparable from the performance of lawyering in courtroom scenes. Gene Hackman (CLASS ACTION) and Ben Affleck (CHANGING LANES) may be depicted as having had loose morals in cheating on their wives, but they are "hard, lean" "upright" and "tight" in their courtroom scenes. And James Stewart (*Anatomy of a Murder*) may tickle the piano keys in his spare time, swapping riffs with Duke Ellington,[226] but in the courtroom he is ramrod straight and all efficiency. Even

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[216] A TIME TO KILL (Warner Bros. Pictures 1996).

[217] GHOSTS OF MISSISSIPPI (Castle Rock Entertainment 1996).

[218] RUNAWAY JURY (Twentieth Century Fox 2003).

[219] ADAM'S RIB (Metro-Goldwyn-Mayer 1949).

[220] A brief survey of law films portraying (white) female attorneys highlights the unshakeable dominance of their white male counterparts. Female lawyer characters frequently end the film uncertain as to whether they will continue in the profession, some having lost their jobs (Mary Elizabeth Mastrantonio in CLASS ACTION), some nearly having lost their lives (Rebecca De Mornay in GUILTY AS SIN (Buena Vista Pictures 1993) and Glenn Close in JAGGED EDGE (Columbia Pictures Corp. 1985)), and some having shifted their focus to an emotional involvement with their client/boss (Sandra Bullock in TWO WEEKS NOTICE (Warner Bros. Pictures 2002)).

[221] DYER, *supra* note 72, at 18.

[222] *Id.*

[223] *Id.* at 23.

[224] *Id.* The argument here is not that, in reality, whites have these characteristics consistently, naturally, or exclusively. Rather they are projected narratives frequently used to underwrite, whether explicitly or implicitly, white hegemony. Dyer seeks to make visible the constructs of white identity which are frequently viewed from a white perspective as "natural" (and generally positive) attributes, rather than as mere projections and/or cultural practices.

[225] Jones, *supra* note 19, at 489.

[226] The use of Duke Ellington and his music in ANATOMY OF A MURDER (Carlyle Productions 1959) further reinforces its narrative of white hegemony. Stewart borrows the Duke's inexhaustible coolness by being his buddy, even sharing keyboards with him. Ellington's casting is an exercise in the uncanny since, even though he isn't cast as himself, the audience knows who he is, and thus is momentarily taken out of the film world. Reducing him to a bit player in Stewart's world further reinforces the totality of white hegemony, which in this instance contains the rational mastery of law along with the apparently effortless, "emotional" world of jazz. Here, jazz is

the hopelessly alcoholic Paul Newman (*The Verdict*) can put on a suit and go through the requisite authoritative motions in court. Again, while the raced nature of the cinematic lawyer hero goes unmarked in these films[227] (and in most commentary about them), the source of the white lawyers' power is overdetermined: whiteness is power, law is power. And as Margaret Russell argues, mainstream film makes this correlation appear natural and simply part of the way the world works.[228]

Yet despite this embodiment, the cinematic white lawyer's depicted ability to go outside the law to find justice reflects the fluidity assigned to white identity.[229] Since whiteness is the normative position of power and law-making, the Dominant, it follows that whiteness is also the position from which laws can be ignored. "At the level of social mores, the right not to conform, to be different and get away with it, is the right of the most privileged groups in society."[230] To make the law is to be able to unmake law. To be the law is to *always* be the law, even when acting outside of its explicit instructions.[231]

What then is the place of non-white characters in this heroic legal narrative? Not surprisingly, "[t]he cinematic rhetoric and style of the traditional hero predicates a social positioning in which blacks, women and other less powerful socio-cultural groups are constantly defined in a subordinate status."[232] For example, focusing on the black hero in popular film,[233] Yearwood argues that the perpetual cultural association of blacks with lawlessness undermines the ability of such characters to be heroes in mainstream film.[234]

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portrayed as merely the faint outlaw behavior of black people, rather than a rigorous cultural and intellectual production with its own particular "laws."

[227] As we have begun to see, the pervasiveness of the legal narrative is flush with the pervasiveness of the white narrative. It may be simply easier to see this overlap in courtroom dramas, but it is also readily apparent in action film genres like the DIE HARD movies (Twentieth Century-Fox 1988, 1990, 1995), the RAMBO franchise (Anabasis N.V. 1982-2008), and the ROCKY franchise (Chartoff-Winkler Productions 1976-2006), just to name a few. *See* VERA & GORDON, *supra* note 17, at 34. These outlaw/official heroes are as essential to cinematic narratives of law as the "heroic" lawyers heretofore mentioned, and their heroic narrative further reflects the characteristics of the narrative of "whiteness" that Dyer sketches. *See supra* note 71. One drawback of insisting on a law film genre with distinct formal codes is that one risks ignoring the ever-present existence of "whiteness" as law. This narrative is inherently already present, even when a film does not contain courtroom scenes.

[228] Russell, *supra* note 42.

[229] Westley, *supra* note 69.

[230] DYER, *supra* note 72, at 12.

[231] Greenfield does not address the racially coded aspect of this in his description of lawyers as villains or heroes. *See supra* note 199.

[232] Yearwood, *supra* note 190, at 44.

[233] *Id.* While I am trying to theorize the interplay between images of whiteness and non-whiteness more broadly, there is value in examining the specific tropes of black male criminality, given their historical persistence and pervasiveness. It is important to not fall into the trap of assuming that the simple replacement of "whites" with "non-whites" within the heroic narrative would be alone a positive development. As long as the hero is associated with the status quo or a modest expansion thereof, a simple substitution of character morphology will not guarantee a critical approach to heroism itself or race.

[234] A cursory examination of the one entry in the superhero film line-up of the Summer of 2008 that presented a non-white superhero (leaving aside HELLBOY II) supports this argument. In HANCOCK, Will Smith plays a superhero on the skids. Unloved and an alcoholic, Hancock wreaks havoc at the site of every rescue. Eventually, he is saved by a white PR executive who teaches him how to use his power in a media-friendly way. (It is significant that the primary problem of a non-white superhero would be depicted as one of *image*). While one's initial reaction is pleasure at the inclusion of a non-white superhero in the mix once again non-whiteness is marked in a way whiteness is not. Rather than being a superhero who happens to be black, Hancock is presented as a kind of example of what a superhero would be *if* he were black, activating various stereotypes of urban, black underclass life. Yet the movie also simultaneously ignores the politics of race in its presentation of Hancock's immortal romantic relationship with white superhero-in-hiding Charlize Theron. While it is suggested the couple was attacked when they were last together in Miami in the 1930s, the film leaves the nature of the attack vague rather than giving it an obvious grounding in historical hostility toward interracial relationships. In this gesture, the

Given the conflation of whiteness and law, a non-white hero necessarily "is by nature a subversive, and is thus unable to take a place in the system of exchange on the same basis as traditional heroes."[235]

Since narratives of race are always relational,[236] we should expect some key representational strategies of race and law to be revealed in films which cast main characters across racial lines. Accordingly, let us examine the lawyer-hero dynamic as it plays out in two films that set up white/non-white character dyads at their core: A *Time to Kill*[237] and *Philadelphia*.[238] Both of these films were made in the mid-1990s and both directly address discrimination under law against socially-marginalized Others. Even so, both films participate in representational strategies that inhere lawyer-heroism in "whiteness."[239]

A Time to Kill[240] follows the conventional white lawyer-hero model. Novice white attorney Jake Brigance (Matthew McConaughy) is hired by African-American lumber worker Carl Lee Hailey (Samuel L. Jackson) to defend him after he shoots two white racists who brutally raped his 10-year-old daughter in Mississippi. Hailey is explicitly aligned with justice as we are told that, given Southern racism,[241] his daughter's rapists would inevitably escape conviction for their crimes. Thus, in announcing its explicit message condemning racial inequality, the film superficially marks the whiteness of the attorney hero as part of his place in the Dominant—Hailey seeks him out because he is a member of the power elite and thus can ably represent him.

Yet this marking of race inequality fails to de-center a white privilege perspective on law, and instead acts to reinforce white subjectivity and supremacy. The majority of this film focuses not on Hailey or racial inequality in criminal sentencing or at trial, but rather on Jake Brigance, who undergoes great travail to defend Hailey.[242] Brigance's fledgling

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film performs the typical Hollywood repression of political narratives in favor of personal narratives *See* RAY, *supra* note 28.

[235] Yearwood, *supra* note 190, at 43. Yearwood quotes critic Thomas Cripps: "[T]he success of the heroic black film derives from a black hero as outlaw who hustles a living outside the dominant social system." All eyes are currently on actor Will Smith who has become a top box office draw, and is increasingly cast as the main character. In addition, Smith pursues control of his production. *See* Tatiana Siegel, *Smith, Lassiter Bent on World Conquest*, VARIETY, Dec. 12, 2008, http://www.variety.com/article/VR1117997301.html?categoryid=13&cs=1. But again, the mere presence of non-white heroes is no guarantee of true de-centering of white representational hegemony.

[236] *See* HANEY LÓPEZ, *supra* note 68.

[237] A TIME TO KILL (Regency Enterprises 1996); PHILADELPHIA (Clinica Estetico 1993).

[238] It is probably not surprising that the vast majority of the few non-white lawyer characters we find in mainstream film are African-American. This is no doubt part of Hollywood's marketing strategy to maximize audience, and it is consistent with the black-white binary that still dominates much casual discourse about race in America. Accordingly, I examine many films within this central narrative.

[239] PHILADELPHIA is certainly on its surface a more nuanced and intelligent film than A TIME TO KILL, and arguably more politically progressive. What makes these films an interesting comparison is that while most casual viewers would view them as significantly different in narrative complexity and style, they have more in common ideologically than initially meets the eye.

[240] In fact, this film is based on John Grisham's 1989 novel of the same name.

[241] Not surprisingly, many Hollywood films are comfortable cabining racism in the South (and typically in the lower class), rather than examining it throughout the country, or examining the psychic and economic interdependence between the North and South. *See* VERA & GORDON, *supra* note 17, at 42-47; *see also* Rob Atkinson, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1370 (1999) (arguing that TO KILL A MOCKINGBIRD shifts responsibility for racism to lower class whites).

[242] This focus on white sacrifice for non-white characters is a phenomenon I like to call, a là W.E.B Dubois, "the souls of white folks." *See* W.E.B DUBOIS, THE SOULS OF BLACK FOLK (Modern Library 2003) (originally published 1903). (Dubois also wrote an essay called *The Souls of White Folk* in DARKWATER (Harcourt, Brace &

law firm is fragile and clientless, yet he takes on this, his first capital case. His house is firebombed and his wife and child threatened and pressured to leave town temporarily. Even Brigance's secretary is forced to quit after her husband is literally scared to death by old-school[243] Klan harassment. Brigance's persistence is presented as truly heroic.

Key to this heroism is what only can be described as male masochism.[244] From repeated images of McConaughy's bloodied bare chest, to scenes of him literally throwing himself in front of bullets to protect others during mob riots, there is an evocation of Christ-like sacrifice in this white lawyer hero. While audience sympathy for Hailey is actively cultivated (in part by the inclusion of the almost unwatchable rape scene at the beginning of the film) *A Time to Kill* avoids fully valourizing Hailey and his justice claim and Hailey by focusing most of its screen time and attention on Brigance and *his* struggles. Thus, the Dominant (Brigance) appropriates the "aura" of justice surrounding the Other (Hailey).[245]

In a superficial attempt to achieve the appearance of racially-balanced character subjectivity, the film activates certain aspects of the "biracial buddy formula,"[246] with Brigance and Hailey working crafty ruses together to advance Hailey's case. But the representational reality of the film has Hailey spending 90% of the film caged—first behind the screen door where he awaits his daughters' rapists, and then for the majority of the rest of the film in prison.[247] While the film depicts Hailey as unjustly on trial, Brigance is the character offered for audience identification and empathy. Thus, through use of the lawyer-hero model, the film's message condemning racial inequality in criminal sentencing remains superficial. The film's true focus is the nobility of the white lawyer hero. [248]

Howe 1920) which doesn't use the phrase in the way I do here, but addresses white supremacy and white racism). It is called by some the "white savior" or "white messiah" complex. *See* VERA & GORDON, *supra* note 17.

[243] Interestingly, whenever I teach this film, someone inevitably expresses confusion about the time of the events depicted. While there are no explicit indications of the film being set in the past, such as antique cars or other obsolescent technology, the tone of the film evokes civil rights era violence and robust Klan activity of yore. I would argue that the willfully anachronistic quality of the film serves to further reinforce the image of Jake Brigance as a white savior, lending him an aura of civil rights era heroism.

[244] *See* DAVID SAVRAN, TAKING IT LIKE A MAN: WHITE MASCULINITY, MASOCHISM, AND CONTEMPORARY AMERICAN CULTURE (Princeton Univ. Press 1998) (arguing that images of white masculinity reflect masochistic victimization fantasies, in part sponsored by fear of political advances made by women and non-whites).

[245] *See* FOSTER, *supra* note 12, at 98, for a discussion of white characters' appropriation of otherness in specific genre films such as musicals, etc.

[246] ED GUERRERO, FRAMING BLACKNESS: THE AFRICAN AMERICAN IMAGE IN FILM 128 (Temple U. Press 1993)("[W]ith the biracial buddy formula Hollywood put the black filmic presence in the protective custody, so to speak, of a white lead or co-star and therefore in conformity with white sensibilities and expectations of what blacks, essentially, should be.")

[247] While this depiction might seem appropriate given that he is in police custody awaiting trial, the filmmakers choose to depict Jackson in a particularly dehumanized fashion, especially in an earlier scene in which he lies in wait for the rapists in the courthouse. An extreme close-up shot of Jackson's eyes behind a wire mesh door, contorted in rage, cast Jackson as animalistic. *See* Yearwood, *supra* note 190, at 43 (arguing that part of cinema's "acquisition of the black body through symbolic domination and control" involves camera use and lighting which "attach[es] semes of inferiority, fear or suspense to blackness"); *see also* Barbara Mennel, *White Law and the Missing Black Body in Fritz Lang's Fury,* 20 Q. REV. OF FILM & VIDEO 203 (1936) (discussing the "Hollywood formula that associates whiteness with the law and blackness with the body.")

[248] An interesting contrast to this is the depiction of the white lawyers in AMERICAN VIOLET (Uncommon Productions 2008), a film about racially targeted police enforcement of drug laws. First, we are given a team of defense attorneys (played by Will Patton and Tim Blake Nelson) rather than a heroic individual. In addition, their efforts in representing an African-American defendant (Nicole Beharie) are not the focus; rather, the defendant's struggles are kept at the center of the film. Finally, the conduct of the case is presented as a group effort between the defendant and her attorneys rather than the result of the white attorneys' *noblesse oblige.*

Any genuine critique of the raced nature of the law is undercut by the film's suggestion that vigilantism is acceptable if performed by a black person to acquit racist white violence. In the film's simplistic logic this is offered, along with the frequent beatings black Sheriff Ozzie Walls gives white suspects, as a kind of thematic recompense for a history of abuse of African-Americans under law. Leaving aside for a moment the perversity and shallowness of such a gesture, this plot's strategy serves to reinforce the inevitability of whiteness' hegemonic hold on legal subjectivity, consigning non-white Others to self-help solutions outside of the legal system, while superficially valorizing their justice claims.

Ultimately, Brigance obtains Hailey's complete acquittal on the improbable grounds of insanity, which is presented as a just result despite Hailey's admitted murder of the two white rapists. Whatever the convoluted nature of this purportedly just outcome, the film maintains the primacy of the perspective of white privilege by keeping the white lawyer character as the "interest center" of the film, despite the black criminal defendant character's place as the "moral center" of the film.[249]

Compare the film *Philadelphia,*[250] which also takes as its subject legal discrimination.[251] Joe Miller (Denzel Washington), attorney for plaintiff Andrew Becker (Tom Hanks), an HIV-infected attorney who is fired by his upscale law firm when it discovers his illness. Becker hires Miller to represent him after no other lawyer will take the case, sues his law firm for employment discrimination, and ultimately prevails.

While Joe Miller is a significant character in the movie and gets enough screen time to qualify as a main character, Andrew Becker remains the focus of the film and Miller's identity as a lawyer is fleshed out largely in comparison and as a counterpoint to Becker's, mirroring the relational narrative of race.[252] While Becker is a high-end corporate lawyer, Miller is depicted as his opposite: an ambulance-chasing, "shyster" personal injury attorney working out of a ramshackle office. In addition, while Becker is initially portrayed as apolitical in his legal career, simply taking corporate cases as part of his "neutral" legal mastery, through the course of the film he is radicalized by his discriminatory treatment by his former firm. Miller's practice, on the other hand, is continuously depicted as apolitical. He expresses no social justice motivations for his work, even though as a plaintiff-side personal injury lawyer, he could be framed as a champion of the "little guy" against corporations.[253]

While *Philadelphia* is exemplary for making Miller a lawyer first rather than a *black* lawyer, it limits its focus on difference to sexual orientation thus avoiding a broader critique of discrimination against all socially marginalized groups. This is a familiar dynamic in law films, which sometimes pit one 'otherness' against another, never able to give 'equal time'

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[249] *See* RAY, *supra* note 28, at 66 (arguing that one way classic Hollywood films maintain the official hero-outlaw hero disjunction is by making one character represent the moral center of the film (the official hero) and the other represent the interest center (typically the outlaw hero)). This is a common way to direct audience identification and comes into play in many films which share screen time between a major white and non-white character. *See* GUERRERO, *supra* note 180 (discussing film's management of audience identification in biracial buddy films of the 1980s). Arguably, Brigance also claims the film's moral center at the end of the film when he shows up at Hailey's house for a picnic in a gesture of racial "healing."

[250] PHILADELPHIA (Clinica Estetico 1993).

[251] A key difference here is that the legal claim articulated in PHILADELPHIA is more concrete in that it involves a violation of the ADA, whereas the discrimination suggested in A TIME TO KILL is not clearly grounded in a violation of law.

[252] *See* HANEY LÓPEZ, *supra* note 68.

[253] As is, for example, Gene Hackman's character in CLASS ACTION, *supra* note 212.

or articulate a cohesive agenda across 'groups.'[254] Thus, Miller is depicted as initially homophobic, the film perhaps in part channeling (without real commentary or examination) assumptions about homophobia in the black community. Thus, the film valourizes one type of "Other" in its adherence to the hero model.

In service of this, Miller's character reflects the characteristics of the typical cinematic white lawyer discussed above[255]—he is rational, persuasive, and authoritative in court. The film works to code him as professionally "neutral," i.e. white,[256] in its depiction of his legal mastery. But instead of the characterization of Miller de-centering a white hegemonic perspective on law, it is used to shift potential audience identification with Miller to focus instead on Andrew Becker.

Miller is seemingly slipped into the role of Dominant, displaced from assuming the role of Other aligned with justice[257] which is filled by Becker, the film not having room for two Others at the same time. Yet crucially, Miller's positioning as Dominant does not equate to a central position as the film's hero. Even though Miller wins the case and excels in the courtroom, he is not elevated to hero status as he would be in other law films where a white male lawyer acted similarly such as *A Time to Kill*. While he experiences some self-doubt and endures homophobic jokes from colleagues, Miller is not presented as going through great personal sacrifice to represent Becker, as Brigance. Most of the screen time and the hero position must go to Andrew Becker, who is aligned with justice in his fight for equal protection of the laws. In addition, the depiction of Miller as functioning in the mode of white lawyer deracinates him[258] and displaces opportunities for his own political voice, or a shared political voice, in favor of Becker's struggle for inclusion.[259]

In this "battle of the Others," the depiction of Washington's character is necessarily underwritten by the "straight-ened" version of a gay man offered for audience identification. While there is undoubtedly value to Director Jonathan Demme putting a gay man at the center of a mainstream film at a time when such a thing was relatively unheard of, we barely see Tom Hanks kiss his partner (played by Antonio Banderas), much less make love with him. Hanks' character is depicted as straight-acting, straight-dressing, straight-talking.[260] He is a more acceptable Other for normative audience identification by not appearing Other.[261] And while Washington's character cannot avoid the *appearance* of

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[254] CYNTHIA LUCIA, FRAMING FEMALE LAWYERS 22 (U. of Tex. Press 2005). Lucia discusses this phenomenon in the context of depictions of women lawyers in law films. The same phenomenon was in evidence during the 2008 presidential campaign where for some reason the notion that both Democratic front-runners Hillary Clinton *and* Barack Obama might be suffering from sexist *and* racist perceptions could not be simultaneously entertained. *See* Randi Kaye, *Some Voters Say Sexism Less Offensive Than Racism*, CNN, Feb. 15, 2008, http://www.cnn.com/2008/POLITICS/02/15/kaye.ohioracegender/index.html.

[255] *See supra* Part IV.

[256] For a humorous take on the assumed neutrality of whiteness in the context of the Justice Sonia Sotomayor confirmation hearings, *see The Colbert Report: The Neutral Man's Burden* (Comedy Central broadcast on July 16, 2009), *available at* http://www.colbertnation.com/the-colbert-report-videos/238783/july-16-2009/the-colbert-report--the-word---neutral-man-s-burden.

[257] Tushnet, *supra* note 183.

[258] Diawara, *supra* note 114.

[259] There is a vague sense in this that civil rights for non-whites are already largely achieved and the focus should now turn back to whites, albeit marginalized whites.

[260] *See* Anne Thompson, *Ang Lee's 'Brokeback' Explores 'Last Frontier,'* THE HOLLYWOOD REPORTER, Nov. 11, 2005, http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=1001477928. ("PHILADELPHIA was less a romance (the gay couple didn't kiss) than a courtroom drama about fighting for justice").

[261] Perhaps where he is more profoundly "othered" is in his physical disability. Yet while the film deserves some credit for focusing on a main character who is disabled, its empowerment of him emanates largely from his

Otherness, the depicted neutrality of his legal mastery is used to deracinate the racial Other's relationship with the law for audience consumption.

Paradoxically, this representation of a sexual Other in the guise of the white male Dominant[262] allows the symbolic reassertion of the Dominant as the center of the narrative, further displacing Washington's character from exercising any real authority. While the antics of the typical biracial buddy film are not employed here, a similar dynamic of the white character retaining "custody" of, or otherwise giving meaning to, a non-white character takes place.[263] Hanks is both law—accomplished attorney who can walk the walk *and* talk the talk—and justice—gay activist acquitting equality under the law. Again, both law and justice are represented in whiteness.[264]

Both *A Time to Kill* and *Philadelphia* revolve around the subjectivity of white lawyer heroes, even when that character is not the central lawyer figure in the courtroom drama depicted. While both of these white lawyers are securely in the Dominant position as wielders of law within a courtroom, both films also align them with justice concerns, thus seeking to "borrow" the valourization of the Other. Accordingly, part of the vision of the Dominant that is whiteness is that it retains the fluidity to exercise hegemony even *outside* its usual hegemonic realm.[265] White mastery is thus a totalizing force, able to act in a court of law and in "the streets" to achieve justice. While non-white figures may excel in the realm of the Dominant, for example the courtroom (Joe Miller), that victory is not sufficient to grant them full subject status within the narrative of the film as it would a white lawyer (Jake Brigance). Instead, non-whites in these narratives exist largely as opportunities to reveal how proficient and beneficent white lawyers can be.

B. The Denial or Displacement of the Law's Role in Constructing Race and Race-Based Discrimination

The lawyer-hero dynamic plays an important part in diverting attention from the law's role in sponsoring racial discrimination, instead focusing audiences on the individual above the institution,[266] the personal above the political.[267] Even when mainstream films attend to stories of racial injustice, they simultaneously suppress the role of law in constructing race and racial discrimination, displacing discrimination onto individual actors and emphasizing the overall fairness of the legal process. "The reassurance here is that, despite the evil that individual whites may do to people of color, white institutions are fundamentally good."[268] Thus, the concrete laws and regulations that have throughout history structured race are either casually suggested or left out all together. This is sometimes facilitated by restricting representations of law to the courtroom setting.

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place as an elite lawyer fighting for his rights. His disability is presented as a victimization, a lack which diminishes his power as a lawyer.

[262] On the place of cinematic gay characters as "white other[s]" who have only recently been coded as "white dominan[t]" figures. *See* FOSTER, *supra* note 12, at 137, 152

[263] GUERRERO, *supra* note 180.

[264] *See* DIANA FUSS, IDENTIFICATION PAPERS 142 (Routledge 1995). ("[E]ven otherness may be appropriated exclusively by white subjects.") (discussing from a psychoanalytic perspective the raced nature of narratives of subject and other in the writing of Frantz Fanon).

[265] This is largely due to the fact that, as previously discussed, the entire dynamic of subjectivity and "othering" in mainstream film is constructed from the perspective of whiteness.

[266] Greenfield, *supra* note 198.

[267] RAY, *supra* note 28.

[268] VERA & GORDON, *supra* note 17, at 53.

Even those films that explicitly take law as their subject fail to fully depict law's part in the construction of race and racial discrimination. For example, *Snow Falling on Cedars*[269] purports to condemn discrimination against Asian-Americans[270] before and after World War II. The film focuses on the murder trial of Japanese-American fisherman, Kazuo Miymamoto (Rick Yune). Kazuo is falsely accused of killing a white fisherman, Carl Heine Jr. (Eric Thal) through the use of the Japanese martial art of Kendo. Crucially, the film initially encourages the viewer to believe in Kazuo's guilt.[271] This is partly achieved by giving him motive in the form of his anger at Heine for refusing to sell him his boat and Kazuo's deeper resentment of Heine's mother for by revoking the land deal which Kazuo's father entered into with the Heine family, seeking to evade the restrictions of the alien land law.[272]

While Kazuo's dilemma and trial form the "moral center" of the film, the film's interest constellates around white news reporter, Ishmael Chambers (Ethan Hawke), who harbors an obsessive affection for Kazuo's wife, Hatsue Miyamoto (Youki Kudoh). Chambers gets the lion's share of the screen time, often in misty flashbacks of his childhood infatuation with Hatsue.[273] In part due to his rage at Hatsue for marrying Kazuo, Chambers conceals exculpatory evidence that would free Kazuo. Just before Kazuo is to be convicted, Chambers reveals the information, thus freeing him and cementing Chambers' place as the film's hero.

The film's vague and brief mention of the alien land laws, along with the minimal focus on the internment of Hatsue, Kazuo, and their families during the war[274] displaces the role of law onto the courtroom scenes. Thus, Kazuo's acquittal is offered as a resolution of the film's racial conflicts; as proof[275] that the legal system itself is just. "The courtroom part of this story really is about the ultimate vindication of the legal system . . . This viewpoint perceives racism as essentially an aberration, an irrationality, in a system that otherwise works generally well and justly."[276] The systemic legalized racism of the alien land law and

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269 SNOW FALLING ON CEDARS (Universal Pictures 1999).

270 As discussed in note 10, *supra*, following Mae Ngai's notion of the "legal racialization" of Asians in the United States, I discuss these depictions in terms of racial signification.

271 The film also activates stereotypes of inscrutable and brutal Asian masculinity through its use of camera and lighting to suggest Kazuo's guilt. While this may be done to heighten viewer suspense, it is done through raced representation.

272 Laws enacted in several states which forbad certain foreign nationals from owning land, used particularly against those of Asian heritage. For example, California's first Alien Land Law was enacted in 1913 and was not repealed until 1952. *See* DUDLEY O. MCGOVNEY, THE ANTI-JAPANESE LAND LAWS OF CALIFORNIA AND TEN OTHER STATES, *in* JAPANESE IMMIGRANTS AND AMERICAN LAW (Charles McClain ed., Garland Inc. 1994). Several other states had such laws. For example, Florida had an alien land law on the books as late as 2008. *See* Hector Chichoni, *Florida's Alien Land Law*, FLORIDA'S EMPLOYMENT & IMMIGRATION LAW BLOG, Sept. 16, 2008, http://www.flemploymentlawblog.com/2008/09/articles/floridas-alien-land-law/.

273 As Keith Aoki argues, rather than critically positioning Ethan Hawke's obsession within the history of U.S. films' construction of the mysterious, dangerous Asian female, it participates in this fetishization by obsessively centering on Hawke. *See supra* note 15.

274 While the film is superficially sympathetic to Japanese internment, the scenes in the camp are mostly used to portray Hatsue's thwarted relationship with Chambers.

275 *See* CLOVER, *supra* note 92 (arguing that all courtroom dramas put some larger question "on trial," in addition to the trial depicted in the film).

276 Aoki, *supra* note 15, at 35.

the internment camps goes without sustained critique;[277] instead, it is washed away in Kazuo's trial.

Crucially, the court proceedings themselves are presented as just and fair.[278] And the law's representatives in the film—the white sheriff (Richard Jenkins), judge and defense attorney (Max Von Sydow)—are depicted as racially tolerant and enlightened. Thus, the viewer is left with the sense that the system works, despite a few bad apples.[279] The overwhelming focus on the trial and the "mystery" of whether or not Kazuo committed murder, deflects any attention to the law's role in racist legislation and executive orders.

Legal discrimination is again viewed from the perspective of white privilege, even in the context of a narrative that purports to be about discrimination against Asian Americans. Any real portrayal of the law itself as constructing race as well as being racially discriminatory is avoided. Instead, the film focuses on the justice served by the 11th-hour intercession of a white man acting from outside the legal system.[280]

Snow Falling on Cedars can be read as a kind of eroticized homage to *To Kill a Mockingbird.*[281] It follows the classic film's depiction of the law as essentially racially-tolerant and enlightened. This is famously embodied in the person of Atticus Finch, but also in the white judge and the sheriff, as in *Snow Falling on Cedars*. Tom Robinson's trial, given Atticus' brilliant defense and summation, is depicted as fair, even noble. Even the appellate court, it is suggested, would have decided in Tom's favor. Thus, the film situates the problem of raced law in the people sitting on the jury, and in some of the townspeople.[282] There is no suggestion of the considerable body of laws responsible for the construction of race, racial discrimination, and segregation in existence both at the time of the story and the time of the film's making.[283] Obviously bound in part by the source novel,[284] the film emphasizes the fairness of the trial in terms of Atticus' representation and the court procedure, thus displacing any racism in the function of law itself.[285] Again, this

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[277] The film takes a shot at displacing racism onto Hatsue's mother who, tells her not to fall in love with "white boys," while they are interned at the camp. In the context of the film's romantic narrative, this statement is framed as cruel and repressive rather than one resisting the oppression of internment.

[278] While Chambers initially withholds exculpatory evidence, it is "extra-legal" information since it involves documents he discovers as part of his investigative reporting.

[279] The only legal actor in the film depicted as racially motivated is the coroner who testifies against Kazuo, referring to him as a "jap."

[280] While Chambers is not a lawyer, he embodies the heroic white legal subject discussed *supra* Part V.A.

[281] Towards its end, the film clearly illustrates the scene where black spectators that are sitting in the segregated gallery rise when Atticus Finch leaves the courthouse. As Chambers leaves, having helped acquit Kazuo, the segregated Japanese-American audience bows to him. Aoki also compares the films, but mostly to argue that Ishmael Chambers isn't as satisfying a hero as Atticus Finch. *See* Aoki, *supra* note 15, at 35-36

[282] *See* Atkinson, *supra* note 241.

[283] One interpretation of the historical place of TO KILL A MOCKINGBIRD is that the film commends white liberals for their support of the civil rights movement, while simultaneously comforting any fears they may have about black resistance becoming violent or fully decentering them from power. The racial intolerance of whites is limited to a few citizens of Maycomb, and the black characters are depicted as infantilized and isolated, thus posing no political threat to whites. For a different reading of the film's resonance for release-date audiences, *see* VERA & GORDON, *supra* note 17, at 43 (arguing that TO KILL A MOCKINGBIRD was aimed at soothing white liberals by suggesting racism was worse in the past).

[284] Even with a film based on a novel, it makes sense to examine what choices the filmmakers make about what to include, and to inquire about why *this* particular movie is made at *this* time. *See* AMY LAWRENCE, ECHO AND NARCISSUS: WOMEN'S VOICES IN CLASSICAL HOLLYWOOD CINEMA (U. of Cal. Press 2001) (arguing that Harper Lee was deeply imaginatively bound by her lawyer father, on whom the novel is based). SNOW FALLING ON CEDARS is also based on a novel, which was written by David Guterson (Vintage 1995) who co-produced the film version.

[285] Much of this is accomplished by maintaining the focus of the novel and the film on the ultimate lawyer-hero and white savior, Atticus Finch.

overarching focus on the trial as the sole indicator of, and avenue to, racial equality is key to diverting attention from law's actual role in constructing race.

I have focused in this section on so-called courtroom dramas. While, as argued above, the notion of genre can be limiting when looking at images of law in film, it's clear that Hollywood films only signal that they are "about" law when dealing with courtroom settings. Obviously then, films which do not revolve around trials also suppress the role of social and legal institutions in constructing race. A recent example of this is *Crash,*[286] which won the best picture Oscar in 2006 and was widely hailed as a hard-hitting exposé of the persistence of American racism.[287] Law loosely forms the core of the film as several interconnected events unfold around two central police characters, John Ryan and Tom Hansen (Matt Dillon and Ryan Phillipe), and detective Graham Waters (Don Cheadle).

Crash depicts race as a problem of personal prejudice, equally shared by individuals of all ethnicities. It focuses on racism as a moral problem rather than a structural and systemic one.[288] Racism becomes a kind of by-product of psychological stress; we follow several Los Angeles residents who lead busy, chaotic lives and who occasionally vent by hurling racial epithets at each other. The intimate focus on individual characters defuses any structural critique of say, racial profiling, which is depicted in the film and superficially condemned.[289] Despite the self-consciously serious surface of the film, issues of race are made to look simultaneously pervasive and extremely trivial,[290] limited to individual behaviors rather than systemic elements of law and social order.

Crucially, the only structural critique of racism in the film is from the mouth of Anthony (Chris 'Ludacris' Bridges), a car-jacker whose control is immediately undermined as he steals the car of a white district attorney (Brendan Fraser) and his wife (Sandra Bullock), just seconds after condemning them for avoiding him on the street because they are threatened by his blackness. Thus, where legal narratives are relatively submerged, mainstream film successfully divert attention from the systemic aspects of race and its embeddedness in law by keeping the focus on the personal and psychological.

C. The Suppression or Revision of Politics and Political History

To say that Hollywood films avoid politics is not to say they are *devoid* of politics. Films model social relationships, and thus relationships of power. While films in the classic Hollywood style create the ability to avoid ideology,[291] this itself is an ideology. Many films alchemize fears and uncertainties regarding political events into more palatable,

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[286] CRASH (Yari Film Group 2005).

[287] However, some critics accused the movie of preachiness. *See e.g.* A.O. Scott, *Bigotry as the Outer Side of Inner Angst,* N.Y. TIMES, May 6, 2005; *see also* Rotten Tomatoes, http://www.rottentomatoes.com/m/1144992-crash/, for representative reviews.

[288] *See* Jones, *supra* note 19, at 488-89.

[289] Policeman Ryan (Matt Dillon) stops T.V. executive Cameron Thayer (Terrence Howard) and his wife Christine Thayer (Thandie Newton) based on his race and car make. Ryan sexually molests Christine as he frisks her. I have always found the subsequent scene, in which Christine excoriates Cameron for "letting" the white policeman mistreat her, profoundly implausible. But again, rather than using the incident to reveal non-whites' shared sense of the realities of systemic racism, the film chooses to "personalize" the situation, making the wife's reaction personal (and hysterical) rather than political.

[290] Accomplishing this contradiction is no mean feat!

[291] RAY, *supra* note 28, at 63 ("By discouraging commitment to any single set of values, this [American] mythology fostered an ideology of improvisation, individualism, and ad hoc solutions for problems depicted as crises.")

personalized narratives.[292] This approach is not restricted to any genre of film or any particular era. And since, as argued earlier, law is at the center of social order, almost any film can be mined for its interpretation of law's ideology.

In part keeping with Hollywood's audience-pacifying preference for personal narratives, there is an extraordinary dearth of mainstream films that tell the myriad, often "action-packed" stories of social resistance to discriminatory law. Paradoxically, despite film's preference for depicting the legal system as ultimately fair, as argued above, few films acknowledge those moments in history when the legal process has been the locus of racial justice. Even a casual survey of America's history of race relations brings to mind hundreds of compelling narratives that never make it to mainstream screens.[293]

Those Hollywood films that purport to be addressing resistance to racial discrimination prefer to do so in narratives of defeat rather than victory. Obvious examples of this are *Mississippi Burning,*[294] and *Ghosts of Mississippi*. These films focus largely on the white lawyers and FBI agents who come to the aid of civil rights workers rather than the resistance of civil rights' activists themselves, again activating the lawyer-hero dynamic and maintaining the focus on white virtue.[295] In *Mississippi Burning*, civil rights workers are depicted marching for a total of twenty seconds of screen time. The film instead displaces the conflict between law and justice onto the battle between "good ol' boy" agent Gene Hackman and "by-the-book" Northerner Willem Dafoe over investigation tactics to solve the disappearance of three civil rights workers. Predictably, Hackman's methods of violence and intimidation win the day, a further thematic displacement of the civil rights workers and their message of non-violence. Ultimately, the film focuses on white saviors who are seen as somehow *granting* non-whites some respect under law.[296] Thus, access to and control of law remains in the hands of white legal subjects, whether implemented for discriminatory or non-discriminatory purposes.

Similarly, in *Snow Falling on Cedars*, no resistance to Japanese internment or the alien land laws is depicted. Instead, Hatsue, her family, and their neighbors silently march off to the camps. The resistance of army inductees or of people like Fred Korematsu who resisted internment is not even suggested.[297] This lack of any narrative of strategic resistance to discriminatory law allows films to superficially manipulate the law-justice binary, obscuring the very concrete, tangible laws and legal practices that support racial discrimination.

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[292] Under this reading, CASABLANCA (Warner Bros. Pictures 1942) emerges as a film which supports American involvement in World War II through empathy with reluctant hero Rick. RAY, *supra* note 28, at 57, 65-6.

[293] For example, where is the full-length mainstream film regarding Japanese internment (leaving aside the unsatisfying television special *Farewell to Manzanar* (Korty Films television broadcast 1976). Films which deal with U.S. slavery (or slavery in Mexico and Central and South America) are still amazingly few, given the relative public familiarity with the topic and the undeniable dramatic potential in these events. Presumably, Hollywood will soon seek to capitalize on the growing Latino population by crafting more films which engage Latino political and legal issues, such as BORDERTOWN (Möbius Entertainment 2006). At present, those films are scarce. Where is the biopic of Thurgood Marshall's amazing life?

[294] MISSISSIPPI BURNING (Orion Pictures Corp. 1988).

[295] ROCCHIO, *supra* note 43, at 102-13. This positive portrayal of the FBI's involvement in the civil rights movement has been justly called to task for its complete historical inaccuracy. The FBI was notoriously hostile to the movement. *Id*; *See also* VERA & GORDON, *supra* note 17, at 45.

[296] VERA & GORDON, *supra* note 17, at 45.

[297] *See* Kim, Hyung-chan, A LEGAL HISTORY OF ASIAN AMERICANS 1790-1990 (Greenwood Press 1994); YUJI ICHIOKA, JAPANESE IMMIGRANT RESPONSE TO THE 1920 CALIFORNIA ALIEN LAND LAW, *in* ASIAN AMERICANS AND THE LAW: JAPANESE IMMIGRANTS AND AMERICAN LAW (Charles McClain ed., Garland Publ'g. Inc. 1994). *See also* WILLIAM MINORU HOHRI, et al., RESISTANCE: CHALLENGING AMERICA'S WARTIME INTERNMENT OF JAPANESE-AMERICANS (The Epistolarian 2001).

Again, this narrative allows for whites to remain the subject-center, whether in denying rights or granting them. In films where the results of the legal system are discriminatory, (e.g. *To Kill a Mockingbird;*[298] *A Time to Kill)*, justice must be obtained outside the legal system. Yet the political activism and resistance of non-whites to racially discriminatory laws, which have brought about very real changes in the legal system, go largely ignored.

When films do depict political movements, they police the line between law and politics, cautioning that to "mix" them is to risk the loss of individual freedom and violent chaos.[299] For example, in *A Time to Kill* (a movie that crudely mirrors *To Kill a Mockingbird*) political organizations are reduced to gross caricature. The film's portrayal of the NAACP is comparable to its portrayal of the Ku Klux Klan. When the local chapter of the NAACP discovers that Hailey is represented on a death penalty charge by Brigance, who has never even taken a criminal case, it raises a defense fund and brings in a fast-talking, big-city death penalty lawyer to take over. While this has historically been a role the NAACP has played, which contributes to fair judicial process, so that the film can underscore the focus on white lawyer-hero Brigance, the NAACP's motivations are depicted as faintly sinister. The NAACP representative emphasizes that Hailey's defense must be "sensitive to the needs of the movement" (a phrase which sounds oddly archaic when set in 1996). Thus, the notion of the trial being "politicized" is cast as a threat, a soulless, institutional oppression of personal freedom. In a gesture only plausible in Hollywoodland, Hailey throws off the experienced lawyer for Brigance (while managing to convert the defense fund to his own use).[300]

In its attempt to separate the political from the legal, *A Time to Kill* depicts communal political protest as at best futile, and at worst a threat to social order. The film suggests an equivalence between the Klan and the protestors who oppose the execution of black criminal defendant Carl Lee Hailey. At the rally outside the courthouse, the camera cross-cuts between both groups of roughly equal number as they collide. Each group is pictured selling its promotional t-shirt, vendors side by side: "Free Carl Lee" for the NAACP and black activists, "Fry Carl Lee" for the Klan and supporters. The camerawork and editing of these scenes creates a visual equivalence that translates into a simple "pro vs. con" opposition, rather than distinguishing between a white supremacist organization and a civil rights organization. This portrayal is undoubtedly used to create conflict and drama, but when the crowds of protestors repeatedly erupt into violence outside of the courthouse, the film suggests that political action is futile and only leads to anarchy.

This message is further underscored by the character of attorney Lucien Wilbanks (Donald Sutherland), mentor to Jake Brigance. Wilbanks was disbarred; initially the audience is lead to believe this was for drunkenness. But later in the film it is revealed that Wilbanks took part in political protests in the 1960s, as he relates to Jake on the eve of trial, thus limiting his effectiveness as a lawyer. "I belonged in the courtroom," Wilbanks tells

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[298] With its obsessive focus on the beneficent white lawyer, TO KILL A MOCKINGBIRD presents a world where *noblesse oblige* is the only option, when, at the time of the book's writing, the film's production, and during the events set, organizations like the NAACP were advocating for the rights of non-whites.

[299] I do not mean to suggest that law is truly outside of politics, rather that popular film participates in the narrative that they *are* separable (as do other American cultural products). *See* RAY, *supra* note 28.

[300] In discussions I have had teaching this film, some viewers remark that Hailey's actions in this scene show that he is "in control." But again, only by the hero-worshipping logic of the film would a defendant be exercising good judgment about his case by dismissing an experienced lawyer in a death penalty case. The film constructs the illusion of Hailey's subjectivity momentarily in order to ultimately cement Brigance as the heroic white lawyer, as well as to reinforce the "biracial buddy" formula that weaves in and out of the film.

Jake.[301] Thus, *A Time to Kill* draws a clear line between political activism and lawyering; one must do one or the other. In addition, the film valourizes lawyering above politics. Wilbanks is depicted as an alcoholic failure in the film, a vaguely tragic figure due to his abandonment of the profession for politics. His cautionary tale to young Jake is to stay out of the streets, advice that is reinforced by the film's depiction of the anarchy attendant to political protest.

The suppression of political responses to racial injustice made by those who suffer under such oppression is part of the overall suppression of non-white subjectivity. When race *is* politicized in film, white actors remain in charge of acquitting civil rights or procedural fairness (*e.g., Snow Falling on Cedars; A Time to Kill; To Kill a Mockingbird; Mississippi Burning*) Thus, non-white characters remain marginal figures, objectified by white characters who act as their saviors. Political solutions and organizations are either absent, corrupt, or ultimately socially-destructive.

D. Conclusion: The Interrelation between Representational Strategies

As we have seen, the cinematic lawyer-hero model is not simply a model of objective legal mastery, but rather an activel construction of the mastery of the Dominant as inextricably linked with whiteness. While the cinematic white lawyer may work for justice on behalf of socially-marginalized clients, his doing so becomes a method for keeping authority and power (as well as audience attention) centralized in the white subject. In addition, mainstream film's obsession with heroic figures deflects attention from larger social forces and institutions that shape laws which both define race and discriminate. And even in narratives that revolve around the acquittal of rights of non-whites (*e.g., A Time to Kill; To Kill a Mockingbird; Snow Falling on Cedars*), the actual role of law in constructing race and racism is obscured, leaving the overall legal system unchallenged.[302] These hero-centered narratives usually depict political movements or solutions as either non-existent (*Snow Falling on Cedars; To Kill a Mockingbird; Crash*), hopelessly anarchic (*A Time to Kill*), or ultimately dependent on white savior figures *(A Time to Kill; Mississippi Burning; Ghosts of Mississippi*).

VI. MOVIES THAT RECAST THE MOLD: POSSIBILITIES FOR MAINSTREAM FILM

Some scholars have chosen to focus on art and independent films' racial signification, in a sense giving up on the possibilities of mainstream cinema.[303] Certainly one cannot compare art house, truly independent films with mainstream films in terms of the possibilities they present for constructions of race.

However, while the means of production of art films may allow more freedom for directors and producers both formally and narratively, even films which "look" mainstream

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[301] That this is a message directed at the audience is underscored by the fact that Brigance is depicted as politically conservative, in favor of the death penalty, and is only with the civil rights protestors so that he may act as savior once the bullets fly.

[302] As Jessica Silbey argues, whatever flaws in the system a mainstream law film may propose, by its end the audience is led to believe they have been fully resolved. *See* Silbey, *supra* note 157, at 112, 115.

[303] *See generally, e.g.*, GLADSTONE L. YEARWOOD, BLACK FILM AS A SIGNIFYING PRACTICE (Africa World Press 2000); MARK REID, REDEFINING BLACK FILM (U. of Cal. Press 1993) (arguing that film criticism overemphasizes images of blackness in white produced and directed mainstream films rather than examining films where black people control film production).

and follow the classic Hollywood style can de-center whiteness or complicate ideas of race. Accordingly, the manipulation of audience identification[304] so essential to mainstream Hollywood cinema is not an inevitable obstacle to progressive or transformative cinema. Rather, as Vera and Gordon argue, "[f]ilms are powerful weapons to maintain white privilege, and thus could serve equally well to produce new object relations to eliminate it."[305] Thus, to reprise the argument from earlier in this article, it is not the case that mainstream films simply are "naturally" or "inevitably" white-centered. There are other options even within the context of classic Hollywood form.

What follows briefly are some examples of films which, while revising genre conventions somewhat, make no radical departures in film narrative form. Yet these films manage to reveal the raced nature of traditional film depictions of law, while simultaneously suggesting different ways of figuring race.[306] Not all of the films I discuss here are as formally successful or as seamless as standard Hollywood fare. My choices here are not meant to be read as endorsements of every aspect of the films I survey. In addition, law and lawfulness play a central role in the plot and world of all of these films, even though two of the films do not focus on law explicitly. But all of these films reveal the nexus between notions of race and law with some critical complexity.

A. Murder on the Border[307]*: The Non-White Lawyer as Hero*

Murder on the Border is a novice, low-budget film, the production values of which may frustrate viewers who are more used to seamless Hollywood product. It is also important to note that this film signals early on that it is not directed solely at a white audience by its frequent use of Spanish dialogue without subtitles. However, *Murder on the Border* follows the standard narrative and formal systems found in classic Hollywood films. The plot centers on Arizona-based, Mexican-American attorney Eduardo Martinez (Gabriel Traversari) who is assigned to defend border patrol officer Scalo (North Roberts)[308] who mistakenly shot a Mexican boy playing along the U.S.-Mexican border. Crucially, a

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[304] *See supra* Part IV; *see also* YEARWOOD, *supra* note 190. The narrative of the hero as it currently stands is problematic in its reinforcement of individual narcissism and an essentially anti-social outlook. However, that narrative can be positioned critically. *See e.g.* THE SWEET HEREAFTER (Alliance Communication Corp. 1997) the Canadian film which follows the classic lawyer-hero mode in presenting a central white lawyer protagonist ostensibly fighting for justice for parents who lost their children in a bus crash. However, the film reveals the lawyer as deeply personally flawed in a way which causes viewers to question his professional motivations and thus his mastery.

[305] VERA & GORDON, *supra* note 17, at 191. While I take issue with the authors' suggestion here that film alone can remake racial representation, I see no reason film cannot aid in remaking the narrative of race it has participated in constructing.

[306] While arguably there may be progress in film's representations of race and law over time, as the opening of this article suggests, that progress is neither linear nor predictable. Vera & Gordon argue that while images of non-whites in film have changed, images of "whites have not, and thus overall race relations remain the same." VERA & GORDON, *supra* note 17, at 186, 191. *See also* Gene Seymour, *Black Directors Look Beyond Their Niche*, N.Y. TIMES, Jan. 11, 2009 at A11 (tracing the diminution and increased restriction in access for black directors from the heyday of the mid-1990's when they enjoyed a 'boomlet.'); Gladstone YEARWOOD, *supra* note 303. We shouldn't be surprised if more progressive films continue to appear sporadically in mainstream cinema for some time to come. Thus, while I end my examples with a very recent film, I do not mean to suggest a teleological history of film.

[307] MURDER ON THE BORDER (also known as LA MIGRA) (Breakaway Films 2005).

[308] Another limitation of the film is its rather over-the-top performances of white evil. The one-dimensional white characters here are somewhat reminiscent of white characters in the so-called blaxploitation films of the 1970's.

reluctant Martinez is told by his African-American boss that he is being put on the case due to his ethnicity ("You know how the game is played" the partner chides Martinez).

Martinez's relationship with his client is adversarial and he openly displays his distaste for his client's overt racism. During the course of his representation, Martinez learns that his own family is planning to enter the United States illegally after months of failed visa applications. When Scalo offers to help Martinez's family cross the border using his corrupt connections in exchange for a guaranteed acquittal, Martinez is conflicted. The film avoids portraying Martinez as purely opportunistic by suggesting that his family may be harmed if he does *not* accept Scalo's help. But significantly, Martinez is shown as supporting his family's illegal immigration.[309] Ultimately, Martinez does his job as a lawyer, but also takes advantage of his position as the Dominant to protect his family as they immigrate to the United States.

Like the classic lawyer-hero movies discussed above, *Murder on the Border* keeps the attorney as the central character. And like those movies, attorney Martinez is depicted as highly competent at his craft; he wins a dismissal for the client he so despises, suppressing hearsay evidence of Scalo's confession along the way. In addition, Martinez is confronted with the "law vs. justice" binary popular in these films.[310] Ultimately, he goes outside the law to acquit what the film constructs as justice—helping his beleaguered family come to the U.S.—while simultaneously zealously representing an avowedly racist client. Additionally, at the end of the film, when he expresses regret about representing "the enemy" to his reporter confidant (Siboney Lo), she assuages his doubt, insisting that Scalo would have simply found another lawyer to do the same thing. The film ultimately emphasizes the value of winning outside of the system, as do many classic law films. However, in this case, the victory is both personal and political: getting Martinez's family to the U.S.

Within this standard law film paradigm, *Murder on the Border* reveals the raced nature of law and re-situates the attorney-hero's neutral legal mastery[311] within a political context. First, rather than simply being the "hired gun" or the lawyer representing a poor victim who serves to burnish the white cinematic lawyer's reputation as a savior, Martinez' relationship with his client is mediated by his politics and his sense of his identity as a Mexican-American immigrant. His position is in opposition to Jason, the white attorney in his firm who traffics in racial stereotypes and views Scalo as simply another paying client. Second, the "law vs. justice" binary Martinez faces is situated within his personal life and the politics of the debate over illegal immigration. Crucially, the film makes clear the conflation of nation and race in the U.S. vis-à-vis Mexican immigration.[312]

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[309] Martinez's family situation is portrayed very sympathetically. His father is ill and we are told the only reason he has not been allowed to immigrate is because he served time in jail for stealing food for his family. In addition, Martinez's young sister is depicted as vulnerable to assault in the poor Mexican neighborhood in which she lives.

[310] Tushnet, *supra* note 183.

[311] *See supra* Part V.A. (discussing the lawyer-hero figure).

[312] *See supra* note 10. For a sophisticated cinematic take on the relationship between race and nation, *see* FROZEN RIVER (Cohen Media Group 2008), which tells the story of a poor white woman, Ray Eddy (Melissa Leo), who lives on the edge of an Indian reservation on the New York-Canada border. In collaboration with her Native American neighbor, Lila Littlewolf (Misty Upham), Ray moves across the boundaries of race and nation as she crosses the reservation from New York to Canada to assist the entry of undocumented immigrants. While the film arguably follows the familiar formula of centering more on its white protagonist than on its non-white protagonist, it also reveals, through Ray's rising self-awareness, the often transparent nature of the power of whiteness and U.S. citizenship.

Rather than going outside the boundaries of law[313] simply as an expression of dominance, Martinez does so in part as an act of resistance against what are portrayed as unjust immigration laws. While the white cinematic lawyer acts out of dominance without acknowledging its raced nature, here the lawyer character is positioned within a world where the raced nature of law is not only relevant but a motivating factor.[314] Ultimately, Martinez performs his role as a lawyer with high competence but without sacrificing his politics: he is not depicted as *either* political *or* a lawyer but as both. Additionally, he receives the positive focus and anointing as hero common to the white cinematic lawyer figure discussed above.[315]

B. Devil in a Blue Dress*: Recognizing Law's Role in Racial Discrimination*

Devil in a Blue Dress[316] is based on the novel of the same name, from a series written by Walter Mosley about African-American detective Easy Rawlins. The movie's plot follows Rawlins (Denzel Washington), a World War II veteran in Los Angeles. Rawlins is unable to find work due to racial discrimination, and in an effort to keep up the mortgage payments on his house, he picks up his first detective job from a thuggish white man, DeWitt Albright (Tom Sizemore). Significantly, Rawlins' assignment is explicitly framed in terms of race: Albright tells Easy to find Daphne Monet (Jennifer Beals), a white woman who frequents black clubs. What subsequently unfolds through the twists and turns of the neo-film noir is that Monet is in fact biracial, but has been passing for white. This causes problems for her wealthy white boyfriend, Todd Carter (Terry Kinney) who is being blackmailed with the information by his rival in the LA mayoral race, Matthew Terrell (Maury Chakin).

Devil in a Blue Dress takes on the form and tone of a detective film noir (though it is in color), with the voiceover of a hard-boiled Rawlins leading the audience through the unexpected plot twists. Ultimately, the mystery is solved, but in this neo-noir there is an emptiness to the resolution of the case, as it represents the triumph of race discrimination: Daphne is ultimately rejected by her white lover due to her race.

The narratives of race and law in *Devil in a Blue Dress* are especially significant in the context of the tropes of film noir, which it implicitly critiques. Some critics have seen the overall tension, explosive violence, and pervasive anxiety common to the classic film noir as symptoms of the destabilization of traditional race and gender definitions and roles after World War II.[317] In addition, the visual style of film noir with its sharp contrasts between dark and light evokes narratives of race.[318] "[F]ilm noir is always and everywhere about race."[319] Oliver & Trigo argue that, rather than connecting darkness to evil and thus

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313 *See* Greenfield, *supra* note 199.

314 This is not to suggest that lawyers should be motivated by race. Nor do I mean to support the proposition that lawyer's should cut private side deals with their clients. Rather, I am talking about the narrative in the context of the world the film participates in, not the world of legal ethics.

315 *See supra* Part V.A.

316 DEVIL IN A BLUE DRESS (Clinica Estetico 1995). Note that this film was produced by a company which was, at the time, co-owned by Jonathan Demme, director of PHILADELPHIA.

317 KELLY OLIVER & BENIGNO TRIGO, NOIR ANXIETY xiii (U. of Minn. Press 2003).

318 *Id.* at 4.

319 *Id.* at 4.

implicitly marking blackness as evil,[320] film noir instead lends "blackness" to white characters in a way that problematizes clear racial boundaries.[321] Thus, at the core of the film noir's racial anxiety is the fear of racial indeterminacy, not simply a fear of blackness.[322] Oliver & Trigo argue that this anxiety—often overlooked by scholars in favor of an analysis of noir as embodying existential anxiety— is a key aspect of film noir's problematic of subjectivity.[323]

As Oliver & Trigo point out, *Devil in a Blue Dress* brings out the *noir* in film noir.[324] Race is marked in Rawlins' experience of discrimination, and is not simply important to Rawlins' detective work, but is in fact the core of his assignment. Significantly, Rawlins' work literally constructs race: he is asked to investigate the racial affinities of Monet, which ultimately leads to a realization of her racial indeterminacy. The "racial instability" of Daphne Monet is the central mystery of the plot, thus foregrounding the constitutive anxiety at the heart of film noir. In the tradition of the classic detective genre, Rawlins initially believes he is on the trail of objectively knowable facts. His discovery of Daphne's secret not only throws a wrench into Rawlins' assignment, but also destabilizes the very notion of race as an objective fact, revealing its fluidity as a concept.[325]

Film noir is rich territory for analysis of the interrelationship between narratives of race and law. While literal courtroom scenes and lawyer characters are rare in classic noir films, themes of law and criminality are central. As John Denvir argues, film noir " . . . subverts the 'rule of law' assumption [in American society], forcing us to reexamine myths about law and America . . . "[326] And just as Oliver & Trigo argue that noir films are about issues of racial identity and subjectivity, so too are they about *legal* identity, most commonly revealed in the characters' relationship to the larger social order. Thus, noir films exhibit overdetermined narratives of law and race.

Two interrelated tropes present in some noir detective films are reworked in *Devil in a Blue Dress*, revealing the raced nature of law and representation. First, the law may be represented as an obstacle to the detective's work.[327]However, the detective may also occasionally be depicted as a "semi-official adjunct" of the legal system, working alongside the police (if not entirely amicably so).[328]

In *Devil in a Blue Dress*, the law is both a motivating factor for Easy's work (and the mayoral candidate who hires him), and an obstacle, in that it restricts him through racial discrimination. Thus, the estrangement of the detective from the legal order is not depicted as chiefly an existential or moral state, but rather is grounded in the marginalized status of the non-white detective. And unlike Phillip Marlowe, Easy cannot act as "semi-official adjunct" to the police due to his race. Instead, Easy is repeatedly trailed, harassed, and beaten by white cops who are racially profiling him; the subplot of intermittent

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320 Here, Oliver & Trigo analyze Eric Lott's well-known argument from *The Whiteness of Film Noir*, 9 AM. LITERARY HIST. 542 (1997). (arguing that film noir displaces evil and wrongdoing onto narratives and stylistic depictions of "darkness" that deflect ultimate moral responsibility from its predominantly white characters).

321 OLIVER & TRIGO, *supra* note 317, at 4-5.

322 *Id.*

323 *Id.* at xiv.

324 *Id.* at 166.

325 The fluidity of racial designation is further reinforced by the casting of Jennifer Beals as Daphne Monet, an actress who has perhaps "passed" as white in prior films, but who is in fact biracial.

326 John Denvir, *Law, Lawyers, Film & Television*, 24 LEG. STUD. FORUM 279, 281 (2000).

327 Rosenberg, *supra* note 65, at 1459.

328 *Id.* Rosenberg uses THE BIG SLEEP (Warner Bros. Pictures 1945) as an example.

collaboration and competition with the police common in detective narratives cannot be played out.[329]

Thus, Easy's race functions both on the narrative level of the film as a source of conflict with the law, and on the formal level of the film as a barrier to the acting out of certain detective film genre conventions concerning the law. The connection between race and law is announced from the film's very beginning, as Easy narrates being pushed into employment on the margins of legality due to pre-Civil Rights Act job discrimination. The film ends with another direct statement of the interrelationship of race and law: Easy reads the newspaper on his front porch, its headline proclaiming racially discriminatory redlining in mortgage lending. Thus, *Devil in a Blue Dress* converts the film noir detective narrative into a self-conscious narrative of race and law.

C. Be Kind Rewind[330]*: Rewinding the Origin of Filmmaking*

Be Kind Rewind is both a love letter to the history of cinema and a re-visioning of its rules of racial representation. Because *Be Kind Rewind* explicitly takes film as its subject, it is in a particularly resonant position to critique Hollywood tropes and techniques of representation. Ultimately, it re-imagines film production as deeply collaborative, multi-ethnic, and communal.

Be Kind Rewind tells the story of two interracial friends, Mike (Mos Def) and Jerry (Jack Black), who live in economically-challenged Passaic, New Jersey. Mike works in a decaying video store owned by Elroy Fletcher (Danny Glover). Jerry is a hapless eccentric who lives in a trailer by a power generating station. When he accidentally becomes magnetized and erases all the videotapes in the store, Mike must somehow keep the business going while Fletcher is out of town.

The two friends hit upon the idea of recreating popular films such as *Ghostbusters, The Lion King, Rush Hour*, and *Robocop* by themselves with an old video camera, ad hoc props and hometown locations (a process they call "Swedeing")[331]. Improbably, their amateurishly brief, lo-tech videos become a runaway hit and customers line up around the block demanding the new videos as fast as Mike and Jerry can make them.

As news of the "Sweded" films spreads, a group of lawyers show up, accuse Mike and Jerry of copyright violations, and destroy the entire stock of videos they have made. Fletcher returns to find his inventory in ruins. He pitches to the city conversion of the shop into a Blockbuster-type DVD rental outfit, but is told the property is to be torn down to make way for condominiums.

Mike and Jerry decide to make one more film, an original film this time, a biography of Fats Waller who, Fletcher had earlier in the film confided, was born in Passaic. When pressed, Fletcher admits the Waller origin story is false, but he teams up with Mike and Jerry to make the film. Faithful store customer and long-time friend of Fletcher, Mrs. Falewicz (Mia Farrow), encourages the project despite the factual indiscrepancies: "Our

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[329] This depiction resonates with D. Marvin Jones' notion of black men as archetypal "anticitizens" explicitly foregrounding the link between race and law. Jones, *supra* note 19, at 493. The concept of "anticitizen" is particularly resonant in the film noir context with its stark visual juxtapositions of black and white.

[330] BE KIND REWIND (New Line Cinema 2008).

[331] For yet another metatextual aspect of BE KIND REWIND, *see* Michel Gondry's "Sweded" version of Fine Line Cinema's trailer for the film, http://www.dailymotion.com/video/x49x9v_michel-gondry-swedes-his-own-be-kin_shortfilms.

past belongs to us. We can change it if we want," she exhorts to her neighbors. Indeed, the entire town —white citizens, black citizens, Latino citizens, etc.—pitch in to help tell the story of Fats Waller, playing extras, building sets, and helping with production.

Be Kind Rewind ends with a screening of the Fats documentary-cum-biopic, shot in Fletcher's shop, with the bulldozers waiting just outside to tear the building down. The store is packed with viewers, and the film ends with a long shot of the townspeople gathered into an audience outside Fletcher's shop, transfixed by the film of their own making.

By ending with the Fats Waller film (which exhibits some formal aspects of pre-classic Hollywood cinema style), *Be Kind Rewind* effectively "rewinds" the history of American film to its origins.[332] In rewinding this history, Gondry allows for the imagining of an inclusive origin for American film, both in content and means of production. Crucially, the film is presented as the *community's* story, not the *African-American* community's story. For example, the Fats Waller film acts as a "remaking" of the origin of American film sound in *The Jazz Singer*[333] with its demeaning use of black face, supplanting that image with the image of Mos Def as Fats Waller.[334] In addition, the film-within-a-film effects a kind of erasure of the first full length American feature, *The Birth of a Nation*,[335] both in its subject matter and its use of a thoroughly racially diverse cast. The Waller film acts as an alchemical transfiguration of the "biracial buddy movies" like *Rush Hour* that Mike and Jerry earlier in the film "Swede" for store patrons, displacing the simplistic, dualistic representations of race that film genre constructs.

Significantly, the Fats film is made as a response to the law, represented by the film studios' lawyers. The production of the Fats film is a collective, communal response to privatized ownership of stories and entertainment. It is a response that unifies the heretofore passive consumers of Mike and Jerry's videos into an active, diverse community of filmmakers. The film's DIY aesthetic empowers both the townspeople audience it depicts and the actual film audience of *Be Kind Rewind* to believe that they can participate in recasting film's representational terms. Thus, the prohibition of law ultimately generates a creative reaction, one which rejects Hollywood's narratives in favor of community-generated, local narratives. This new approach simultaneously embraces ethnic and racial diversity while recasting the representational terms of race itself.

VII. CONCLUSION

Importing theoretical approaches from other disciplines, I have tried to show that narratives of race in popular law-themed films go far beyond negative portrayals and stereotypes, but rather construct *subjectivity itself* as raced. The image of law in film is key to this raced subjectivity. Mainstream film's obsessive focus on constructing and maintaining white superiority dovetails with narratives of legal mastery in the form of the lawyer-hero character. In addition, films displace law's role in constructing race onto personal narratives of courtroom triumphs, thus suppressing the image of law as systemically and structurally racist, and, as suppressing narratives of political resistance.

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[332] BE KIND REWIND also begins with the Waller movie, further reinforcing the feeling that it operates as a kind of representational "rewind" of the origin of early American film.

[333] THE JAZZ SINGER (Warner Bros. Pictures 1927).

[334] This subtext is reinforced by the repeated refusal to allow Jerrys to don blackface and play Fats in the movie, culminating in an off-screen lecture on blackface that Fletcher delivers to Jerry.

[335] THE BIRTH OF A NATION (D. W. Griffith Corp. 1915).

Finally, I have offered case studies of formally-mainstream films that suggest other options for racial representation, proving that Hollywood's current practice is neither unavoidable or inevitable.

Direct v. Indirect Discrimination in European Football[1]: The Legal Differences Between UEFA's Homegrown Player Rule and FIFA's "6+5" Proposal

JOHN J. MCDERMOTT*

ABSTRACT

The Bosman ruling by the European Court of Justice in 1995 eliminated the rules that existed in many European national football federations restricting the number of foreign players that could be in the starting lineup of club teams. These rules were declared to be illegal under European Union law on the grounds of illegal discrimination based on nationality against nationals of EU member nations. Currently, FIFA is trying to reinstitute this type of eligibility restriction with the "6+5" rule while UEFA has the "homegrown player rule" for its club competitions. This note will address the structure of European club football; the history of EU labor law as it has been applied to sports, focusing on the Bosman decision and its descendents; and the potential future legal issues surrounding both the "homegrown player rule" and the "6+5" rule under existing EU law.

SUMMARY

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[1] "Football," as used in this paper, refers to the sport known as "soccer" in the United States.

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I. INTRODUCTION

On November 2, 2006, the Fédération Internationale de Football Association (FIFA)[2] and the Fédération Internationale des Footballers Professionnels (FIFPro)[3] signed a landmark Memorandum of Understanding that, among other things, expressed support for the reinstitution of nationality-based player quotas[4] for the first time since the Court of Justice of the European Communities (E.C.J.) declared them to be in violation of EU law in

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[2] FIFA is the worldwide governing body for football. *See generally* FIFA.com, http://www.fifa.com (last visited Feb. 12, 2010).

[3] FIFPro is the worldwide representative organization for all professional football players. *See generally* FIFPro: World Player's Union, http://www.fifpro.org (last visited Feb. 12, 2010).

[4] Memorandum of Understanding, FIFA-FIFPro, art. 2.6, Nov. 2, 2006, *available at* http://www.fifa.com/aboutfifa/federation/releases/newsid=1139271.html (Australian Professional Footballers' Association) ("FIFA and FIFPro have already agreed on the following: ...Protection of national teams by FIFA introducing, over several seasons, the 6+5 system regarding eligibility for national teams.").

the lawsuit brought by Jean-Marc Bosman that was decided on December 15, 1995.[5] FIFA President Sepp Blatter is an outspoken proponent of this rule for two main reasons. First, he believes that it will enable the greater development of players for their national teams.[6] Second, he is concerned about the consistent domination of domestic and European competitions by the same clubs year after year.[7] However, regardless of Blatter's rationales and despite support from the FIFA Congress and the President of the Union of European Football Associations (UEFA)[8] Michel Platini, the quota system proposed by FIFA cannot be implemented in Europe because of EU law.

The FIFA "6+5" proposal would only permit teams to play five foreign players in their starting elevens. Blatter stated "we would say that it is the result that six players eligible to play for the national team of the country should be on the field of play at the beginning."[9] Meanwhile, a similar rule—albeit different in an important way—has already been implemented by UEFA. On April 21, 2005 UEFA implemented the home-grown player rule for all UEFA run club competitions.[10] This rule would require teams participating in European club competitions[11] to reserve four spots from their 25-man roster for locally-trained players, which consist of either players trained by that club or in that club's national association.[12] UEFA's rule differs from FIFA's proposal in that it does not explicitly make nationality a requirement for eligibility.

This note will focus on the interaction of both the UEFA home-grown players rule and the FIFA "6+5" proposal with EU law. First, it will give a brief overview of the organization of international club football (focusing on Europe) and the international transfer market in general, particularly to highlight its difference from American sports. Second, it will address the prohibition against discrimination based on nationality in EU labor law. Third, it will demonstrate the applicability of EU labor law to sports, with particular attention paid to the *Bosman* ruling. Fourth, it will discuss the current transfer market and eligibility rules including the UEFA home-grown players rule and the FIFA "6+5" proposal. It will go into the transfer rules established in the wake of the *Bosman*

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[5] Case C-415/93, Union Royale Belge des Sociétés de Football Association ASBL [Royal Belgian Football Association] [URBSFA] v. Bosman, 1995 E.C.R. I-4921, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61993J0415:EN:NOT [*hereinafter Bosman*].

[6] Ossian Shine, *FIFA Congress Backs Blatter Over Foreign Quotas*, INT'L HERALD TRIBUNE (London), May 30, 2008, *available at* http://uk.reuters.com/article/sportsNews/idUKSP9615120080530.

[7] Richard Aikman, *Blatter: English Dominance Shows Player Quota is Needed*, THE GUARDIAN (Manchester), May 7, 2008, *available at* http://www.guardian.co.uk/football/2008/may/07/blatterfifaquotas ("For the last two seasons, there have been three Premier League sides in the last four of Europe's elite club competition and Blatter fears a monopolisation of football, with the richest clubs buying up the best players from all over the world at the expense of domestic talent.").

[8] UEFA is the administrative and regulatory body for European football. It is the most important of the six regional confederations under FIFA: CONCACAF – North America, Central America and the Caribbean; CONMEBOL – South America; AFC – Asia; CAF – Africa; and OFC – Oceania. *See generally* UEFA.com, http://www.uefa.com (last visited Feb. 12, 2010).

[9] Shine, *supra* note 6.

[10] UEFA, Declaration of the UEFA Congress on the Subject of Local Training of Players (Tallinn, Estonia) (Apr. 21, 2005) *available at* http://www.uefa.com/multimediafiles/download/uefa/uefamedia/297202_download.pdf.

[11] UEFA runs the UEFA Champions League (formerly European Cup) and the UEFA Cup (renamed the UEFA Europa League beginning in 2009-10). Qualification for these competitions is based on success in domestic competitions.

[12] Samuli Miettinen & Richard Parrish, *Nationality Discrimination on Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home-Grown Player Rule)*, 5(2) ENT. AND SPORTS LAW. J., ¶ 3 (2007).

ruling, the basic concepts of both the home-grown players rule and the "6+5" rule, the reasons behind the implementation of these rules, the legality of these rules under EU antidiscrimination laws, and potential alternative solutions for these bodies to achieve their desired goals. Finally, it will briefly examine the changes to sport in the EU that are in the Treaty of Lisbon. This examination will demonstrate that the homegrown player rule might be legal as it stands, and would definitely be legal with slight modifications. In contrast, the "6+5" rule is a strict nationality-based quota system that would be a flagrant violation of EU law.

II. OVERVIEW OF INTERNATIONAL FOOTBALL ORGANIZATION

A. FIFA and its Structure

International football is organized in a pyramid structure. FIFA is the world governing body for both national team and club football. Underneath FIFA are the six regional confederations,[13] of which UEFA is the most significant. The national associations are the next level of the pyramid.[14] In order for a European national association to be a member of UEFA, that national association has to have its regulations approved by UEFA.[15] It is at the national and regional levels where meaningful club football occurs, despite the recent reincarnation of the Intercontinental Cup as the FIFA Club World Cup.[16] Looking more specifically at European football, UEFA sponsors two major European club competitions, the UEFA Champions League and the UEFA Cup.[17]

B. UEFA Champions League

The Champions League consists of the winners of 52 of the 53 national leagues[18] plus the runners-up of the top-15 leagues, third-place teams of the top-6 leagues, and fourth-

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[13] *See* discussion *supra* note 8.

[14] For the purposes of this paper, the national associations are the lowest level at which meaningful decisions are made.

[15] William Duffy, *Football May Be Ill, But Don't Blame Bosman*, 10 SPORTS LAW. J. 295, 297-298 (2003) (explaining the structure of international football).

[16] The FIFA Club World Cup is a tournament that has been played since 2005 (once in 2000 as the FIFA Club World Championship) that pits the champions of each regional confederation against each other as well as the winner of the host nation's top league. In 2008 for example, the tournament was held in Tokyo and pitted Manchester United (UEFA), Liga Deportiva Universitaria (LDU) de Quito (CONMEBOL), Club de Fútbol Pachuca (CONCACAF), Gamba Osaka (Japan and AFC Champion), Al-Ahly (CAF), Waitakere United (OFC) and Adelaide United (AFC Runner-up (Gamba Osaka's victory meant this slot went to the runner-up)) against each other with Manchester United defeating LDU de Quito 1-0 in the championship. The tournament is widely regarded as less important than regional competitions due to the domination of European and South American clubs that face much stiffer competition in their respective confederations than they do at the Club World Cup. *See generally* FIFA.com, FIFA Club World Cup UAE 2009, http://www.fifa.com/clubworldcup/index.html (last visited Feb. 12, 2010).

[17] *See* discussion *supra* note 11.

[18] The Liechtenstein Football Association is a member of UEFA, but with only 7 clubs, the nation does not sponsor a league competition. Liechtenstein clubs play in the Swiss league and are ineligible for the UEFA Champions League. *See generally* Liechtenstein Football Association, http://www.lfv.li/english-info/liechtenstein-fa/history.html (last visited Feb. 12. 2010).

place teams of the top-3 leagues.[19] Teams are placed into different qualifying rounds based on their national affiliation and their finish according to Annex 1a of the competition regulations.[20] The main phase of the competition then begins with a group stage of 32 teams.[21] The recent domination of this highly lucrative competition by the same teams, and particularly by members of the English Premier League,[22] is one of the reasons that Blatter and FIFA are proposing the "6+5" rule.

The UEFA Champions League provides an enormous source of revenue for UEFA, its national associations, and especially for participating clubs. For example, the 32 clubs that participated in the group stage of the 2006/07 Champions League received just shy of 585 million Euros, with 6 clubs making over 30 million Euros.[23] The revenues earned by these clubs enable them to purchase the best players in the transfer market when they need to fill holes, enabling them to finish at the top of their respective domestic leagues and qualify again for the Champions League. Former Newcastle United manager Kevin Keegan said: "I can only start my season to fight to be fifth or sixth or seventh. It is impossible for me to go into the final four."[24] This cycle is precisely what Blatter is trying to rectify with his "6+5" proposal, which would make it more difficult for the wealthiest teams to buy foreign players to fill their needs. Theoretically, the rule would create more parity in the game.

C. The Transfer Market - Basics

The transfer market in international football is far different from the system of acquiring players in professional sports in the United States. In American professional sports, there are free agent signings in the off-season, and there are both in-season and off-season trades between teams. Trades typically involve players or draft picks moving both ways. Occasionally some monetary compensation is included but money is never the primary consideration given in a trade.[25] In international football, however, the overwhelming majority of player movement occurs through the transfer market.

Transfers occur when one club pays another club a fee for a player. There are some transfers that involve money and players, but, for the most part, a transfer is simply a

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[19] *Regulations of the UEFA Champions League 2008/09*, Geneva, Switzerland, pg. 44 (Annex 1a: Access List for the 2008/09 UEFA Club Competitions), *available at* http://www.uefa.com/multimediafiles/download/regulations/uefa/others/70/22/60/702260_download.pdf.

[20] *Id.*

[21] *Id.*

[22] The 2007-08 competition featured 2 English finalists (Manchester United, Chelsea) and 1 additional English semi-finalist (Liverpool), while the 2006-07 competition featured the same 3 English semi-finalists and a final between Liverpool and AC Milan (Italy). In the last four competitions there have only been a total of 6 different semi-finalists. *See generally* UEFA.com, UEFA Champions League, http://www.uefa.com/uefachampionsleague/index.html (last visited Feb. 12, 2010).

[23] *UEFA Financial Report 2006/07*, Geneva, Switzerland, pg. 49 (UEFA Champions League 2006/07: Distribution), *available at* http://www.uefa.com/newsfiles/651628.pdf.

[24] Richard Aikman, *Foreign Player Quotas in Place by 2012, Says Blatter*, THE GUARDIAN (Manchester), May 27, 2008, *available at* http://www.guardian.co.uk/football/2008/may/27/blatter.quotas.

[25] There are some trades made in the NFL, NBA, and NHL that are made for salary cap purposes to free up money and there are some trades made in the MLB to enable a team to save money by shedding a player's contract. Unlike the international football trading systems, there are no trades made in major American professional sports that are solely one team purchasing another player for money. However, in the NBA, teams sometimes purchase draft picks.

purchase agreement. FIFA implemented an exhaustive list of regulations[26] for international transfers in 2003 to replace the system that was found illegal in *Bosman*. These include regulations on the timing of transfers, on transfers of minors, and assorted other details. However, the basic structure of the transfer market tilts the playing field heavily in favor of the wealthier clubs. While wealth plays a factor in all professional sports, the fact that money is the only thing required to obtain a star player from a smaller club makes it easier for the top clubs to remain the same year after year, funded by Champions League and soaring television broadcast revenues. Transfer fees have also skyrocketed recently[27] with Manchester City reportedly offering more than £100 million to AC Milan for Kaka.[28] The rapid increase in transfer fees was the biggest item that caused UEFA to implement its homegrown player rule. It is also what concerns Blatter. Quoting the UEFA Congress: "football should not be a mere financial contest. It should above all be a sporting contest."[29]

III. BASIC PRINCIPLES OF NON-DISCRIMINATION IN EUROPEAN UNION LABOR LAW

A. Founding of the European Union

The European Economic Community (EEC) was formed with the signing of the Treaty of Rome on March 25, 1957.[30] Its members consisted of Belgium, the Netherlands, Luxembourg, Italy, France, and Germany.[31] On January 1, 1973, the United Kingdom, Ireland, and Denmark joined the EEC.[32] The EEC continued to expand but would become subsumed into the European Union under the Treaty of Maastricht, signed on February 7, 1992.[33] The current version of the European Union treaty is the Treaty of Lisbon, which was signed on December 13, 2007.[34] As it is currently constructed, the EU consists of 27 member nations.[35]

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[26] FIFA, Regulations on the Status and Transfer of Players (2003), *available at* http://www.fifa.com/mm/document/affederation/administration/regulations_on_the_status_and_transfer_of_players_en_33410.pdf.

[27] In 1982 the largest transfer fee ever paid was €3.4 million for Diego Maradona by Barcelona. By 2001, this had increased to €51 million for Zinedine Zidane's trade to Real Madrid. Nick Harris, *14 of the World's Most Expensive Football Signings*, THE INDEPENDENT, Jan. 16, 2009, *available at* http://www.independent.ie/sport/soccer/premier-league/14-of-the-worlds-most-expensive-football-signings-1604382.html.

[28] BBC, *Man City Move For Kaka Collapses*, Jan. 20, 2009, *available at* http://news.bbc.co.uk/sport2/hi/football/teams/m/man_city/7838966.stm.

[29] UEFA, *Declaration of the UEFA Congress on the Subject of Local Training of Players* (2005), *available at* http://www.uefa.com/multimediafiles/download/uefa/uefamedia/297202_download.pdf.

[30] EUROPA – The EU at a glance – The History of the European Union – 1945-1959, http://europa.eu/abc/history/1945-1959/index_en.htm (EUROPA is the portal site of the European Union) (last visited Apr. 20, 2009).

[31] Treaty Establishing the European Community as Amended by Subsequent Treaties, Preamble, Mar. 25, 1957, 298 U.N.T.S. 11, *available at* http://www.hri.org/docs/Rome57/Rome57.txt [*hereinafter* EEC Treaty].

[32] EUROPA – The EU at a glance – The History of the European Union – 1973, http://europa.eu/abc/history/1970-1979/1973/index_en.htm (last visited Apr. 20, 2009).

[33] EUROPA – The EU at a glance – The History of the European Union – 1990-1999, http://europa.eu/abc/history/1990-1999/index_en.htm (last visited Apr. 20, 2009).

[34] The European Union Treaty has been ratified by all member countries. EUROPA – Treaty of Lisbon – Taking Europe into the 21st Century, http://europa.eu/lisbon_treaty/take/index_en.htm (last visited Apr. 20, 2009).

[35] Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania,

B. Article 39 (Previously Article 48)

Part Three of the Treaty of Rome deals with policies of the newly formed EEC[36] and within this section is Article 48. This Article reads as follows:

> 1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.
>
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
>
> 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
>
> (a) to accept offers of employment actually made;
>
> (b) to move freely within the territory of Member States for this purpose;
>
> (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation, or administrative action;
>
> (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
>
> 4. The provisions of this Article shall not apply to employment in the public service.[37]

Article 48 of the Treaty of Rome established the EEC labor law principle that no discrimination based on nationality is allowed within the EEC (and later the EU) at least when it comes to nationals of European Union Member States. In other words, there can be no law in France that treats French employees differently than German or Belgian employees. The European Union treaty has been updated several times since the Treaty of

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Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. *See generally* CIA – The World Factbook - European Union, https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html (last updated Feb. 24, 2009).

[36] EEC Treaty, *supra* note 31, at Part Three.

[37] EEC Treaty, *supra* note 31, at Art. 48 (as in effect 1957) (now article 39).

Rome in 1957.[38] However, the only relevant change to Article 48 of the Treaty of Rome has been in its numbering.[39]

IV. HISTORY OF EUROPEAN UNION LABOR LAW AND SPORTS

A. Early Case Law Applying Article 39 to Sports – Walrave and Dona

The first notable cases where the European Court of Justice applied what is currently Article 39[40] of the EU Treaty to professional sports arose in the 1970s. In 1974, the ECJ was presented with a case about nationality rules in cycling championships.[41] The rule at issue in *Walrave* required that the pacemaker for a cycling team had to be of the same nationality as the rider.[42] The ECJ ruled that sports are subject to EEC law "only in so far as it constitutes an economic activity within the meaning of Article 2 of the treaty."[43] The argument made by the defendants was that the non-discrimination requirement of Article 39 only bans restrictions that come from government acts, not other associations.[44] The ECJ declared that "the Treaty's guarantee of free movement would be undermined if organizations could justify barriers to free movement merely by pointing to their exemption from public law"[45] and that the rule in *Walrave* violated the non-discrimination provision of Article 39.

In 1976, the ECJ was presented with another Article 39 case that focused on sports in *Dona v. Mantero*.[46] In *Dona*, the court ruled that restrictions imposed by the Italian Football Federation that limited participation in professional or semi-professional matches to members of that federation, while also restricting membership in that federation to Italian nationals, were in violation of Article 39.[47] The court also reaffirmed its claim in *Walrave* that professional sports "qualify as 'economic activity' within the scope of EEC law because those activities constitute gainful employment or remunerated service."[48] These two rulings establish that professional sports are considered an economic enterprise that falls under the umbrella of EEC law. However, the ECJ did acknowledge in its decisions in

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[38] *See generally*, EUROPA – The EU at a glance – European treaties, http://europa.eu/abc/treaties/index_en.htm (last visited Apr. 20, 2009). The major treaty updates are the Treaty of Maastricht (1992), the Treaty of Amsterdam (1997), and the Treaty of Lisbon (2007).

[39] The Treaty of Amsterdam renumbered the articles of the EU treaty and what was Article 48 became Article 39. The Treaty of Lisbon, which was signed on December 13, 2007, renumbered the articles of the founding treaty once again. The numbering used in this paper will reference the numbering in the EU Treaty immediately after the Treaty of Amsterdam took effect in 1999 (Article 39). Article 39 in the EU Treaty will be renumbered to Article 45 in the Treaty on the Functioning of the European Union by the Treaty of Lisbon. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community *Annex*: Table of Equivalences Referred to in Article 5 of the Treaty of Lisbon, Dec. 13, 2007, 2007 O.J. (C 306) 210.

[40] Article 39 was Article 48 at the time of the *Walrave* decision.

[41] Case 36/74, B.N.O. Walrave and L.J.N. Koch v. Association Union Cycliste Internationale, 1974 E.C.R. 1405, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61974J0036:EN:HTML [hereinafter *Walrave*].

[42] *Id.* ¶ 2.

[43] *Id.* ¶ 4.

[44] *Id.* ¶ 15.

[45] David W. Penn, *From Bosman to Simutenkov: The Application of Non-Discrimination Principles to Non-EU Nationals in European Sports*, 30 SUFFOLK TRANSNAT'L L. REV. 203, 209 (2007), *citing Walrave*, ¶ 18.

[46] Case 13/76, Donà v. Mantero, 1976 E.C.R. 1333, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976J0013:EN:HTML [hereinafter *Donà*].

[47] *Id.* ¶ 19.

[48] Penn, *supra* note 45, at 210; *see Donà*, 1976 E.C.R. 1333 ¶ 12.

both *Walrave* and *Dona* that there could be certain rules that would fall outside of the scope of EEC law if they were "of sporting interest only."[49]

B. Exceptions – "Purely Sporting Rules" and "Inherency"

The ECJ has acknowledged that there are certain regulations that are unique to sports and may discriminate based on nationality that could fall outside of the scope of Article 39. In *Walrave*, the Court reasoned that, because sports are only subject to EC law in so far as they constitute economic activity, rules that are only of purely sporting interest and have nothing to do with economic activity do fall outside of Article 39's prohibition against nationality discrimination.[50] The most common example of a "purely sporting rule" is the nationality restriction on the formation of national football teams.[51] This rule is in no way based on economics but is rather a necessary restriction for international football competition to occur. It is not possible to have meaningful competitions between national teams if there are no eligibility restrictions based on nationality. However, despite the arguments of many national football associations to the contrary, the *Walrave* ruling did not place the entirety of the regulations of sports governing bodies outside of the scope of Article 39.[52]

The ECJ in *Dona* reiterated the acceptability of nationality restrictions in the context of national team competition[53] but qualified the "purely sporting rules" exception by saying that the "restriction on the scope of the provisions in question must however remain limited to its proper objective."[54] This ruling essentially means that the only time a nationality restriction can be considered a purely sporting rule is if it is in the context of national team competition and even then only if it is restricted to its stated goal. Also, in the case of *Meca-Medina v. Commission*,[55] the ECJ ruled that "the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down."[56]

The ECJ has more recently recognized an exception for rules that are "inherent" to a sport. However, this exception does not remove the rule in question from the scope of the treaty but, after a further analysis to determine if it actually constitutes a restriction or obstacle to free movement, leaves the potential for the rule to be upheld.[57] This is shown in *Meca-Medina* when the ECJ ruled that "where engagement in the activity must be assessed in the light of the Treaty provisions relating to competition, it will be necessary to determine...whether the rules which govern that activity emanate from an undertaking, [and] whether the latter restricts competition."[58] While both of these exceptions will be relevant to the *Bosman* ruling and to the status of EU law in general on the interaction of

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[49] *Walrave*, 1974 E.C.R. 1405, ¶ 8; *Donà*, 1976 E.C.R. 1333 ¶ 14.

[50] *Walrave*, 1974 E.C.R. 1405, ¶ 8; *see also* Miettinen & Parrish, *supra* note 12, ¶ 4.

[51] *Walrave*, 1974 E.C.R. 1405, ¶ 8.

[52] Miettinen & Parrish, *supra* note 12, ¶ 4.

[53] *Donà*, 1976 E.C.R. 1333, ¶ 14.

[54] *Id.* at ¶ 15.

[55] Case C-519/04 P, Meca-Medina v. Comm'n, 2006 E.C.R. I-6991, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:C2006/224/14:EN:NOT [hereinafter *Meca-Medina*].

[56] *Id.* ¶ 27.

[57] Miettinen & Parrish, *supra* note 12, ¶ 5.

[58] *Meca-Medina*, 2006 E.C.R. I-6991, ¶ 30.

Article 39 and football, neither exception is likely to apply to a rule that is as directly targeted at nationality discrimination as Blatter's proposed rule is.[59]

C. UEFA's "3+2" Rule

In 1978, UEFA instituted player eligibility regulations that limited the number of foreign players permitted to play for its member clubs.[60] The regulations permitted the playing of up to two foreign nationals from other European Union Member States per club as well as an unlimited number of foreigners who had resided for five years in that nation.[61] The regulations contained no restrictions on the number of foreign players that a club could have under contract. This set of eligibility rules lasted for 13 years until UEFA in 1991 adopted the so-called '3+2' rule, under which from 1 July 1992 the number of foreign players whose names can be included on the team-sheet[62] may be restricted to not less than three per team, plus two players who have played in the country in question for five years uninterruptedly.[63]

Technically, this is a guideline that only demonstrates the minimum allowable restriction, meaning that a national association could permit more foreigners but could not have a rule restricting the number of foreigners to a lower number.[64]

However, what this rule did in practice was restrict the number of foreigners in all major national football associations to the "3+2" number that UEFA decreed. The "3+2" rule was also the rule applied in all UEFA sponsored club competitions, such as the UEFA Cup and the UEFA Champions League. This had significant practical implications in the early 1990s for teams like Manchester United. Manchester United was unable to field its strongest side in UEFA competitions in the early 1990s as players like Peter Schmeichel (Denmark) and Denis Irwin (Northern Ireland)[65] would sometimes need to be left out of the starting lineup due to the nationality restrictions.[66]

While the ECJ had determined in *Doná* that restrictions on the number of foreign players that could participate in sporting competitions were in violation of the EU treaty,

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[59] *See* Miettinen & Parrish, *supra* note 12, ¶ 7 ("The Court has never recognised that nationality restrictions can constitute 'purely sporting' exceptions to Treaty rights except in a tightly circumscribed set of circumstances, applicable only where nationality rules apply to national teams playing on behalf of a Member State. Its acceptance of rules 'inherent' to the proper organisation of sport also appears limited to non-discriminatory, indistinctly applicable rules that bear no relationship to nationality. Where nationality affiliations are one, but not the only, method by which the sport is organised, the Court has denied that these rules fall outside the scope of the Treaty and within the 'sporting exception'.").

[60] Amikam Omer Kranz, *The Bosman Case: The Relationship Between European Union Law and the Transfer System in European Football*, 5 COLUM. J. EUR. L. 431, 435 (1999).

[61] *Id.*

[62] This means that five foreigners can play in a match at any one time but that a sixth could not be substituted in without taking one of the original five foreigners out of the match.

[63] Case C-415/93, Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman, 1995 E.C.R. I-4921, ¶ 39, *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61993C0415:EN:NOT [hereinafter *Bosman*].

[64] *Id.* ¶ 40 (noting also that the English football association did not include Welsh, Scottish, or Irish players as foreigners and the Scottish football association did not have any restriction against foreigners at all).

[65] Irwin did not count towards the "3+2" limit in English club matches since Northern Irish players were not considered foreigners. However, he did count towards the "3+2" limit for UEFA club matches since the UEFA regulations made no such distinction for the other members of the British Isles. This also affected other United stalwarts like Ryan Giggs (Wales) and Roy Keane (Ireland).

[66] Simon Gardiner & Roger Welch, *'Show Me The Money': Regulation of the Migration of Professional Sportsmen in Post-Bosman Europe*, *in* PROFESSIONAL SPORT IN THE EU: REGULATION AND RE-REGULATION 107, 110 (Andrew Caiger & Simon Gardiner eds., 2000).

the "3+2" rule proposed to get around that ruling by eliminating all restrictions on the number of foreign players that a club could have under contract.[67] National football associations had utilized such regulations since the 1960s, but with the ruling in *Doná*, UEFA needed a new way to achieve the same results as those regulations without running afoul of EU law. The "3+2" rule was UEFA's solution to this problem, and it regulated European club football until *Bosman* was decided by the ECJ in 1995.

D. The Bosman Case

One of the most significant events in shaping modern European club football was the decision of the European Court of Justice in the *Bosman* case. The case arose from the transfer regulations in place in the Juliper League[68] and in UEFA as a whole. Jean-Marc Bosman, the eventual plaintiff, played for RC Liége, a Juliper League club, and his contract was set to expire on June 30, 1990.[69] Under URSFBA regulations, RC Liége was required to make Bosman a new contract offer no later than April 26, which they did, and he subsequently rejected the offer since it was at minimum salary, far less than what he had previously been making.[70] Bosman then came to a contract agreement with US Dunkerque, a French second division club.[71] US Dunkerque and RC Liége came to a transfer agreement but the transfer broke down when RC Liége had doubts over Dunkerque's ability to pay the agreed-upon transfer fee.[72] Without a transfer agreement or a contract, RC Liége suspended Bosman under URBSFA rules, and he did not play the following season.[73]

Bosman then brought an action against URBSFA, and eventually against UEFA, alleging on two grounds that his rights under Article 39 of the EU Treaty providing for freedom of movement of workers were being violated. First, he claimed that the transfer system in place was a violation of Article 39 by preventing him from finding employment with clubs in other Member States. Second, and more important, Bosman argued that UEFA's "3+2" rule violated Article 39 by restricting the ability of footballers to find employment with clubs in foreign Member States.[74]

As is normal procedure in the European Court of Justice, the Advocate General filed an opinion in this case after the Cour d'Appel, Liège referred two questions to the ECJ for a preliminary ruling on whether EC law should be interpreted as:

> (i) prohibiting a football club from requiring and receiving payment of a sum of money upon the engagement of one of its players who has come to the end of his contract by a new employing club;
>
> (ii) prohibiting the national and international sporting associations or federations from including in their respective regulations provisions restricting access of

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67 *Doná*, 1976 E.C.R. 1333, ¶ 19.

68 The Juliper League is the top division of Belgian professional club football.

69 *Bosman*, 1995 E.C.R. I-4921, ¶ 42; *see also* Kranz, *supra* note 60, at 436.

70 Kranz, *supra* note 60, at 436.

71 *Id.*

72 *Id.*

73 *Id.*

74 Gardiner & Welch, *supra* note 66, at 110.

foreign players from the European Community to the competitions which they organize?[75]

The first of these two questions deals with the legality of the transfer rules while the second question deals with the legality of the nationality-based eligibility restrictions. The first question is important but secondary for this paper so it will only be dealt with briefly. However, before the court dealt with either of these questions it had to assess the general applicability of Article 39 to sports. The Court reaffirmed its holdings in *Donà* and *Walrave* that Article 39 applies to sport only so far as it is considered an economic activity and that the activities of professional footballers would be considered an economic activity.[76]

The Court then went on to discuss whether or not the transfer rules constitute an obstacle to freedom of movement for workers.[77] Using established case law, the Court explained that "provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned."[78] Bosman and Advocate General Lenz argue that the transfer rules in existence at the time are likely to restrict freedom of movement of players by deterring their departure from the clubs that they play for even after their contracts have expired.[79] Finally, the court held that the rules "directly affect players' access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers"[80] and therefore, "the transfer rules constitute an obstacle to freedom of movement for workers prohibited in principle by Article [39] of the Treaty."[81] This part of the ECJ's opinion answered the first question raised by Bosman, but the question on nationality clauses is dealt with in a separate part of the opinion.

The Cour d'Appel, Liège also requested a ruling on the legality of the nationality clauses, or the so-called "3+2" rule that UEFA had instituted, and that many of its subordinate national associations had adopted. Section 2 of Article 39 expressly requires the elimination of any regulations that discriminate based on nationality, among nationals of Member States, with regards to employment.[82] The Court went on to describe how this section has been interpreted by the Council of the European Union.[83] According to Article 4 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968, "provisions laid down by law, regulation or administrative action of the Member States which restrict by number or percentage the employment of foreign nationals in any undertaking, branch of activity or region, or at a national level, shall not apply to nationals of the other Member

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[75] Opinion of Mr. Advocate General Lenz, *supra* note 63, ¶ 53.

[76] *Bosman*, 1995 E.C.R. I-4921, ¶ 73.

[77] *Id.* ¶ 92.

[78] *Id.* ¶ 96 (citing Case C-10/90 Masgio v. Bundesknappschaft, 1991 E.C.R. I-1119, ¶ 18-19).

[79] *Id.* ¶ 99; *see also* Opinion of Mr. Advocate General Lenz, *supra* note 62, ¶ 210 ("[U]nder the applicable rules a player can transfer abroad only if the new club (or the player himself) is in a position to pay the transfer fee demanded. If that is not the case, the player cannot move abroad. That is a direct restriction on access to the employment market.").

[80] *Id.* ¶ 103.

[81] *Id.* ¶ 104.

[82] *Id.* ¶ 117; *see also* EEC Treaty art. 48(2) (as in effect in 1957) (now article 39), *supra* note 30.

[83] *Id.* ¶ 118.

States."[84] That principle does apply to the regulations of sports associations, such as UEFA, as determined in *Donà*.[85]

Finally, the Court ruled that it is not relevant that the nationality restrictions in question only restricted participation, not employment. The Court reasoned that since participation in matches is the reason that a player is employed by a club, a restriction on participation will necessarily become an obstacle to employment.[86] However, it is important to note that this case does fall short of providing complete free movement for workers. Most importantly, it does not invalidate restrictions placed on non-EU Member State nationals, even if they have previously resided in a Member State.[87]

UEFA and URBSFA put forward justification arguments in this case, but they were all rejected by the ECJ. First, they tried to use the ECJ's prior holding in *Donà* to argue that this rule was of sporting interest only and not of an economic nature.[88] However, the court stated that the nationality clauses at issue here "apply to all official matches between clubs and thus to the essence of the activity of professional players"[89] and cannot be in accordance with Article 39 because, if they were permissible, Article 39 would have no practical effect.[90] Several other arguments were made that were summarily rejected including the argument that the participation of the European Commission in the creation of the "3+2" rule authorized these regulations gained any traction with the ECJ.[91]

E. Direct Discrimination vs. Indirect Discrimination

The European Court of Justice has differentiated between two different types of nationality-based discrimination. Direct discrimination consists of a rule that explicitly makes nationality the relevant basis for the rule.[92] An example of this would be a rule in France that put a strict quota on the number of foreign nationals that were allowed to work in a certain factory. The rule expressly discriminates against foreigners by installing a quota system. Meanwhile, "most rules which place migrants at a disadvantage will constitute indirect discrimination."[93] This essentially means that any rule that disadvantages foreign nationals, but falls short of direct discrimination, constitutes indirect discrimination. Any rule that can be shown to likely have a greater impact on foreign nationals can constitute indirect discrimination.[94]

The Court has also treated direct and indirect discrimination very differently when it comes to justification of rules. A rule that is found to be directly discriminatory "can only be objectively justified under one of the Treaty categories that recognise legitimate objective differences between nationals and non-nationals and may not be founded on

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[84] Council Regulation 1612/68, art. 4, On Freedom of Movement for Workers Within the Community, 1968 O.J. (L 257) p. 1-12 (EEC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31968R1612:EN:NOT.

[85] *Bosman*, 1995 E.C.R. I-4921, ¶ 119, (citing *Donà* 1976 E.C.R. 1333, ¶ 19).

[86] *Id.* ¶ 120.

[87] Kranz, *supra* note 60, at 432.

[88] *Bosman*, 1995 E.C.R. I-4921, ¶ 127.

[89] *Id.* ¶ 128.

[90] *Id.* ¶ 129.

[91] *Id.* ¶ 136.

[92] Miettinen & Parrish, *supra* note 12, ¶ 12.

[93] *Id.*

[94] *Id.*

economic grounds."[95] This would include "justifications on grounds of public policy, public security, or public health."[96] On the other hand, a rule that is found to be indirectly discriminatory can be justified either on the same Treaty justifications as a directly discriminatory rule or on broader public interest justifications.[97]

F. Objective Justification

The process of objective justification is the means by which an indirectly discriminatory regulation and a non-discriminatory obstacle to freedom of movement can be considered legal, despite Article 39. Using the test enunciated in *Gebhard*, a rule may be objectively justified despite constituting an obstacle to freedom of movement.[98] The test is a four-stage test[99] that "applies to all 'national measures liable to hinder or make less attractive the exercise of fundamental freedoms'."[100] Those measures must fulfill four conditions: (1) they must be applied in a non-discriminatory manner, (2) they must be justified by imperative requirements in the public interest, (3) they must be suitable to accomplish their stated goal, and (4) they must be narrowly tailored to meet that goal.[101] This is a stringent test but "the Court has already recognised 'maintaining a balance between clubs' and 'encouraging the recruitment and training of young players'"[102] as legitimate sporting interests that satisfy part 2 of the test. However, the Court made clear in *Bosman* that it will take parts 3 and 4 of the test seriously and require an actual showing of fit and proportionality for rules to be upheld via objective justification.[103]

G. Post-Bosman Developments in Article 39 EU Case Law

i. Malaja

The first significant Article 39 sports case to appear in Europe following the *Bosman* decision arose in France. Lila Malaja, a Polish female basketball player, signed a contract with RB Strasbourg for the 1998-99 season. However, Strasbourg had already signed two non-EU[104] players, the maximum allowed by the French Federation of Basketball rules. Malaja filed a lawsuit claiming that she could not be discriminated against as a worker in France because of Poland's 1991 Association Agreement with the EU that contained a

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[95] *Id.*

[96] *Bosman*, 1995 E.C.R. I-4921, ¶ 86.

[97] Miettinen & Parrish, *supra* note 12, ¶ 12.

[98] *Id.* ¶ 16, *citing* Case C-55/94 Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165 [hereinafter *Gebhard*].

[99] This is very similar to the test in First Amendment law (outside of the non-discrimination prong) to determine if a certain type of speech can be restricted. When referencing commercial speech, the Supreme Court held: "The State must assert a substantial interest to be achieved by restrictions on commercial speech...First, the restriction must directly advance the state interest involved...Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 564 (1980).

[100] Miettinen & Parrish, *supra* note 12, ¶ 12 (quoting Gebhard, 1995 E.C.R. I-4165, ¶ 37).

[101] *Gebhard*, 1995 E.C.R. I-4165 ¶ 37, (citing Case C-19/92 Kraus v. Land Baden-Wuerttemberg, 1993 E.C.R. I-1663, ¶ 32).

[102] Miettinen & Parrish, *supra* note 12, ¶ 16 (quoting Bosman, 1995 E.C.R. I-4921, ¶ 106).

[103] *Id.* (citing Bosman, 1995 E.C.R. I-4921, ¶ 110).

[104] Poland did not become an EU Member State until 2004.

similar labor discrimination clause to Article 39.[105] France's highest court, the Conseil d'Etat, extended *Bosman* to nations that had signed Cooperation or Association Agreements with the EU.[106]

This decision was not received favorably by sporting officials or the media.[107] While it had no binding legal authority outside of France, officials feared "an influx of immigrant 'bargain' players"[108] into their leagues. FIFA President Sepp Blatter, the main proponent of the current "6+5" proposal (and a proponent of it even then), characterized the ruling as "Bosman multiplied by a million."[109] Even though this ruling only had authority in France, it was widely speculated that the issue would soon be pressed at the EU level. The European Court of Justice would soon get an opportunity to rule on essentially the same issue as the Conseil d'Etat did in Malaja.

ii. Kolpak[110]

Maros Kolpak was a Slovakian handball player who played for a second division German handball club and had signed contracts in both 1997 and 2000.[111] The German Handball Association's (DHB) rules prohibited clubs from having more than two non-EU nationals on a team.[112] Kolpak filed suit in the German courts arguing that the DHB should allow him to participate on the same terms as an EU national due to the antidiscrimination clauses in both the Treaty of Rome and the Association Agreement[113] between Slovakia and the EU.[114] The ECJ eventually heard the case and relied on precedent from a 2002 case involving the EU's Association Agreement with Poland.[115] The Court held that the wording of the non-discrimination clauses in the two Association Agreements were identical and because it had previously held that Polish nationals were not to be treated differently from nationals of EU Member States, that Slovak nationals should receive the same treatment.[116] The Court did limit this holding, however, only to Slovak nationals who were already lawfully employed in a Member State and did not extend the antidiscrimination provision to access to the labor market.[117] The ECJ also reiterated its holding from *Bosman* that

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105 Penn, *supra* note 45, at 218.

106 *Id.* at 219.

107 *See* SPORTSILLUSTRATED.COM, *FIFA's Blatter Worried By Widening of Bosman Ruling*, Jan. 20, 2003, http://sportsillustrated.cnn.com/soccer/news/2003/01/20/int_rdp/ (last visited Apr. 11, 2009); *see also* SPORTSILLUSTRATED.COM, *Bosman Times 10: New 'Malaja' Rule Could Change Soccer Forever*, Feb. 3, 2003, http://sportsillustrated.cnn.com/soccer/news/2003/02/02/malaja_rule/ (last visited Apr. 11, 2009) (describing Malaja ruling as threatening "a second flood of bargain-buy footballers through Western Europe").

108 Penn, *supra* note 45, at 219.

109 *Id.*

110 Case C-438/00 Deutscher Handballbund eV v. Kolpak, 2003 E.C.R. I-4135, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000J0438:EN:NOT [*hereinafter Kolpak*].

111 Penn, *supra* note 45, at 220.

112 *Id.*

113 "Treatment accorded to workers of Slovak Republic nationality, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals." Europe Agreement Establishing an Association between the European Communities and their Member States and the Slovak Republic art. 38(1), EU-Slovk., Oct. 4, 1993, 1994 O.J. (L 359).

114 Penn, *supra* note 45, at 220.

115 *Kolpak*, 2003 E.C.R. I-4135, ¶ 24 (citing Case C-162/00 Land Nordrhein-Westfalen v. Pokrzeptowicz-Meyer, 2002 E.C.R. I-1049, ¶ 30).

116 *Kolpak*, 2003 E.C.R. I-4135, ¶ 29.

117 Penn, *supra* note 45, at 221; *see also Kolpak*, 2003 E.C.R. I-4135, ¶ 42.

nationality clauses are not justified on purely sporting grounds, at least outside the context of national team eligibility.[118]

iii. Simutenkov[119]

Igor Simutenkov's case was very similar to Kolpak's. Simutenkov, who is Russian, played football for Club Deportivo Tenerife in Spain.[120] He, like Kolpak, requested to be given the same license that EU nationals possessed under the antidiscrimination clauses in the Treaty of Rome and the Partnership and Cooperation Agreement between the EU and the Russian Federation.[121] Unsurprisingly, the ECJ ruled in favor of Simutenkov. Article 23(1) of the Partnership Agreement states "in clear, precise and unconditional terms, a prohibition precluding any Member State from discriminating, on grounds of nationality, against Russian workers, vis-à-vis their own nationals."[122] However, just like in *Kolpak* the ECJ in *Simutenkov* restricted this holding to Russian nationals already legally employed in a Member State.[123] This ruling eliminated any real debate over whether the ECJ would apply the antidiscrimination principles in *Bosman* and *Kolpak* to other nations with Association or Cooperation Agreements with the EU. As long as the Agreement in question contains an antidiscrimination clause similar to the ones in *Kolpak* and *Simutenkov,* the ECJ will be bound by its own precedent to extend antidiscrimination protections.

V. UEFA'S HOMEGROWN PLAYER RULE AND FIFA'S "6+5" PROPOSAL

A. Post-Bosman Transfer Market Rules

The *Bosman* decision created an entirely new system of transfer market rules in European football. Despite *Bosman*, FIFA and UEFA insisted on keeping the transfer rules intact, at least as they handled players who still had contracts (Bosman's situation was distinguishable because his contract had already expired).[124] This would only last a few years as the EC ordered another change to the transfer rules in 1997. FIFA was slow to respond but faced with increasing pressure in the form of legal challenges, new transfer regulations were put in place in 2001.[125] The new rules had four significant changes to the old system.

First, the new rules prohibited international transfers of minors unless the family of the player also moves to the country and that move had no relation to football.[126] Second, there is automatic compensation paid for training expenses if a player that is 23 years or

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[118] Penn, *supra* note 45, at 221-222.

[119] Case C-265/03 Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol, 2005 E.C.R. I-2579, *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0265:EN:NOT [*hereinafter Simutenkov*].

[120] Penn, *supra* note 45, at 222.

[121] *Id.*

[122] *Simutenkov*, 2005 E.C.R. I-2579, ¶ 22.

[123] *Id.*

[124] Stratis Camatsos, *European Sports, the Transfer System and Competition Law: Will They Ever Find a Competitive Balance?*, 12 SPORTS LAW J. 155, 166 (2005).

[125] *See generally* FRANS DE WEGER, *FIFA Regulations for the Status and Transfer of Players in* THE JURISPRUDENCE OF THE FIFA DISPUTE RESOLUTION CHAMBER 145 (Robert C.R. Siekmann and Janwillem Soek, eds., T.M.C. Asser Press 2008) (Annexes).

[126] *Id.* at 146 (Ch. II, Art. 4.1-2).

younger is transferred. [127] Third, if a player is transferred mid-contract, five percent of the player's salary will go to the club that trained him.[128] Finally, and most controversially, there are now two transfer windows per year, which are the only times during which a player can be transferred.[129]

These new rules, other than the transfer windows, have had very minimal impact on transfers since the vast majority of transfers are agreed-upon between the two clubs involved. The regulations put in place dealt with compulsory transfers, not voluntary transfer agreements. In fact, the rules have had the exact opposite impact as they were intended to have. The transfer windows restrict movement of workers and are still vulnerable to challenge under Article 39. The windows have also increased the competitive gap between large clubs and small clubs, as opposed to shrinking it, as the rules were intended.[130] However, none of these rule changes have had the impact that a return of nationality clauses to European football would have.

B. Basics – Homegrown Player Rule and "6+5"

In addition to the new transfer rules, professional football came up with new rules to replace the struck-down nationality clauses. UEFA, in 2005, instituted what is now known as the "Homegrown Rule."[131] Being a UEFA rule, the homegrown player rule is only applicable in UEFA competitions, such as the UEFA Champions League or the UEFA Cup/Europa League, and competitions where a club is entered as a UEFA representative, such as the FIFA Club World Cup. The rule requires that, for the 2006-2007 season, clubs must include on the twenty-five man "A"[132] roster that they submit to UEFA, at least two club trained players and at least two other players trained either by that club or by another club from that country (i.e., association trained players).[133] This requirement would increase to three, and then four of each of these types of players over the next two seasons. A player qualifies as a club trained player if he was registered with his current club for at least three years between the ages of 15 and 21.[134] Meanwhile, a player counts as an association trained player if he was registered with a club in the same national association as his current club for at least three years between the ages of 15 and 21.[135]

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[127] *Id.* at 146 (Ch. III, Art. 5.2(b)); *see also FIFA Regulations Governing the Application of the Regulations for the Status and Transfer of Players in* THE JURISPRUDENCE OF THE FIFA DISPUTE RESOLUTION CHAMBER 153 (Ch. III, Art. 5), (Robert C.R. Siekmann and Janwillem Soek, eds., T.M.C. Asser Press 2008) (Annexes).

[128] *Id.* at 148-149 (Ch. IV, Art. 10).

[129] *Id.* at 145-148; *see also* Camatsos, *supra* note 124, at 167.

[130] *Id.* at 170.

[131] *See* UEFA.COM, *Homegrown Plan Wins Approval*, Apr. 21, 2005, http://www.uefa.com/uefa/footballfirst/protectingthegame/youngplayers/news/newsid=297230.html#homegrown+plan+wins+approval (last visited Mar. 11, 2010) (describing UEFA's adoption of the homegrown proposal).

[132] Clubs in UEFA competitions are allowed to submit 2 rosters: an A roster and a B roster. The A roster can consist of no more than 25 players. The B roster can consist of an unlimited number of players 21 years of age or younger if they have also been eligible to play for the club in question for any uninterrupted period of 2 years since they turned 15 or if they are 16 and registered with the club for the previous two years. Players registered with UEFA on either roster are eligible to play in matches. *See Regulations of the UEFA Champions League 2008/09*, *supra* note 19, at 23.

[133] *See* UEFA.COM, *Local Training Debate Moves Online*, Feb. 6, 2005, http://www.uefa.com/uefa/footballfirst/protectingthegame/youngplayers/news/newsid=261004.html#local+training+debate+moves+online (last visited Mar. 11, 2010) (explaining the basics of the homegrown rule).

[134] *Regulations of the UEFA Champions League 2008/09*, *supra* note 19, 17.10 at 22.

[135] *Id.* 17.11 at 23.

UEFA's homegrown rule has not met with significant opposition either in the press or among most football insiders, probably because it really has had very little impact on most clubs. It is not a very stringent requirement to force clubs to have eight out of twenty-five players be home grown, especially since most nationals will be at least association trained players and a significant number will be club trained as well. The rule does not require a minimum number of home grown players to actually play in a match and, most likely, has not forced any significant changes to the structure of club rosters since its inception.[136] A club, if necessary, could easily fill out the back end of a twenty-five man roster with young players from its academy that would never see the field anyway. However, FIFA President Sepp Blatter is pushing for a different, more stringent regulation that would have a much greater impact on roster composition.

As far back as 2003, FIFA was studying a formula that they call the "6+5" rule.[137] This is a regulation that FIFA is trying to implement that would require "at least six players on the field at the beginning of each match [to be] from the country of the club they are playing for."[138] The rule would not limit foreign substitutes or the number of foreign players that a club could have under contract, so a club could finish a match with up to eight foreign players in the game. This proposal would also have a phase-in period similar to the homegrown players rule, beginning with a 4+7 requirement and over two years expanding to the 6+5 requirement.[139] In order to qualify as one of those six players, a player would need to be eligible for the national team[140] of the country of the club.[141] This has met with significant opposition from the European Union, but it has received support from some European nations[142] as well as some prominent names in professional football like Inter Milan manager Jose Mourinho, Manchester United manager Sir Alex Ferguson, and UEFA President Michel Platini.[143]

C. Rationale Behind These Rules

The reasoning behind both UEFA's homegrown players rule and FIFA's proposed "6+5" rule is very similar. The homegrown rule has several justifications according to UEFA. First, UEFA claims that it is trying to promote greater parity in domestic competitions by creating a system where "somebody with less money but a serious training

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[136] Examining the 8 current Champions League quarterfinalists' rosters (8 of the most successful and wealthiest clubs in Europe, and most likely the ones to rely most on foreign transfers) demonstrates that none of the clubs have any problems meeting this requirement. *See generally* UEFA.COM, 2009 Champions League Quarterfinal Match Press Kits, http://www.uefa.com/uefa/mediaservices/presskits//index.html (last visited Apr. 12, 2009).

[137] *See FIFA's Blatter Worried By Widening of Bosman Ruling*, supra note 107.

[138] EURACTIV.COM, *FIFA Shown EU 'Red Card' Over Player Quotas*, May 29, 2008, http://www.euractiv.com/en/sports/fifa-shown-eu-red-card-player-quotas/article-172786 (last visited Apr. 12, 2009).

[139] *See generally* FIFA.COM, *Media Release: FIFA Congress Supports Objectives of 6+5*, May 30, 2008, *available at* http://www.fifa.com/aboutfifa/federation/bodies/media/newsid=783657.html.

[140] FIFA has hinted that in the unique case of the United Kingdom, British would count as a nationality even though England, Wales, Scotland, and Northern Ireland all field separate national teams. *See* Dale Johnson, *The Flaws of 6+5*, ESPN.COM, Feb. 26, 2009, http://soccernet.espn.go.com/news/story?id=622672&sec=england&cc=5901.

[141] ESPN.COM, *EU and FIFA Clash Over 6+5 Rule*, Feb. 26, 2009, http://soccernet.espn.go.com/news/story?id=622632&sec=global&cc=5901.

[142] ESPN.COM, *Blatter Welcomes UK Support for 6+5 Rule*, Apr. 21, 2009, http://soccernet.espn.go.com/news/story?id=639181&sec=england&cc=5901.

[143] FIFA.COM, *Blatter: '6+5' Rule is Crucial*, May 7, 2008, http://www.fifa.com/aboutfifa/federation/president/news/newsid=762500.html (roundtable between Blatter and journalists).

programme has a better chance [in the future] than today to compete at the top level."[144] The idea behind this is that forcing teams to have a certain number of homegrown players will make being competitive in domestic leagues less reliant on expensive transfers, and will enable well-run smaller clubs to compete with larger clubs. UEFA was concerned with the same clubs repeatedly competing for honors year after year while most of the league simply fought for scraps, or just to avoid relegation.[145] UEFA also believes that this will drive transfer prices down since there will be less competition for foreign transfers and less hoarding of players, enabling more clubs to afford quality transfer players.[146]

Second, UEFA is trying to increase the quality of football at the national team level. UEFA believes that introducing the homegrown player rule will focus clubs more intensely on training young, local talent. Theoretically, "this will, in turn, help to provide a pool of playing talent in every European country and can also help to increase the quality of, and competition between, national teams."[147] Creating better infrastructure for training young footballers is another one of UEFA's goals, and the homegrown player rule should also create greater incentives to train young talent.[148] Finally, UEFA is concerned with clubs losing their local identities and connections with their fan bases. This is a concern that has been around since *Bosman.* There is a fear that if teams lack local or even domestic talent, the lack of local connection will eventually alienate their fan bases.[149]

FIFA wants to introduce the "6+5" rule for mostly the same reasons as UEFA introduced the homegrown player rule. The FIFA Congress cited clubs' loss of national identity, enhancing the education and training of young players, the increasing lack of parity in club competitions, and safeguarding the continued development of football as the rationales behind approving the 6+5 rule.[150] FIFA simply believes that the homegrown players rule does not go far enough and does not have enough impact on clubs. Imposing the eligibility requirement on the starting lineup would open up more and better opportunities for local players and young players. Since these players would not just be at the back end of the roster, but actually playing, that it would force clubs to make an even greater commitment to training programs, since they might not always be able to fill a roster need with an established foreign transfer player.

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[144] Simon Hart, *Call to 'Create Level Playing Field'*, UEFA.COM, Oct. 4, 2004, http://www.uefa.com/uefa/keytopics/kind=65536/newsid=242608.html (quoting Gianni Infantino, UEFA Director of Legal Services).

[145] European football is organized domestically so that each country has several leagues operating hierarchically. At the end of the season, a certain number of teams at the bottom of each league are dropped to the league below (relegated) and an equal number of teams at the top of the league below are promoted to the league above. For example, in English football, the bottom three teams in the Premier League are relegated to the Football League Championship while the top two teams in the Football League Championship are promoted and the next four teams compete in a playoff for the third promotion spot. James Mockridge, Understanding the English Football League System, Helium.com, available at http://www.helium.com/items/1332161-understanding-the-english-football-league-system.

[146] Mark Chaplin, *UEFA Out to Get the Balance Right*, UEFA.COM, Feb. 3, 2005, http://www.uefa.com/uefa/footballfirst/protectingthegame/youngplayers/news/newsid=277348.html#uefa+balance+right (last visited Mar. 11, 2010).

[147] *Homegrown Plan Wins Approval*, *supra* note 131.

[148] *See* UEFA, *Declaration of the UEFA Congress on the Subject of Local Training of Players*, *supra* note 10.

[149] Gardiner & Welch, *supra* note 66, at 110-111 (citing Opinion of Mr. Advocate General Lenz, *supra* note 62, ¶¶ 142-143).

[150] FIFA CONGRESS SUPPORTS OBJECTIVES OF 6+5, *supra* note 139.

D. Homegrown Player Rule - Legality?

While the homegrown player rule and the "6+5" rule have similar rationales, there are significant differences between the two when it comes to their interaction with EU law, differences that make the homegrown player rule acceptable under Article 39 but the "6+5" rule unacceptable. This section will address the legality or illegality of both rules and the differences between the rules that affect whether or not they would be considered legal.

The homegrown player rule is an example of what would be classified as indirect discrimination. It certainly would be considered an obstacle to freedom of movement, as described by the ECJ in *Bosman*.[151] The homegrown player rule is indirectly discriminatory because it does not actually distinguish players based on nationality: "Although the objective is an attempt to link attributes of residence and players' club affiliations, the method employed does not constitute direct nationality discrimination but indirect discrimination which arises from requirements which more nationals than non-nationals are likely to fulfill."[152] It is clear that this rule would have a discriminatory effect since local players are more likely to be locally trained and, therefore, qualify as homegrown players; but since it is not explicitly based on nationality, it is only indirectly discriminatory. The Commission of the European Communities (Commission) has made it clear that the homegrown player rule could be compatible with the EU Treaty. The Commission stated in its White Paper on Sport:

> Rules requiring that teams include a certain quota of locally trained players could be accepted as being compatible with the Treaty provisions on free movement of persons if they do not lead to any direct discrimination based on nationality and if possible indirect discrimination effects resulting from them can be justified as being proportionate to a legitimate objective pursued, such as to enhance and protect the training and development of talented young players.[153]

This demonstrates that the homegrown player rule could be justifiable if it could successfully go through the process of objective justification.[154]

In defending the legality of the homegrown player rule, UEFA would be unable to avail itself of either the "purely sporting rules" exception or the "inherency" of the rule exception.[155] The "purely sporting rules" exception has essentially been deemed only to apply to eligibility rules for national team competitions.[156] Also, cases where the "inherency" exception was relied upon successfully have only occurred when the rule in question was obviously applied in a completely non-discriminatory fashion, e.g., the anti-doping rules in *Meca-Medina*.[157] Since there is an element of nationality discrimination involved in the homegrown player rule, albeit not explicitly, the "inherency" exception cannot be relied upon. Therefore, UEFA would have to satisfy the four-stage test from *Gebhard* for this indirectly discriminatory rule to be acceptable.[158]

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[151] *Bosman*, 1995 E.C.R. I-4921 ¶ 103.

[152] Miettinen & Parrish, *supra* note 12, ¶ 17.

[153] *Commission White Paper on Sport*, at 2.3(9), COM(2007) 391 final (Jul. 11, 2007), *available at* http://ec.europa.eu/sport/white-paper/whitepaper8_en.htm#2_3.

[154] Miettinen & Parrish, *supra* note 12, ¶ 15.

[155] *Id.* ¶ 17.

[156] *Id.*

[157] *Id.* ¶ 9 (citing *Meca-Medina*, 2006 E.C.R. I-6991).

[158] *See supra* note 101 and accompanying text.

The toughest part of the *Gebhard* test for the homegrown player rule to satisfy is the first part; that the rule in question needs to be applied in a non-discriminatory manner. UEFA's argument would be that any player, regardless of nationality, can qualify as a homegrown player, and therefore there is no discrimination. The debate is whether or not the homegrown player rule constitutes de facto discrimination. While foreign players would have control over where they would qualify as a homegrown player, this choice would come at a very young age, when it may be impractical for them to move.[159] Players tend to begin their careers as youths in their own countries, and since the rule requires three years of being at a club before a player turns twenty-one, most players would not qualify as homegrown anywhere outside their home countries.[160] The rule has likely had the effect of reducing player movement but "UEFA will rely on the uncertainty and discretion involved in determining whether a disparate impact is actually impermissible discrimination."[161] Even if we assume that it can pass the first prong of the *Gebhard* test, which is not a given, the homegrown player rule would still need to pass the other three prongs.

The second thing that UEFA would need to prove is that there is a substantial public interest that is being furthered by the implementation of this rule. UEFA has put forward several possibilities to meet this prong including the need to promote competitive balance, the need to encourage the education and training of young players, the need to maintain club identity, and the need to deepen the talent pool for national team selection.[162] The ECJ in *Bosman* has already stated that both encouraging the training and development of young footballers and promoting competitive balance are legitimate objectives.[163] Maintaining club identity, on the other hand, has not been considered a legitimate objective by the ECJ because in its estimation there is no link between club support and the proportion of local players on the club.[164] Finally, the ECJ stated that "pursuit of a national team's interests constitutes an overriding need in the public interest."[165] Despite the ECJ's view on maintaining club identity, there are clearly enough substantial public interests that can be invoked by UEFA to pass this prong of the test and move the homegrown player rule on to the third prong.

The third prong of the *Gebhard* test requires UEFA to show that the homegrown player rule will have a substantial impact on the legitimate public interests invoked to satisfy the second prong. The ECJ already ruled in *Bosman* that rules of this nature will not be sufficient to protect competitive balance because there is nothing preventing the biggest, wealthiest clubs from still fielding a starting eleven full of expensive foreign transfers as long as they have eight homegrown players on their twenty-five man roster.[166] Also, this will just drive up the prices for the best players that do qualify as homegrown players and

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[159] Lindsey Valaine Briggs, *UEFA v. The European Community: Attempts of the Governing Body of European Soccer to Circumvent EU Freedom of Movement and Antidiscrimination Labor Law*, 6 CHI. J. INT'L L. 439, 450 (2005) ("Although many clubs will pay for foreign youths to attend their academies, it is still difficult and impractical for many teens to attend. Considerations other than soccer, such as schooling and family, will discourage young players from training in foreign countries.").

[160] *Id.*

[161] *Id.* at 451.

[162] Miettinen & Parrish, *supra* note 12, ¶¶ 18-27.

[163] *Bosman*, 1995 E.C.R. I-4921, ¶ 106; *see also Commission White Paper on Sport, supra* note 151, at 2.3(9).

[164] *Bosman*, 1995 E.C.R. I-4921, ¶ 131.

[165] Opinion of Mr. Advocate General Cosmas delivered on 18 March 1999, Case C-51/96, Deliège v. Ligue Francophone de Judo et Disciplines Associèes ASBL, 2000 E.C.R. I-2549, ¶ 84, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61996C0051:EN:NOT.

[166] *Bosman*, 1995 E.C.R. I-4921, ¶ 135.

for the most talented young foreign players (players that could still eventually qualify as homegrown players), making them only affordable to the biggest clubs. Those affluent clubs would also be in the best position to heavily invest in youth training academies and, hence, maintain their dominant position in club football despite the introduction of this rule.[167] However, UEFA does have a strong argument for the homegrown player rule advancing the public interest in that the rule encourages the education and training of young players.

One of the rationales made by the ECJ against the validity of the competitive balance argument actually works in favor of the argument for encouraging the education and training of young players. The ECJ argues that the bigger clubs would still be in the best position to invest in youth academies.[168] While that may be true, it also concedes the point that the homegrown player rule is likely to cause an increase in investment in youth academies. Finally, UEFA's argument that the homegrown rule will improve the talent pool for national teams is unlikely to succeed. The ECJ in *Bosman* made the point that "rather than restricting opportunities for national talent who are afforded fewer opportunities due to the presence of foreign players, labour mobility has enhanced their employment prospects through the creation of a larger market."[169] It is likely that the imposition of the homegrown player rule may lead to increased domestic opportunities for youth training but it is also likely that it will lead to fewer professional opportunities as foreign labor markets will prove to be harder to enter, weakening the top-level talent pool for national team selection.[170]

The only one of UEFA's proffered public interests to make it through both the second and third prongs of the *Gebhard* test is the interest in encouraging the education and training of young players. The final prong of the test is that the rule must be narrowly tailored to meet the stated interest. This is a tough prong to satisfy, but this rule can meet it. This rule does not broadly overreach its stated goals as it encourages the development of youth academies without overtly discriminating based on nationality. The eight spots required to be held for homegrown players hold no penalties for not being met, other than the loss of those spots on the roster for that match. If a club could not have eight homegrown players on the roster; its roster size for that match would simply be reduced by the number of players less than eight that it listed. The rule does not require any of those players to start, nor does it even require any of them to ever see the field. There is no restriction on the number of foreign players that can play or can be under contract for a club. All of these factors combine to make it clear that the rule is sufficiently narrowly tailored to meet UEFA's stated goals, despite the likely consequence of somewhat restricting player mobility.

Overall, the Commission's description of the homegrown player rule is probably the best assessment of its current legality—it could be legal depending on future studies of the effects that it is having.[171] More recently, the European Parliament supported the homegrown rule when it stated that it "agrees with the Commission that investment in young talented sportsmen and sportswomen is crucial for the sustainable development of

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[167] Miettinen & Parrish, *supra* note 12, ¶¶ 18-19.

[168] *Id.*; *see also* Briggs, *supra* note 159, at 452.

[169] Miettinen & Parrish, *supra* note 12, ¶ 25 (citing *Bosman*, 1995 E.C.R. I-4921, ¶¶ 133-134).

[170] "One may conclude that labour mobility has actually enhanced competitive balance in national football competitions. The success of the French and Greek national teams in the 2000 and 2004 European Championships attests to this as both countries have significant numbers of their leading players playing outside their national associations, although it should be noted that all of Italy's winning 2006 World Cup squad played in Italy." *Id.*

[171] *See supra* note 153 and accompanying text.

sport and believes there is a real challenge for the sports movement to ensure the local training of players; [it] believes the UEFA home-grown rule can serve as an example to other federations, leagues and clubs."[172] Unfortunately for UEFA, none of this is legally binding on the ECJ and the court would likely have reservations about approving the homegrown rule, should it come up for legal challenge, due to its de facto discriminatory nature.

However, with some slight modifications, the homegrown player rule would be more likely to pass ECJ scrutiny. One thing UEFA should have done differently when it instituted the rule in the first place was to not have it apply to players that had already reached twenty-one years of age, and, therefore, had no opportunity to choose where they would qualify as a homegrown player. However, since that modification is unlikely to happen now, there are two other changes that UEFA should make in order to make the rule more palatable to EU antidiscrimination law. First, UEFA should extend the age range during which the three years of training need to be completed. If the upper limit of the age range was pushed to 22 or 23, for example, many of the problems associated with teenagers having to move countries in order to meet the homegrown requirement would go away, since players could make this decision a little bit later in life, but still in their developmental stage. This would make it more reasonable to claim that this is not nationality discrimination because the player has a choice in the matter.

Second, UEFA should set a period of time over which a player can become a homegrown player even if he or she has passed the age limit. This would essentially mean that a player could meet the homegrown requirement after playing in the same country for five years. Such a rule would mitigate the problems associated with players that were twenty-one or older when the rule was implemented as well as lessen the discriminatory effect of the rule by including more players under the homegrown banner. Now, this may have the effect of slightly lessening the impact of the rule in terms of the goals UEFA is trying to accomplish. However, the homegrown player rule would still encourage clubs to invest in training younger players because it would be much cheaper than paying for established players who would eventually qualify. By minimizing the discriminatory effects of the rule, these changes should help the homegrown player rule pass any legal challenge and survive objective justification under *Gebhard*.

E. "6+5" Rule – Legality?

FIFA, as opposed to UEFA, does not believe that the homegrown rule is particularly effective and believes that a more stringent rule is necessary. Sepp Blatter has been pushing for the "6+5" rule to be put in place to create competitive balance and help encourage the training and education of young players. The biggest hurdle to the implementation of the "6+5" rule by FIFA is whether or not it would be legal under European Union law. While FIFA is a worldwide football organization, and its rules apply equally to its six regional confederations,[173] Europe remains the center of worldwide football, especially when it comes to club football. Any rule that would not be legally enforceable in European club football would be essentially impotent and unlikely to be put in place by FIFA.

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[172] Motion for a European Parliament Resolution on the White Paper on Sport, EUR. PARL. DOC. (2007/2261 (INI)) (2008), at 34, *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2008-0149+0+DOC+PDF+V0//EN.

[173] *See supra* note 8.

FIFA's "6+5" rule, while supported by many of the same justifications as UEFA's homegrown rule, cannot rely on those justifications to survive a legal challenge under Article 39. This is because the "6+5" rule constitutes direct discrimination which can only be justified by reference to the three justifications in the treaty itself.[174] These justifications are public policy, public security, and public health.[175] The "6+5" rule would have to be justified solely by one of these justifications and could not have even a hint of economic or commercial basis.[176] While nationality clauses as applied to national team eligibility have been justified as "purely sporting" rules, they do not fall under Article 39 because Article 39 only applies to sport as it constitutes an economic activity.[177] It is apparent now that national team competition is significantly linked to economic activity, so "the Court's decision to allow nationality restrictions within teams that only compete internationally . . . plainly represents a pragmatic rather than legalistic approach to the problem."[178] The use of the "purely sporting" rules exception, at least in the context of antidiscrimination law, seems to be very much restricted to national team eligibility requirements.

This leaves FIFA only the three built-in exceptions in Article 39(3) to try to justify the "6+5" rule. There is no argument that can be made under the public security exception as it simply does not apply to this case. It would appear at first glance that nationality clauses would be decent candidates for an argument over the public policy exception. However, the public policy exception has always been construed very narrowly. In fact, it has been argued that measures taken on the grounds of public policy can only be applied to individual situations, and do not cover blanket policies.[179] There can be an interesting attempt at an argument on public health grounds based on the support of exercise and sports and their positive roles in the promotion of public health. However, the public health exception is in place to deal with disease and other immediate public health issues that might arise from foreign nationals, not for measures that in the long run might have an impact on physical fitness. Finally, "it must be pointed out that economic aims . . . cannot constitute grounds of public policy"[180] and equally cannot constitute grounds of public health or security.

While it appears that the "6+5" rule cannot be justified because it constitutes direct discrimination, FIFA argues that it only constitutes indirect discrimination and can therefore be justified by the same arguments that can justify the homegrown player rule. To study this argument, FIFA commissioned the Institute for European Affairs (INEA) to prepare an opinion on the compatibility of the "6+5" rule with EU law.[181] This opinion argues that the "6+5" rule is compatible with EU law because it "constitutes, at the most, an indirect or concealed discrimination within the meaning of Article 39 EC Treaty because, in contrast to the rules on foreign players, it is legally not directly linked to the nationality of

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[174] *See supra* note 95 and accompanying text.

[175] EEC Treaty art. 48 (as in effect 1957) (now article 39), *supra* note 31, *see also* Case C-388/01, Commission v. Italy, 2003 E.C.R. I-721, ¶ 19.

[176] Miettinen & Parrish, *supra* note 12, ¶ 14.

[177] *Commission White Paper on Sport, supra* note 153, at 4.1.

[178] Kranz, *supra* note 60, at 447.

[179] Rachel B. Arnedt, *European Union Law and Football Nationality Restrictions: The Economics and Politics of the Bosman Decision*, 12 EMORY INT'L L. REV. 1091, 1128 (1998).

[180] Case 352/85, Bond van Adverteeders v. Netherlands, 1998 E.C.R. 2085, ¶ 34, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61985J0352:EN:NOT (describing Article 56 public policy grounds, but applicable by analogy to Article 39).

[181] PROF. DR. JÜRGEN GRAMKE, INST. FOR EUROPEAN AFFAIRS, EXPERT OPINION ON THE COMPATIBILITY OF THE "6+5" RULE WITH EUROPEAN COMMUNITY LAW (SUMMARY) (2008), *available at* http://inea-online.com/download/regel/gutachten_eng.pdf.

the professional footballer but applies to the qualification for the national team."[182] This is a weak argument that is based on the fact that players who are not from a certain nation can eventually gain national team eligibility,[183] as has happened with several Brazilian players. Some players, depending on the nation, may also have eligibility if they have ancestors from that nation. Despite these possibilities, this occurs in such a minute percentage of players on national teams that this rule cannot legitimately be claimed to only be indirect discrimination on this basis. The opinion continues by arguing that the "6+5" rule could be justified even if it is direct discrimination, but does so without recourse to the three treaty exceptions. It has already been established that the exceptions in Article 39(3) are the only justifications that can legitimize direct discrimination. By ignoring this requirement, the opinion fails to make a legitimate case for the compatibility of the "6+5" rule with EU law.

Despite the likelihood that it is incompatible with EU law, the FIFA Congress voted 155-5 in favor of the objectives of the "6+5" rule on May 30, 2008, with the objective of implementing it gradually over a three-season period beginning with the 2010-2011 season.[184] UEFA President Platini stated to the Congress that "6+5" is illegal within the EU but that UEFA supports the objectives and will work with FIFA to try to make it palatable to the EU.[185] FIFA is hoping that through consultation with the European Union, they can work out a way to make this proposal legal, potentially when the Treaty of Lisbon comes into effect, with its acknowledgement of the specificity of sport. However, the European Parliament has also asked FIFA to do away with the "6+5" proposal and back the homegrown player rule instead.[186] Ivo Belet, a Member of the Sports Committee, said that FIFA is trying to get clubs to invest in homegrown players, which is a goal that the European Parliament supports, but that the "6+5" rule is simply not compatible with EU law.[187] Overall, the "6+5" rule cannot be construed as compatible with EU law due to the fact that it is direct discrimination based on nationality of the same type that was ruled illegal by the European Court of Justice in *Bosman*.

F. Potential Alternatives

Besides the modifications to the homegrown player rule suggested in part V(D) above,[188] there are other alternative methods for UEFA and FIFA to accomplish their goals of maintaining competitive balance, encouraging the education and training of young footballers, strengthening club identity, and improving the talent pool for national team selection. The first option is to institute a revenue sharing procedure, particularly when it

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[182] *Id.* at 14.

[183] FIFA STATUTES: REGULATIONS GOVERNING THE APPLICATION OF THE STATUTES, May 2008, arts. 15-18 (p.62) (national eligibility regulations).

[184] *FIFA Congress Supports Objectives of 6+5*, *supra* note 139.

[185] *Id.*

[186] EPPGROUP.COM, *Press Release: White Paper on Sports: The European Parliament Asks FIFA to Abolish "6+5" Rule* (May 7, 2008), *available at* http://www.epp-ed.eu/Press/showpr.asp?PRControlDocTypeID=1&PRControlID=7374&PRContentID=12856&PRContentLG=en.

[187] *Press Release: White Paper on Sports: The European Parliament Asks FIFA to Abolish "6+5" Rule*, *supra* note 186 ("The '6+5' rule is not compatible with the free movement of persons in the EU. The European Treaty is very clear on this point: discrimination on the basis of nationality is not allowed; this also counts for football. With the '6+5' rule, FIFA is going back to the era before the Bosman verdict." (quoting Ivo Belet MEP, Member of the Sports Committee)).

[188] *See supra* Part V.D.

comes to television revenue.[189] There already is a revenue sharing aspect to European football, especially in the Premier League where there is a league-wide television contract with the league distributing the proceeds.[190] However, UEFA's attempts to do this were until recently restricted by the constant threat of the top clubs to break away from UEFA and form their own European Super League,[191] which would have kept a significant percentage of revenue away from UEFA altogether. A revenue sharing program would at least have the effect of helping to maintain competitive balance by somewhat equalizing revenue streams. It could also have the secondary effect of encouraging investment in youth training academies as top clubs would have smaller revenue streams with which to purchase transfer players, and send them looking for cheaper talent.

A second option would be to institute a salary cap. This might run afoul of Article 81 as a restriction of competition, but it could be argued that the cap would be an inherent rule and thus free from the scope of Article 81.[192] However, as we have seen in the United States, salary caps in professional sports can take on a wide variety of forms and have a variety of effects. Another interesting option, especially to encourage the training of young players, is to require each club to run a youth development program. UEFA already has such a requirement, but it could be toughened in order to make it more effective. UEFA could be more stringent in what qualifies as an approved program. It could also institute a minimum floor on spending on these academies. This would certainly have an impact on the training of young players and through this, would impact the national team talent pool, although it would not be likely to have a huge impact on competitive balance.

G. Treaty of Lisbon Changes to Sport in the EU (Article 165)

The recently signed Treaty of Lisbon has some changes that have an impact on sports in the European Union. Article 165 of the Treaty of Lisbon states: "The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport."[193] This is the first time that the EU Treaty has ever explicitly mentioned sport, and it may make EU institutions more prone to incorporate sports into their decisions. It does not mean that sports are exempt from EU law, but rather that the uniqueness of sports will permit the continuing application of the analysis of sports rules as being either "purely sporting," under EU law but with the potential to be objectively justified, or prohibited by EU law.[194] However, since the Treaty of Lisbon has not been ratified yet, there is no way to tell what the actual impact of this will be, and how the European Court of Justice will interpret these new treaty provisions.

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[189] Miettinen & Parrish, *supra* note 12, ¶ 28.

[190] BBC.COM, *BSkyB Snatches Setanta TV Rights*, Feb. 6, 2009, *available at* http://news.bbc.co.uk/2/hi/business/7875478.stm; *see also* Official site of the Barclay's Premier League – FAQs, http://www.premierleague.com/page/Faqs/0,,12306,00.html (describing how television revenues are divided among clubs).

[191] The G-14 which consisted of 18 (14 originally) leading European clubs threatened multiple times to break away from UEFA, mostly over issues with Champions League format. This was disbanded in January 2008, to be replaced by a more representative body, the European Club Association (ECA). It should be noted that at the first meeting of the ECA it rejected FIFA's "6+5" rule. John Ashdown, *Europe's Top Clubs Oppose Blatter's '6+5' Quota Plans*, THE GUARDIAN, Jul. 8, 2008, *available at* http://www.guardian.co.uk/football/2008/jul/08/3.

[192] Miettinen & Parrish, *supra* note 12, ¶ 29.

[193] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Dec. 13, 2007, 2008 O.J. (C 115) 51, art.165(1), *available at* http://eurlex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:EN:HTML [*hereinafter* Treaty of Lisbon].

[194] Marios Papaloukas, *Policy, European Sports Law, and Lex Sportiva*, 14TH WORLD I.A.S.L CONGRESS, Nov. 27-29, 2008, *available at* http://ssrn.com/abstract=1357783.

VI. CONCLUSIONS

The *Bosman* decision sent a ripple effect through European football that combined with the explosion of television rights fees, the rise of the Internet, and the globalization of the world economy to completely transform European club football. FIFA and UEFA are right to be concerned with the seeming stagnation of club competitions where the same clubs dominate every single year,[195] with few notable exceptions. The most successful sport in America is the NFL, and its success is very much due to the level of parity in the sport. A huge percentage of the teams have a shot every season at making the playoffs. In the Premier League, for example, it was widely known going into this season that there were only four clubs with a realistic shot at the title (Arsenal, Chelsea, Liverpool, and Manchester United) and that those four teams would finish in the top four spots. Thus, they would qualify for the Champions League again next year, just as many of them did the year before. Unsurprisingly, with only three matches to go in the season,[196] those four teams have a stranglehold on the top four spots. There is no indication that this cycle of dominance will break any time soon, and it is much the same in many other top-flight European leagues.[197]

It is understandable that FIFA and UEFA would resort to roster restrictions to try to improve the level of parity in their sport. However, as reasonable as it may sound, it cannot be done in violation of European Union law. *Bosman* made it clear that direct discrimination based on nationality is in violation of Article 39. Since FIFA has no recourse to Article 39(3) exceptions based on public policy, public health, or public safety, this makes the "6+5" rule incompatible with EU law, and, therefore, impossible to implement. UEFA's homegrown player rule has a chance at being considered legal since it only constitutes indirect discrimination but surviving the *Gerhard* test for objective justification is not an easy task, especially since the rule does have significant discriminatory effects. By reducing those effects with modifications like extending the age range or allowing long-term membership in a national association to eventually qualify a player for homegrown status even beyond the proffered age range, UEFA can make its rule more palatable to the European Court of Justice.

As it stands right now, the homegrown player rule would have a difficult time surviving a legal challenge based on the principles of *Bosman* and *Gerhard*. No such challenge has occurred yet. However, it is nearly a given that a challenge would be brought almost immediately against the "6+5" rule if FIFA tries to go ahead and implement it.[198] In

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[195] In the 2008-2009 UEFA Champions League the four semi-finalists have the same nationality breakdown (3 English, 1 Spanish) as in the 2007-2008 UEFA Champions League semi-finals. They also consist of three of the same teams (Manchester United, Chelsea, Barcelona) and Arsenal with last year's fourth semi-finalist (Liverpool) being eliminated by Chelsea, in a reversal from last season's semi-final match.

[196] As of May 5, 2009 (4 matches remaining for Manchester United and Wigan Athletic).

[197] Spain – (Barcelona, Real Madrid, Villareal), Italy – (Internazionale, Juventus, AC Milan), France – (Lyon, Bordeaux, Marseilles), Portugal – (Sporting Lisbon, FC Porto), Scotland – (Glasgow Rangers, Glasgow Celtic), etc.

[198] FIFA appears to be acknowledging the difficulty it might have implementing this rule in Europe. On 6/3/2009, Sepp Blatter announced that FIFA was delaying their implementation of the "6+5" rule by a year to further investigate the legality of the proposed rule under EU law. FIFA is also hoping that the eventual ratification of the Treaty of Lisbon would help their case. ESPN.COM, *FIFA Hold Fire on Blatter's "6+5" Plan*, Jun. 3, 2009, http://soccernet.espn.go.com/news/story?id=652475&sec=global&cc=5901 (last visited Jun. 19, 2009) ("The Treaty of Lisbon, if ratified would give sport a special status that could allow players to be exempt from labor laws. 'If we get that by end of year – then next year we will be able to announce that we were on the right path and can begin implementing it.'" (quoting FIFA President Sepp Blatter)).

the process, that challenge could take down the homegrown player rule as well. The FIFA Congress and Sepp Blatter have placed the organization on a collision course with the European Union, and they are getting themselves into a fight that they cannot win without significant changes to either EU law or to the rule itself.

The Times they are a Changing: Secondary Ticket Market Moves from Taboo to Mainstream

DANIELLE MOORE*

ABSTRACT

The secondary ticket market provides a means for fans to attend already sold out games. Traditionally, it was the scalper standing outside the stadium who obtained the benefit of high demand events by reselling tickets at prices above face value. While such activity was previously strictly patrolled by the states, a trend toward relaxed regulation has emerged. This note provides an analysis of state regulation of ticket sales on the secondary market, as well as traditional and modern responses of teams and leagues to the resale of their tickets. This analysis shows that the secondary ticket market has gained acceptance and legitimacy through state deregulation and through the move by teams and leagues to become active participants in the secondary ticket market. Instead of merely placing restrictions on the resale of tickets, teams and leagues have come to embrace and profit from this resale, teaming up with secondary ticket providers to create official resale platforms. Efforts by teams and leagues to move the resale of tickets away from street scalpers and unofficial secondary ticket providers, in addition to providing a new source of revenue, have allowed teams and leagues to exercise control over the resale of their tickets, while simultaneously supporting the view that the resale of tickets on the secondary market is now a legitimate, mainstream practice.

SUMMARY

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I. INTRODUCTION

Any sports fan wanting tickets to the "big game" knows that the first place to look is no longer Ticketmaster.[1] If tickets went on sale at noon, and it is now half past the hour, those tickets are long gone. The contemporary sports fan also knows that he no longer needs to find a street scalper outside the stadium to buy tickets either. Instead, his best bet is to purchase them online at StubHub, TicketsNow, or any other secondary ticket reseller, where he or she can find tickets at escalated resale prices. As long as he is willing to pay the price, he is guaranteed to find tickets still available.

While previously shunned as "scalping", the resale of tickets at a price above face value has since become mainstream practice.[2] Wherever or whenever the initial sale takes place, tickets are quick to make their way to the secondary resale market.[3] While labeled anything from the free market at work to exploitation,[4] the secondary ticket market is filling consumer demands while continuing to demonstrate rapid growth, even despite recent economic downturns.[5]

The days of strict regulation through anti-scalping legislation are apparently gone.[6] Anti-scalping legislation was originally enacted to serve several purposes. First, legislation was enacted to protect fans from having to pay extortionate ticket prices.[7] Second, it was aimed at preventing the harassment of fans by street scalpers.[8] Finally, legislation was deemed necessary to prevent fans from being duped into buying counterfeit tickets.[9]

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[1] Ticketmaster holds the exclusive rights to "primary ticket distribution services or primary-ticketing services for 26 of 30 NBA teams, 31 of 32 NFL teams, 26 of 30 NHL teams, and the vast majority of major venues and professional sport franchises." Ticketmaster L.L.C. v. RMG Tech., Inc., 536 F. Supp. 2d 1191, 1193 (C.D. Cal. 2008) (internal quotation marks omitted).

[2] *See infra* Parts II, IV.

[3] *See, e.g., infra* text accompanying notes 82-85.

[4] Jasmin Yang, *A Whole Different Ballgame: Ticket Scalping Legislation and Behavioral Economics*, 7 VAND. J. ENT. L. & PRAC. 110, 111 (2004).

[5] *Seatwave Continues to See Strong Secondary Ticket Sales*, TICKETNEWS, Nov. 6, 2008, http://www.ticketnews.com/node/4285.

[6] *See infra* Part II.

[7] Jonathan C. Benitah, *Anti-Scalping Laws: Should They be Forgotten?*, 6 TEX. REV. ENT. & SPORTS L. 55, 63 (2005); Paul J. Criscuolo, *Reassessing the Ticket Scalping Dispute: The Application, Effects and Criticisms of Current Anti-Scalping Legislation*, 5 SETON HALL J. SPORTS & ENT. L. 189, 199 (1995) (noting that anti-scalping legislation supporters seek to prevent "gouging of ticket prices").

[8] Benitah, *supra* note 7, at 65.

[9] Scott D. Simon, *If You Can't Beat 'Em, Join 'Em: Implications for New York's Scalping Law in Light of Recent Developments in the Ticket Business*, 72 FORDHAM L. REV. 1171, 1209 (2004). It should be noted, however, that incidents of counterfeit tickets are still prevalent. *See, e.g.*, Alfred Branch, Jr., *Hundreds of Texas Tech Football Fans Scammed by Counterfeit Tickets*, TICKETNEWS, Nov. 3, 2008,

However, with the rise of the Internet, street scalping is now the smallest part the ticket resale industry.[10] While anti-scalping legislation proved notoriously difficult to enforce prior to online sales, Internet ticket reselling simply exacerbated the problem of the impracticalities of enforcement, such that many anti-scalping laws have consequently been repealed.[11] State deregulation of ticket resales, combined with the under-pricing of tickets for primary sale, has opened the door for further expansion of the secondary ticket market.

This note examines the methods by which teams and leagues have become involved in the secondary ticket market. Part I examines the current state of anti-scalping legislation. Part II examines attempts made by organizations to restrict the secondary ticket market by limiting ticket resale opportunities. Part III discusses methods by which teams and leagues have become active participants in the secondary ticket market. Finally, Part IV examines the future of the secondary ticket market in light of recent calls for increased restrictions on the resale market, league-wide agreements with secondary ticket resellers, and the use of paperless ticketing technology.

II. ANTI-SCALPING LEGISLATION

States take a variety of approaches in regulating the resale of tickets on the secondary market.[12] Some states establish strict regulation of the resale of tickets that are priced in excess of the face value.[13] In contrast, other states place limited or no restrictions on the resale price of tickets.[14] Many states seek a middle ground by imposing some requirements, including geographic and service fee restrictions.[15] Even if ticket resale is not regulated at the state level, cities often adopt ordinances placing restrictions on the market.[16]

Some states continue to maintain strict regulation on the resale of tickets. For example, Michigan prohibits resale by those who do not have the express permission of the operator to do so.[17] Similarly, Massachusetts prohibits the resale of tickets by anyone not holding a license.[18] Further, those licensed to resell tickets may do so for no more than two dollars above the face value of the ticket.[19] Likewise, Florida prohibits ticket resales exceeding face value by more than one dollar.[20] Thus, while some states continue to strictly regulate the resale prices of tickets, such restrictions are becoming increasingly uncommon, as "ticket resales are freely permitted in all but a handful of states."[21]

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http://www.ticketnews.com/Hundreds-of-Texas-Tech-football-fans-scammed-by-counterfeit-tickets118345 (reporting that about 500 fans bought counterfeit tickets, which displayed duplicated barcodes to other tickets already sold).

[10] Daniel J. Glantz, *For-Bid Scalping Online?: Anti-Scalping Legislation in an Internet Society*, 23 CARDOZO ARTS & ENT. L.J. 261, 262 (2005).

[11] Benitah, *supra* note 7, at 68-69; Criscuolo, *supra* note 7, at 214-17.

[12] *See infra* notes 13-24 and accompanying text.

[13] *See infra* notes 17-21.

[14] *See infra* note 23.

[15] *See infra* text accompanying notes 22-23.

[16] *See infra* notes 25-29 and accompanying text.

[17] MICH. COMP. LAWS § 750.465 (2008) (dictating that if the ticket is sold at a location other than the box office, the owner must print the charge in excess of the box office price on the face of the ticket, along with a disclaimer that the ticket can be purchased without the excess charge at the box office).

[18] MASS. GEN. LAWS ANN. ch. 140, § 185A (2008).

[19] *Id.* at § 185D.

[20] FLA. STAT. ANN. § 817.36 (West 2008).

[21] Eric Fisher, *Vertix to Brokers: Data is Now Part of the Deal*, STREET & SMITH'S SPORTS BUS. J., at 11 (Aug. 4, 2008), http://www.sportsbusinessjournal.com/article/59725.

Instead, the move is towards decreased regulation of maximum resale prices. For example, New York no longer places a maximum resale price restriction on tickets, but rather imposes licensing restrictions on those in the business of reselling tickets.[22] Similarly, while Illinois law deceptively states that the "sale of tickets at more than face value is prohibited," that statement is then extensively modified by a series of exceptions, including sales by authorized ticket brokers, Internet auctions, non-profit organizations, and websites (if the operator has a business address in Illinois).[23] Some states do not regulate the secondary ticket market at all.[24]

Notwithstanding a lack of state regulation, municipalities can enact ordinances to control the secondary ticket market.[25] However, many cities with prohibitions against ticket resales are moving towards deregulation of the market as well. For example, while Wisconsin state law does not prohibit ticket reselling, the city of Green Bay previously did.[26] However, the city recently adopted an ordinance that allows for the resale of Green Bay Packers' tickets by ticket brokers holding an appropriate permit in a specific geographic area.[27] Similarly, Oklahoma City has considered allowing an increased resale price for tickets to the Oklahoma City Thunder games.[28] Likewise, an Arlington, Texas ordinance allows organizers to resell, and authorize others to resell, their tickets at any price.[29] Therefore, while cities may still impose additional restrictions on the resale of tickets, many are choosing not to regulate, instead favoring free market forces.

State and municipal deregulation removes price controls, letting the free market work. A 2006 survey analyzing the effects of anti-scalping laws on the resale of National Football League (NFL) tickets revealed that when the home team was in a state with stricter ticket resale restrictions, fewer online resale transactions took place, and resale mark-ups were greater.[30] For example, 225 fewer NFL tickets per game were resold on eBay during the survey period when the home team had resale licensing requirements as opposed to a free market system.[31] Similarly home teams in states prohibiting resale above face value sold approximately 500 less tickets per game than those in free market states.[32] Further statistical analysis suggested that states with strict anti-scalping laws push online transactions out-of-state, which increases transactional costs, and results in increased costs being passed to consumers by way of higher resale ticket prices.[33]

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[22] *See* N.Y. ARTS & CULT. AFF. LAW § 25.01 et seq. (McKinney 2007); *see generally* Andrew Kandel & Elizabeth Block, *The "De-Icing" of Ticket Prices: A Proposal Addressing the Problem of Commercial Bribery in the New York Ticket Industry*, 5 J.L. & POL'Y 489 (1997).

[23] 720 ILL. COMP. STAT. ANN. 375/1.5 (LexisNexis 2010).

[24] For example, Colorado, Ohio and Texas, all states with multiple professional sports teams, do not regulate the secondary ticket market.

[25] *See, e.g.*, DENVER, COLO. REV. CODE § 7-293, 7-294 (2008) (stating that tickets to athletic events and other entertainment performances bought or sold at a premium over the regular price are void).

[26] Daniel W. Elfenbein, *Do Anti-Ticket Scalping Laws Make a Difference Online? Evidence from Internet Sales of NFL Tickets*, SOC. SCI. RES. NETWORK, June, 30, 2006, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=595682.

[27] GREEN BAY, WIS. MUN. CODE § 6.12 (2008).

[28] Alfred Branch, Jr., *Oklahoma City Considers Scalping Law Changes*, TICKETNEWS, Oct. 29, 2008, http://www.ticketnews.com/Oklahoma-City-considers-scalping-law-changes1082905. Currently, Oklahoma City prohibits the sale of tickets in excess of the printed face value, allowing only a $0.50 service fee for mailing expenses. *See* OKLA. CITY, MUN. OKLA. CODE § 7-132 (2007).

[29] ARLINGTON, TEX. CODE § 15.05 (2008).

[30] Elfenbein, *supra* note 26.

[31] *Id.*

[32] *Id.*

[33] *Id.*

As an alternative to relying on state and municipal regulation, teams and leagues have taken matters into their own hands, either by placing restrictions on the resale of tickets or by getting involved and profiting from ticket resales.[34]

III. REDUCING TICKET RESALE OPPORTUNITIES

Using a variety of approaches, several attempts have been made by organizations to reduce the opportunities available for third parties to capitalize on the resale of their tickets.

The most common practice employed by organizations is to print restrictions on the actual ticket, stating that the ticket may not be provided for resale.[35] It has long been established that tickets to entertainment performances are nothing more than revocable licenses.[36] By providing effective notice of the restrictions on resale and transferability, such restrictions, presuming they are reasonable, are consistently enforced.[37] While theoretically the characterization of a ticket as a revocable license is an appealing concept, practical enforcement of resale restrictions is difficult. Tickets are often transferred among individuals, and organizations have no way of tracking whether such transfers were made by gift, sale for face value, or sale above face value. Further, enforcement against individual violators consumes significant resources, while only marginally furthering the organization's goal of preventing widespread resale of its tickets.

Historically, cases involving the resale of tickets were primarily brought by ticket brokers who were challenging the constitutionality of ticket resale restrictions.[38] While case law involving the conduct of ticket brokerages is limited, a few cases are particularly relevant. In *McBride's Theatre Ticket Office, Inc. v. Moss*, the court held that the brokerage's license was subject to suspension or revocation, as the delivery charge for theater tickets imposed was merely an attempt to circumvent restrictions on the maximum premium price for which the tickets could be resold.[39] Similarly, in *People v. Concert Connection, Ltd.*, the court held the president of a Connecticut corporation, Concert Connection, liable for violating the New York statute prohibiting the resale of tickets to events held in New York priced in excess of the maximum premium price.[40]

Recently, several teams have taken a hard stance against the resale of tickets, primarily focusing on ticket resales by season's ticket holders. For example, in *NPS, L.L.C. v. StubHub, Inc.*, the New England Patriots brought suit to compel StubHub to produce the names of individuals who sold tickets to the Patriots' home games through StubHub.[41] The Superior Court of Massachusetts held that StubHub was required to provide the Patriots with the user list.[42] While the Patriots have not yet acted, the team previously stated its

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[34] *See infra* notes 35-63.

[35] Anthony J. Dreyer & Mitchell P. Schwartz, *Whose Game is it Anyway: Sport Teams' Right to Restrict (and Control) Ticket Resale*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 753, 767 (2007).

[36] *Id.* at 766.

[37] *Id.* at 766-71.

[38] *See e.g.*, Gold v. DiCarlo, 235 F. Supp. 817 (S.D.N.Y. 1964) (involving a class action by ticket brokers to enjoin enforcement of N.Y. GEN. BUS. LAW § 167-c, which made it unlawful to resell tickets for entertainment events for more than $1.50 above face value, under the Fourteenth Amendment).

[39] 54 N.Y.S.2d 883, 893 (N.Y. Sup. Ct. 1945).

[40] 629 N.Y.S.2d 254, 255-56 (N.Y. Sup. Ct. 1995); *see also* People v. Rosenblatt, 667 N.Y.S.2d 886, 887, 890 (N.Y. Sup. Ct. 1997) (affirming the indictment of defendants, owners of Tickets on Request, a ticket brokerage company, for among other things, selling tickets above the permitted maximum premium price).

[41] 22 Mass L. Rptr. 717, 717-18 (Sup. Ct. 2007).

[42] *Id.* at 722.

purpose for obtaining the user list was to cancel the season tickets of these users.[43] Similarly, in 2006, the New York Yankees took a no-tolerance approach to resales by cancelling the season tickets of those fans found reselling their tickets.[44] The organization refused to "tolerate scalping or reselling of tickets in any manner at any time."[45] In addition, despite Major League Baseball's (MLB) recent resale agreement with StubHub, the Boston Red Sox ticket policy continues to provide that any tickets purchased for the purpose of resale on the secondary market may be revoked.[46] The Red Sox mitigate this strict rule by providing that if one is unable to attend a game, he/she should use licensed entities to sell the tickets, in compliance with Massachusetts law.[47]

The issue of ticket resale is also prevalent outside the United States. For example, in the United Kingdom (UK), "[i]t is an offence for any unauthorised person to sell a ticket for a designated football match, or otherwise to dispose of such a ticket to another person."[48] The focus of such a provision is primarily on the issue of public order, rather than access to tickets.[49] "Ticket touting" is a strict liability criminal offense.[50] Thus, while the resale of English Premier League tickets is prohibited, the teams allow season ticket holders to dispose of tickets they are unable to use through ticket exchanges.[51]

The most logical, but perhaps most difficult approach to reducing opportunities for third parties to resell tickets is to increase the price of tickets for primary sales, thus decreasing the range between the face value of the ticket and market value of the ticket.[52] Many teams have adopted variable ticket pricing methods in an attempt to price tickets according to demand.[53] Variable ticket pricing allows teams to set higher primary ticket prices for high demand games, as determined by the rival team, the day of the week, time of day, and other factors.[54] However, teams have traditionally had a difficult time determining the market value of such tickets.[55] Out of fear that raising prices will result in games that are not sold out and a decrease in revenue from other sources, such as concessions, teams are reluctant to raise prices.[56] However, some organizations are taking the chance. For example, some 2009 Super Bowl premium tickets had a face value of over $1000.[57]

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[43] *Id.* at 718.

[44] Dreyer & Schwartz, *supra* note 35, at 776-79.

[45] Alfred Branch, Jr., *Yankees Urged to Stop Canceling Tickets*, TICKETNEWS, Mar. 21, 2007, http://www.ticketnews.com/Yankees-Urged-to-Stop-Canceling-Tickets. Recent amendments to New York scalping law eliminate such conduct by "prohibiting operators of places of entertainment from placing restrictions on their fans regarding the resale price and method of resale for tickets... This legislation would prohibit the venues from revoking season tickets or the contractually agreed upon right of first refusal to purchase future tickets when such revocation is based solely on the basis of resale." Assem. A07526, 2007 Leg., Reg. Sess. (N.Y. 2007).

[46] Boston Redsox, Red Sox Ticket Policies, http://boston.redsox.mlb.com/bos/ticketing/ticket_policies.jsp (last visited Mar. 3, 2010).

[47] *Id.*

[48] Violent Crimes Reduction Act, 2006, c. 38, § 53 (Eng.).

[49] Steve Greenfield et al., *Contradictions Within the Criminalisation of Ticket Touting: What Should be the Role of the Law?*, 3 Web J. CURRENT LEGAL ISSUES (2008), *available at* http://webjcli.ncl.ac.uk/2008/issue3/greenfield3.html.

[50] *Id.*

[51] *See e.g.*, Chelsea FC Viagogo Ticket Exchange, http://chelseafc.viagogo.co.uk (last visited Mar. 3, 2010); *see also* Manchester United Ticket Exchange, http://manutd.viagogo.com (last visited Mar. 3, 2010).

[52] *See* Yang, *supra* note 4, at 122,-23 ("One approach is for clubs to try to gauge the primary ticket market more accurately in order to decrease the amount of secondary resale by ticket brokers.").

[53] *Id.* at 123; Simon, *supra* note 9, at 1201-02.

[54] Simon, *supra* note 9, at 1201.

[55] *Id.* at 1179.

[56] *Id.* at 1181.

[57] Alfred Branch, Jr., *Super Bowl Tickets Reach the $1,000 Threshold*, TICKETNEWS, Oct. 16, 2008, http://www.ticketnews.com/Super-Bowl-tickets-reach-threshold10816781.

Recognizing that last year's Super Bowl tickets sold for more than $2000 on the secondary market, one broker thinks that NFL officials plan to squeeze out the secondary market by reducing the differential between the face value and the market value of the tickets.[58]

Another method used to reduce opportunities to resell tickets is the use of auctions for the primary sale of tickets. While primary sales of tickets above face value are strictly forbidden, an exception is often made for tickets sold by way of auction.[59] For example, in 2001, the Seattle Mariners established its "Ticket Marketplace," which allowed season ticket holders to resell their tickets via auction.[60] However, in addition to this ticket exchange, the Mariners also made direct primary sales through the Ticket Marketplace, whereby the primary ticket sale was made through an auction to the highest bidder.[61] To escape the restriction that the primary sale could not exceed the face value of the ticket, the ticket did not have a printed face value until sold, at which time the face value of the ticket was printed as the agreed upon sale price determined by the highest bidder.[62] This method allowed "consumers themselves to determine the value of the ticket."[63]

While various attempts have been made to reduce the opportunities for third parties to profit from the resale of tickets, teams and organizations have also apparently recognized the opportunity presented by the secondary ticket market to increase revenues. Thus, even prior to league-wide decisions to team-up with secondary ticket resellers, individual teams and organizations were making attempts to become active participants in the secondary ticket market.[64]

IV. ACTIVE PARTICIPATION IN THE SECONDARY TICKET MARKET

Instead of merely preventing third parties from capitalizing on the resale of tickets, organizations have sought ways to personally benefit from ticket resales. "Whereas in the past, teams vigorously opposed ticket reselling, they have now opted to benefit from the resale of tickets. Consequently the number of teams that have contracts with secondary ticket services has increased exponentially in recent years."[65]

One common approach that individual teams and organizations have taken is to enter into agreements with third party vendors and allow the vendors to resell the tickets, whereby the team obtains a percentage of the resale price.[66] Other teams have opted to obtain a flat fee from such third parties instead of a percentage of the ticket resale price.[67]

Teams and organizations also provide ticket exchanges through which season ticket holders can sell unused tickets legitimately.[68] Ticket exchanges allow sellers to post tickets

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58 *Id.*

59 *See e.g.*, N.Y. ARTS & CULT. AFF. LAW § 25.29(1) (McKinney 2008) ("[N]othing in this article shall be construed to prohibit an operator or its agent from offering for initial sale tickets by means of an auction.").

60 Glantz, *supra* note 10, at 270-71. The Mariners' took percentages from both the buyer and seller engaged in any transaction on its Ticket Marketplace.

61 *Id.* at 270.

62 *Id.*

63 Yang, *supra* note 4, at 124.

64 *See infra* notes 65-80.

65 Dreyer & Schwartz, *supra* note 35, at 780.

66 *Id.* at 782.

67 *Id.* at 781-82.

68 *Id.* at 783.

at prices equivalent to the face value of the ticket,[69] and, depending on the state and local law, potentially at a price greater than face value.[70] While ticket exchanges only allow sales from season ticket holders, non-season ticket holders may buy tickets.[71] Organizations beyond teams in the big four leagues are also getting involved in the secondary ticket market through the use of ticket exchanges.[72] For example, in the summer of 2008, the United States Tennis Association (USTA) announced an agreement with TicketsNow to provide a ticket exchange for the resale of US Open tickets.[73]

In 2002, the Chicago Cubs took a different approach when its then owner, the Tribune Company, created Wrigley Field Premium Ticket Services (Premium), a ticket broker licensed under the laws of Illinois.[74] The Cubs withheld tickets from the public, instead selling them directly to Premium, which then sold the tickets at escalated resale prices.[75] Fans brought suit claiming that the transfer of tickets to Premium did not constitute a sale, such that Premium's sale was a primary sale valued above the face value of the ticket as prohibited by Illinois scalping law.[76] However, the court held a sale had occurred when money was transferred between the two companies' bank accounts, such that Premium's sale constituted an authorized resale as permitted by state law.[77] While convinced that if they were successful other teams would soon follow,[78] due to substantial negative publicity, the Cubs are the sole team to have opened their own ticket brokerage.[79] While the Cubs were simply following the lead of the Broadway show "The Producers" where the producers of the hit Broadway classic open up a ticket brokerage, Broadway Inner Circle, to resell Broadway tickets at an unprecedented price of $480,[80] the Cubs learned that "[t]he problem . . . is the public relations aspect."[81]

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[69] *See e.g.*, Chicago Bulls TicketExchange by Ticketmaster, http://www.nba.com/bulls/tickets/ticket_exchange.html (last visited Mar. 3. 2010) (permitting the sale of tickets for "face value or above").

[70] *See supra* text accompanying notes 12-34.

[71] *See e.g.*, Toronto Raptors TicketExchange by Ticketmaster, https://teamexchange.ticketmaster.com/html/eventlist.html?l=EN&team=raptors (last visited Mar. 3. 2010) ("TicketExchange members can get tickets for some of the best seats in the house by buying directly from Toronto Raptors Season Seat Holders!").

[72] The "big four leagues" referred to include the National Football League (NFL), National Hockey League (NHL), National Basketball Association (NBA), and Major League Baseball (MLB).

[73] Press Release, Ticketmaster, Tennis Fans Turn to TicketsNow for US Open Tickets (Aug. 18, 2008), *available at* http://investors.ticketmaster.com/releasedetail.cfm?ReleaseID=330253 (last visited Mar. 3. 2010). However, no other Grand Slam tournament permits the resale of tickets. *See e.g.*, Wimbledon Website, Spectators - Buying Tickets: Conditions of Sale, http://www.wimbledon.org/en_GB/about/tickets/conditions_sale.html (last visited Mar. 3. 2010) ("Tickets shall not be resold or transferred ... and shall not be purchased or obtained from or through any person, commercial agent, company or otherwise than directly by the applicant from the Club....").

[74] Dreyer & Schwartz, *supra* note 35, at 786.

[75] *Id.*

[76] Cavoto v. Chi. Nat. League Ball Club, Inc., No. 1-03-3749, 2006 WL 2291181, at *8 (Ill. App. Ct. July 28, 2006).

[77] *Id.* at *8, *10.

[78] Simon, *supra* note 9, at 1171 ("If we win, and I expect we will, I think that many more teams will be doing this.") (citation omitted).

[79] Christine Palul, *Super Scalpers: Teams with Vision,* TICKETNEWS, Aug. 15, 2006, http://www.ticketnews.com/Super-Scalpers-Teams-with-vision.

[80] Jesse McKinley, *For the Asking, a $480 Seat*, N.Y. TIMES, Oct. 26, 2001, *available at* http://www.nytimes.com/2001/10/26/theater/for-the-asking-a-480-seat.html. At the time, New York scalping law set a maximum percentage price restriction for resale of tickets. The tickets had been set at an escalated primary price of $400, and then resold for the maximum resale price of $480.

[81] *Id.*

V. THE FUTURE OF THE SECONDARY TICKET MARKET

A. Increased State Regulation is Unlikely

The secondary ticket market has evolved rapidly in recent years due to significant changes involving the deregulation of ticket resales. However, pleas for the return of increased regulation can still be heard, none louder then after the 2007 Hannah Montana ticket incident. Hannah Montana tickets across the country sold out within minutes of going on sale on the primary ticket market.[82] Ticketmaster encouraged buyers to use TicketExchange, Ticketmaster's secondary resale marketplatform, to purchase tickets.[83] Parents were forced to turn to the secondary market, some paying over $1000 for their families to see the show.[84] In Missouri, additional tickets to the "sold out" concert were released to the public by Ticketmaster after a settlement with the State Attorney General.[85] The media has since put extraordinary pressure on the secondary ticket market, using the Hannah Montana tour as its platform.[86] Despite the attention, it seems unlikely that increased state regulation of the secondary market will result. While investigations in Arkansas, Pennsylvania and Missouri were conducted by the Attorney Generals of those states,[87] nothing indicates that these investigations were aimed at increasing regulation of the price of tickets sold on the secondary market. As suggested by Senator Eric Kearney, who "vowed to introduce legislation to help fans better understand event ticketing by improving the transparency of the marketplace",[88] increased transparency rather than regulation of ticket prices seems most plausible in light of the secondary market's recent mainstream presence.

Further, renewed state legislation seems unlikely, as such legislation has previously proven ineffective.[89] With the move of ticket scalping from the streets to the internet, the resale of tickets has become extraordinarily difficult to patrol.[90] Without a uniform national stance on scalping, increased prohibitions on the resale of tickets in one state simply force scalpers to relocate to a neighboring, more lenient state to conduct business.[91]

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[82] AuthorityTickets.com, *Mom Sues Over Hannah Montana Tickets*, Oct. 9, 2007, http://www.authoritytickets.com/?p=27.

[83] Alfred Branch, Jr., *NATB Responds to Ticketmaster Hannah Montana Ticketing*, TICKETNEWS, Oct. 31, 2007, http://www.ticketnews.com/NATB-Issues-Statement-Concerning-Hannah-Tickets0103107.

[84] Marco R. della Cava, *Web Scalping Boosts Ticket Prices and Frustration*, USA TODAY, Nov. 6, 2007, http://www.usatoday.com/life/music/news/2007-11-05-scalping-tickets_N.htm. Alfred Branch, Jr., *North Carolina Parent Sues TicketsNow Over "Hannah" Prices*, TICKETNEWS, Oct. 8, 2007, http://www.ticketnews.com/North-Carolina-Parent-Sues-TicketsNow0100807.

[85] News Release, Missouri Attorney General News Release, Nixon Reaches Settlement with GoTickets Inc.; Broker to Comply with Consumer Protection Laws, Pay $7,500 (Feb, 28, 2008), *available at* http://ago.mo.gov/newsreleases/2008/022808.htm; Branch, *supra* note 83.

[86] Branch, *supra* note 83.

[87] della Cava, *supra* note 84.

[88] Alfred Branch, Jr., *Investigation Sought for Hannah Montana Ticketing Mess*, Dec. 20, 2007, http://www.ticketnews.com/Investigation-Sought-for-Hannah-Montana-Ticketing-Mess0127201.

[89] *See* Glantz, *supra* note 10, at 267, 269 (finding anti-scalping laws ineffective because websites require minimal identity verification, in addition to being unclear as to which state's laws apply).

[90] *Id.*; John Helyar, *In Change of Heart, Leagues Embrace Secondary Ticket Sellers*, ESPN, Dec. 21, 2007, http://sports.espn.go.com/espn/news/story?id=3165059.

[91] Glantz, *supra* note 10 at 291-92, 297-99.

While states may choose not to regulate the resale of tickets, municipalities can impose their own restrictions.[92] For example, in March 2008, the Ticket Resale Consumer Fairness Bill was proposed as an amendment to the New York City Administrative Code, aimed at addressing the fairness concerns surrounding ticket resales.[93] The proposed legislation would require that operators of places of entertainment that receive public funding reserve a minimum of 40% of its tickets for individual buyers, publicly announce the number of tickets for sale to individual consumers, and limit the purchase of tickets to four per day for any individual consumer through all mediums of sale.[94] The legislation would substantially increase the accountability of operators, going so far as to require the number of tickets for individual sale to be printed on the face of every ticket sold.[95] However, individual municipal ordinances such as this are limited in the same way as inconsistent state legislation, simply pushing potential transgressors to move to neighboring, more lenient municipalities.

B. League-Wide Exclusive Secondary Ticket Agreements

As long as demand for tickets outpaces supply, and operators fail to equate a ticket's face value with its market value, the secondary ticket market and ticket brokers will continue to exist. In an attempt to capitalize on a part of the profit, all four major sporting leagues have recently entered into exclusive ticketing agreements with secondary ticket resale providers.[96]

The National Hockey League (NHL), National Basketball Association (NBA), and NFL all signed agreements with Ticketmaster, making Ticketmaster the official secondary ticket provider for the three leagues through its TicketExchange website.[97] However, the reach of these three agreements is limited, as individual teams "will be allowed to maintain [their] own ticketing policies as part of any secondary ticketing deal."[98] Thus, teams such as the Patriots that forbid tickets to be resold for above face value will continue such practices.[99] Teams having prior exclusive agreements with other secondary ticket providers will continue, without change, until the expiration of such agreements.[100] In fact, the NBA agreement does not provide Ticketmaster with the secondary ticketing rights to any additional teams.[101] The deal instead simply seems to increase marketing exposure.[102]

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[92] Branch, *supra* note 88 ("As a state, Ohio doesn't regulate ticket reselling, instead leaving it in the hands of municipalities. Cleveland, Cincinnati and Columbus all allow some version of reselling, such as restricting it to the internet and/or requiring a permit.").

[93] Jennifer Lee, *Hannah Montana v. Ticket Bots*, N.Y. TIMES, Mar. 11, 2008, http://cityroom.blogs.nytimes.com/2008/03/11/hannah-montana-vs-the-ticket-scalping-bots (discussing proposed NEW YORK CITY, N.Y., ADMIN. CODE § 20-811, introduced by Leroy Comrie, Queens City Councilman and Chairman of the Consumer Affairs Committee).

[94] New York City Adm' Code § 20-811 (proposed Feb. 20, 2008).

[95] *Id.*

[96] *See infra* notes 97-109.

[97] Alfred Branch, Jr., *Ticketmaster and NHL Stick a New Deal*, TICKETNEWS, Dec. 19, 2007, http://www.ticketnews.com/Ticketmaster-NHL-Stick-New-Deal0127196.

[98] *Have a Seat: Ticketmaster, NFL Close to Ticket Resale Deal*, STREET & SMITH'S SPORTS BUS. DAILY, Dec. 7, 2007, available at http://www.sportsbusinessdaily.com/article/117035.

[99] *Id.*

[100] Alfred Branch, Jr., *NFL, Ticketmaster Finalize Secondary Ticketing Deal*, TICKETNEWS, Dec. 18, 2007, http://www.ticketnews.com/NFL-Ticketmaster-Finalize-Deal01271823.

[101] Chris Woodyard, *Ticketmaster Gets Deal to Resell NBA Tickets*, USA TODAY, Feb. 25, 2007, available at http://www.usatoday.com/money/companies/2007-02-25-ticketmaster-usat_x.htm.

[102] *See id.*

However, the broader implication of these league-wide deals with secondary ticket providers is the legitimizing and mainstreaming of the secondary ticket market.[103] "[Leagues] no longer see [the secondary ticket market] as an enemy but as an ally of their own box office."[104]

MLB signed its exclusive secondary ticketing agreement with StubHub. Due to the MLB Advanced Media platform, the MLB-StubHub agreement applies to "all online secondary ticket sales through MLB sites supplanting other current secondary solutions . . . assuming all existing team enabled online secondary ticket offerings."[105] The deal requires all thirty MLB teams' online ticket resales be made through StubHub.[106] The agreement does not place restrictions on the resale of tickets by fans, but rather only on the online secondary ticketing platforms offered by teams.[107] But the reach of MLB Advanced Media comes into question as the Boston Red Sox act as the sole holdout on the deal. Instead of joining the twenty-nine other teams and allowing for the resale of its tickets through StubHub, the Boston Red Sox signed an agreement with Ace Ticket to operate as its official ticket resale agency for season ticket holders.[108] While the Red Sox claim the decision was made in the best interest of the team and the fans, such decision leaves fans without an official way to resell their tickets online.[109]

C. Paperless Ticket Technology

Since it appears that a uniform, league-wide secondary ticket platform cannot be forced upon the teams, upon expiration of current secondary ticketing agreements teams will likely look to other options which better capitalize on the potential revenues of the secondary ticket market. The most recent solution has been the use of paperless ticketing. Paperless ticketing allows fans to enter entertainment venues by use of credit card, driver's license or other identification at the gate.[110] Teams including the Houston Rockets, Colorado Rapids, and Real Salt Lake have adopted paperless, digital technology to meet their secondary market ticket resale needs, and the Colorado Avalanche, Denver Nuggets, Colorado Crush, and Colorado Mammoth are soon to follow.[111] Similarly, the University of Alabama adopted paperless ticket technology for the current year's football season.[112]

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[103] *See id.* (noting that league-wide agreements contribute to "more acceptance of the secondary ticket market as a mainstream option for fans").

[104] Helyar, *supra* note 90.

[105] Press Release, StubHub!, StubHub (an eBay Company) and MLB Advanced Media Forge Long-Term Online Secondary Ticketing Partnership (Aug. 2, 2007), *available at* http://www.stubhub.com/sites/corpsite/?gsec=news&gact=press&article_id=5510.

[106] Brad Stone & Matt Richtel, *Baseball Gets Into Resale of Tickets*, N.Y. TIMES, Aug. 2, 2007, http://www.nytimes.com/2007/08/02/business/02tickets.html.

[107] Alfred Branch, Jr., *StubHub! and MLB Strike Precedent-Setting Secondary Ticketing Deal*, TICKETNEWS, Aug. 2, 2007, http://www.ticketnews.com/StubHub-and-MLB-Strike-Precedent-Setting-Secondary-Ticketing-Deal8227.

[108] Jenn Abelson, *Sox Snub StubHub, Sign with Ace Ticket: Unlike Rest of MLB, Team Makes Resale Deal on its Own*, BOSTON GLOBE, Mar. 8, 2008, available at http://www.boston.com/sports/baseball/redsox/articles/2008/03/08/sox_snub_stubhub_sign_with_ace_ticket.

[109] *Id.*

[110] Flash Seats: Frequently Asked Questions, http://www.flashseats.com/FAQsDetails.aspx?ss=0&a=2#e1 (last visited Mar. 3, 2010).

[111] Press Release, Veritix, Flash Seats and Vertical Alliance Introduce Veritix (Jan. 30, 2008), *available at* http://www.veritix.com/news/Veritix%20Name%20Announcement%20Final.pdf; Press Release, Veritix, Kroenke Sports Enterprises to Move Ticketing Operations for Pepsi Center, Denver Nuggets and Colorado Avalanche to

Paperless ticketing is said to eliminate concerns regarding fraudulent tickets, which was also an initial goal of anti-scalping legislation.[113] "Recipients are assured that the tickets are valid, as electronic tickets cannot be duplicated or counterfeited."[114] While a paperless ticketing system eliminates counterfeit tickets and cuts costs, "it also takes away a valuable tangible memento of the game."[115] However, while teams promote paperless ticketing as beneficial to customers, it is clear that the main purpose of the paperless ticketing system is to allow "venue operators to regain control of their secondary market."[116]

It seems probable that once teams' agreements with other secondary ticket providers expire, they will turn to paperless digital ticketing providers to meet their secondary ticketing needs. Paperless ticketing allows teams to study the secondary ticket industry, know who is attending an event, know who is selling tickets, and know the price each and every ticket is resold for.[117] With this information, teams will gain the ability to accurately determine the market value of tickets and then price tickets on the primary market accordingly. In the interim, teams will be in direct control of their resale markets, as paperless tickets cannot be resold on the open market.[118] Those wanting to resell tickets may do so, but only through the paperless digital marketplace.[119] Teams are likely to move to integrated primary and secondary ticketless digital marketplaces, as "the net benefits are increased revenue streams and greater operating efficiencies, while building stronger client loyalty and creating a much better fan experience."[120]

So why aren't more teams jumping to sign with Flash Seats? First, Ticketmaster is not far behind, recently offering paperless ticket technology for primary ticket sales.[121] Second, teams may have pre-existing agreements that control the rights to their resale markets.

Ticketmaster recently announced the launch of its "Paperless Ticket" platform, planning over the next year to install "Paperless Ticket" technology at major venues around the world.[122] Its paperless technology has been tested by several musical artists this year for

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Veritix in 2009 (July 30, 2008), *available at* http://www.veritix.com/news/Veritix_&__Kroenke_Sports_Extend_Partnership.pdf; Press Release, Veritix, Real Salt Lake Soccer, Real Salt Lake Chooses Veritix as Long-Term Ticketing Services Partner (July 7, 2008), *available at* http://www.veritix.com/news/Real%20Salt%20Lake%20%20Veritix%20Release.pdf .

[112] Brian Thompson, *Univ. of Alabama Tries Paperless Ticketing*, TICKETNEWS, Apr. 28, 2008, http://www.ticketnews.com/Univ.+of+Alabama+tries+paperless+ticketing.

[113] *See* Flash Seats: The Future of Ticketing Today, http://www.flashseats.com/.

[114] Press Release, Veritix, Houston Rockets, Toyota Center Launch Veritix's *Flash Seats* Paperless Ticketing Technology During NBA Playoffs (Apr. 16, 2008), *available at* http://www.veritix.com/news/Veritix%20-%20Houston%20Rockets%20New%20Partnership.pdf.

[115] Thompson, *supra* note 112.

[116] Press Release, Paperless Ticketing Technology During NBA Playoffs, *supra* note 114.

[117] *See id.* ("[B]ecause paperless tickets exist in a virtual state, they can only change hands via a digital sale or transfer that is facilitated by the Flash Seats system, which means [teams] are able to capture information about those who actually attend the event" providing a "platform to manage their entire ticket inventory and create a relationship marketing database that includes their entire ticket-buying customer base.").

[118] *See* Veritix- What is Digital Ticketing?, http://www.veritix.com/solutions/digital_ticketing_solutions.aspx.

[119] *Id.*

[120] Press Release, Flash Seats and Vertical Alliance Introduce Veritex, *supra* note 111; *see also* Flash Seats™ Acquires Vertical Alliance™ Inc., BUSINESSWIRE, Nov. 6, 2007, *available at* http://www.businesswire.com/portal/site/google/?ndmViewId=news_view&newsId=20071106006402&newsLang=en ("Venues and teams are expected to gain revenue streams in the seven figure plus range, the ability to conduct world-class relationship marketing by building rich behavioral profiles on ticket buyers, while offering the buyer the convenience of electronically transferable, paperless venue access.").

[121] Press Release, Ticketmaster, Ticketmaster Introduces Paperless Ticket (May 13, 2008), *available at* http://www.prnewswire.com/mnr/ticketmaster/33099/.

[122] *Id.*

their concerts.[123] By offering digital ticket technology for primary ticket sales, it seems likely that Ticketmaster will follow by offering integrated primary and secondary paperless ticketing opportunities in cooperation with its subsidiary secondary ticket companies.

Notwithstanding Ticketmaster's plans for a paperless ticket system, teams' pre-existing agreements with Ticketmaster may already be expansive enough to provide Ticketmaster with the rights to their secondary ticket sales. Recently, in *Cavaliers Operating Co. v. Ticketmaster*, the United States District Court Northern District of Ohio ruled that the Cleveland Cavaliers' use of Flash Seats as a secondary ticket alternative violated the Cavaliers existing exclusive ticketing agreement with Ticketmaster.[124] The parties disagreed as to whether their Licensed User Agreement prohibited the Cavaliers from contracting with another company for technology for resale of single-game tickets.[125] The court held that "the [Licensed User Agreement] prohibited (and continues to prohibit) the Cavaliers from contracting with Flash Seats to facilitate the resale of single-game tickets originally sold as part of a season ticket package."[126] While the immediate legal implications of the decision may be narrow, affecting only those teams with similarly broad contractual language giving Ticketmaster exclusive rights to a team's secondary ticketing services,[127] the practical implications are extensive. Teams planning to renegotiate future agreements with Ticketmaster for primary ticketing services will undoubtedly bargain for narrow language, to leave open the opportunity to use alternative secondary ticket providers, at least until Ticketmaster provides an equally lucrative integrated primary and secondary paperless digital ticket platform as its competitors.

VI. CONCLUSION

While no more than two years ago discussions involving ticket reselling was primarily focused on the legality of the secondary ticket market, that inquiry has been largely settled by state deregulation of ticket resale prices, as well as the legitimization and mainstreaming of secondary ticket providers through team and league agreements. Teams and leagues have shifted the focus from restricting ticket resales to becoming active participants in the resale market. Until teams and leagues are able to accurately predict the market value for primary ticket sales, active involvement in the secondary market is the best alternative. A move to paperless ticket technology will allow teams to regain control and profit from ticket resales, simultaneously gaining information as to the market value of tickets. While changes to the secondary ticket market are likely to continue at rapid speeds, one thing is certain: "[t]he taboo of the secondary market has been all but eliminated."[128]

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[123] *See* Allison Reitz, AC/DC Tour Latest to Employ Ticketmaster's Paperless Ticket Technology, TICKETNEWS, Sep. 17, 2008, http://www.ticketnews.com/AC-DC-tour-latest-to-employ-Ticketmasters-paperless-technology09817462 (noting that artists including Tom Waits, Metallica, and AC/DC all adopted paperless ticketing for their recent tours).

[124] Nos. 07CV2317 & 08CV240, 2008 WL 4449466, at *6 (N.D. Ohio Sept. 30, 2008).

[125] *Id.* at *2.

[126] *Id.* at *6.

[127] The court noted that "[t]he Cavaliers specifically requested a ticketing system that could provide both primary and secondary ticketing services in one bundled package." *Id.* at *7.

[128] Stone & Richtel, *supra* note 106.