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THE NO-FANTASY LEAGUE: WHY THE NATIONAL FOOTBALL LEAGUE SHOULD BAN ITS PLAYERS FROM MANAGING PERSONAL FANTASY FOOTBALL TEAMS

Michael B. Engle*

INTRODUCTION

On Thursday, September 25, 2014, the visiting New York Giants of the National Football League (hereinafter “NFL”) defeated the Washington Redskins by a score of 45-14.1 The Week 4 victory was the second of the season for the Giants, and also represented a “coming-out party” for the then-obscure Giants tight end Larry Donnell.2 Donnell was credited with seven catches and seventy-seven receiving yards, while catching three touchdowns passes from quarterback Eli Manning.3 This marked the first time any Giants tight end had scored three touchdowns in a game since Joe Walton in 1962.4

Meanwhile, at some interval before Thursday the 25th, Larry Donnell was required to finalize his fantasy football roster for the upcoming week.5 Donnell had himself on his 2014 fantasy roster, and had started himself the prior week, when the Giants played against the Houston Texans.6 In Week 4, however, he elected to bench himself, instead choosing to start Vernon Davis of the San Francisco 49ers as

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* Michael B. Engle is a JD/MBA candidate at the Maurice A. Deane School of Law and the Frank G. Zarb School of Business at Hofstra University, where he anticipates graduating in December 2015. Mr. Engle serves as the Technology Editor of the Hofstra Labor & Employment Law Journal, where his Note on Nepalese slave labor in Qatar for construction on the 2022 FIFA Men’s World Cup will be published in Volume 32. Mr. Engle wishes to thank Professor Johan S. Powell for his guidance and enthusiastic support on this article, as well as his family for their unconditional love and understanding throughout the writing process.


3. Id.


6. Id.
his tight end.\textsuperscript{7} Davis had a mere two catches for eight yards.\textsuperscript{8} In hindsight, Donnell would have won the week in his fantasy league if he had started himself instead of Davis.\textsuperscript{9} The following week, Donnell started himself again and “laid a goose egg” against the Atlanta Falcons (having failed to record a catch).\textsuperscript{10} Donnell subsequently decided to bench himself for the rest of the season.\textsuperscript{11}

Donnell’s decision—namely, never to start himself on his fantasy team for the rest of the season—appears to be partially superstitious and partially to make a “win-win” situation, in which he reasoned, “I’ll bench myself in my fantasy [sic] and then everybody else will win. . . . I’ll win on Sunday and everybody else will also win on Sunday.”\textsuperscript{12} Even though Donnell may have minimized the risk of “distractions” to his locker room by shutting down his personal fantasy storyline, it is this author’s opinion that Donnell’s experiences opened a “can of worms” for the NFL. At the very least, this episode shone a spotlight on a Pandora’s box that has been open for a considerable amount of time. Donnell claims that he is a newcomer to fantasy football, and that he is only playing “for fun and bragging rights.”\textsuperscript{13} However, he quickly became aware of the other—more high-stakes—side of fantasy football, involving extensive research and big money.\textsuperscript{14}

Fantasy football has burgeoned from humble beginnings in individuals’ basements in disparate geographic areas into a $40 billion market,\textsuperscript{15} thanks in part to the Internet’s role in facilitating fantasy football league management. By its very nature, fantasy football has the potential to yield esoteric short-term changes in rooting interests that are subject to change on a week-by-week basis. A fantasy football player might be a fan of the Atlanta Falcons, but for one week, he might need New Orleans Saints quarterback Drew Brees to have a “big game” with gaudy passing statistics, if (a) said Falcons fan had

\textsuperscript{7} Id.
\textsuperscript{8} Id.
\textsuperscript{9} Id.
\textsuperscript{10} Charles Curtis, Giants’ Larry Donnell started himself in fantasy football this week (but said ‘LOL’ about zero points), NJ.COM (Oct. 5, 2014, 6:00 PM), http://www.nj.com/giants/index.ssf/2014/10/giants_larry_donnell_started_himself_in_fantasy_football_this_week_but_said_lol_about_zero_points.html.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} (“People are that in-depth? That serious? . . . Man, I’m just having fun with it.”)
Drew Brees on his fantasy team, or if (b) the Saints were going against the Carolina Panthers in a NFL game, while the Falcons fan’s fantasy opponent of the week has chosen to start the Panthers defense.

To some people who decline participation in fantasy leagues, the mere thought of having to root for players on other teams out of personal self-interest is an anathema. On the other hand, proponents of fantasy football claim that it is minimally different from rooting for an archrival to beat a team that one’s own team is trying to overcome in the standings, in order to qualify for the playoffs. While NFL executives might be eager to champion fantasy football as a way for football fans to further engage with the NFL (why only follow one team from afar, when you can have control over your team and an excuse to watch and follow all thirty-two NFL franchises?), they should be aware of a devilish connection to gambling. After all, if Larry Donnell can operate a fantasy team, so can anybody in the NFL: perhaps a defensive lineman for the San Diego Chargers might miss a tackle on Kansas City Chiefs tailback Jamaal Charles, so that he might pick up a few extra yards before a teammate tackles him instead; or a special teams player on the Tennessee Titans might not want to block field goal kicks by Indianapolis Colts kicker Adam Vinatieri; or a retired player, employed by his former NFL team with a sinecure, might stock his team with old personal friends and young players from his collegiate alma mater, his high school alma mater, or his home region.

There has been considerable debate as to whether fantasy football is a game of chance or of skill, but regardless, people employed by the NFL or a member team should be enjoined from operating fantasy football teams. In Part [A], I will chart the history of fantasy football. In Part [B] et seq., I will recount instances where active participants in professional sports leagues were found to have gambled on results in their direct control, with all the respective negative aftermaths, including the Black Sox Scandal, the Pete Rose scandal, point shaving scandals in NCAA basketball, and a results manipulation scandal by NBA referee Tim Donaghy. In addition to these clear-cut examples of gambling, I will also compare this potential fantasy football fiasco to what is probably its closest comparable, as a “socially more acceptable” form of gambling: March Madness pools (pertaining to contestants’ accuracy in predicting outcomes in an elimination bracket involving more than sixty-three games, culminating in the National Collegiate Athletic Association (hereinafter “NCAA”) men’s basketball championship), and one such scandal implicating Rick Neuheisel, who was then employed by the University of Washington, as the head coach of its football team.
62  DEPAUL J. SPORTS L. & CONTEMP. PROBS.  [Vol. 11:59

In Part [C], I will highlight arguments on both sides as how to classify fantasy football, i.e.: in support of fantasy football as a game of chance, or as a game of skill, and discuss and critique subsequent judicial rulings, congressional lawmaking, and effects on public policy. Finally, Part [D] will conclude this note with an analysis of relevant statutory language from the NFL’s collective bargaining agreement. At this point, I will ascertain whether or not NFL Commissioner Roger Goodell (a) has the authority under the CBA to immediately bar employees from having fantasy teams, or (b) must wait until the expiration of the current CBA to promulgate and enforce such a rule, and then (c) whether such a ban on fantasy football would be beneficial to the NFL, (d) whether such a ban is likely, and (e) discuss resulting residual consequences and possible compromise solutions.

[A].  HISTORY OF FANTASY FOOTBALL

Fantasy football is, surprisingly, almost as old as modern football.16 Wilfred “Bill the Gill” Winkenbach, an Oakland, CA-area businessman and a limited partner in the Oakland Raiders (then of the American Football League, before the advent of the Super Bowl and the AFL-NFL merger), spearheaded the oldest known fantasy league.17 In 1962, while in a New York hotel room, in the midst of an east coast, cross-country Raiders road trip, Winkenbach, Raiders’ public relations director Bill Tunnel, and Oakland Tribune reporter Scotty Stirling drafted rules that would lay the foundation for modern fantasy football.18 These rules were the genesis of the Greater Oakland Professional Pigskin Prognosticators League (hereinafter “GOPPPL”). The GOPPPL’s first draft took place in August 1963, in the rec room of Winkenbach’s home, among eight charter league members.19 In order to simplify scoring, which was done manually by consulting the local sports section of the newspaper, only touchdowns were counted in scoring.20 This league is still active and, as per tradition, it is still “touchdowns only,” despite the extended opportunities available today to award points for other milestones and the ease of computerized calculations.21

17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
Fantasy football was slow to spread, but Andy Mousalimas facilitated the first spinoffs in 1969. Mousalimas, who was an original creator of the GOPPPL and participant in the inaugural draft, brought fantasy football to King’s X, his sports bar. Mousalimas oversaw additional leagues that would meet at the bar; as trivia teams congregated at the bar for the trivia circuit, the concept of fantasy football became more familiar outside Oakland, even though due to the time-consuming need to hand-score from newspaper results, it was slow to gain popularity. However, in 1981, a new—and now long-standing—league became established in Spokane, WA. As a tribute to its place of birth, a now-defunct pizza parlor known as Maria’s, the league is known as “The League Formerly Known as Maria’s.” Like the GOPPPL, it was “touchdowns only” to facilitate manual scoring; now, Maria’s League allows for a limited number of “bonus points” for milestones yardages, e.g.: for every 100 yards a quarterback throws, for every 100 yards a running back rushes, or for every 50 yards a wide receiver collects in catches, but it remains “mostly touchdowns” as a tribute to its heritage.

In 1985, Jim Boullion and Lee Fanshaw, of Madison, WI, established one of the most ambitious fantasy football leagues of its time, with four distinct categories for scoring. Boullion, Fanshaw, and eight original owners (of which six still participate) used the Madison Capitol as the league’s meeting place, as most of the league members were employees of the Wisconsin State Legislature. The Capital Football League is one of the earliest, and most long-standing, examples of a rotisserie league. In rotisserie leagues, instead of keeping the points earned as a score, players are assigned scores for relative placement. In other words, there is no difference between finishing one point ahead of the runner-up or 100 points ahead—the winner earns a set number of points for winning.

22. Id.
24. Hruby, supra note 16.
26. Id.
27. Id.
29. Id.
30. Id.
32. ANSWERS.COM, supra note 28.
In addition to drafting players and having a head-to-head round robin schedule among members (awarding six points to a head-to-head winner, and awarding three points to each player in the case of a tie), the league awarded points based on team statistics, such as passing yards, rushing yards, receiving yards, receptions, total yards from scrimmage, and total scoring. For the team categories, the Capital Football League awarded points in descending rank order, from twenty-five for the leader to zero for the last-place finisher. The Capital Football League also recognized individual categories: for individual passing yards, passing touchdowns, rushing yards, receiving yards, receptions, and kicking points. The fantasy team owner who had the NFL category leader on his team earned five rotisserie points, the one who had the category runner-up garnered three, and the one who had the category second runner-up received one. Finally, the Capital Football League created a “playoff” section at the end of the regular season, with an extra bonus to the winner of the playoffs. In this league, the “winner” is the one who has the most points after all four categories are tabulated.

Modern fantasy football was facilitated by improvements in technology, starting in 1989. Promoters Robert Barbiere and Brad Wendkos facilitated “Pigskin Playoff,” a de facto-national fantasy league that was picked up by several major newspapers and allowed more than 100,000 players to compete against each other, employing touchtone phone service to make trades and otherwise interact. Finally, in 1997, CBS launched the beta version of the first free and publicly available fantasy football website. All other major sports media websites followed suit within three years, and in 2010, the NFL itself launched its own site, “NFL.com Fantasy Football.”

To this day, fantasy football is the NFL’s most important marketing tool, with an estimated nineteen million online participants between

33. Id.
34. Id.
35. Id.
36. Id.
37. Id.
38. Id.
40. Id.
41. Id.
42. Id.
public and private leagues. As Mr. Goff notes in his *Forbes* article, fantasy football could have been incalculably more lucrative for the NFL, as well as the members of its Players’ Association (hereinafter, “NFLPA”), i.e.: the players, if they were able to claim the rights to the statistics. As it stands, the NFL cannot have a trademark claim to, for example, Marshawn Lynch’s 160-yard game with two touchdowns for the Seattle Seahawks, because this is considered to be a news event. On the other hand, the ability to capitalize on fantasy football at all was hardly a foregone conclusion until recently. However, the more appropriate query is to ascertain whether or not the members of the NFLPA should be allowed to participate in fantasy football.

[B].  **Gambling on Sport and in Sport**

[B-1].  **The “Black Sox Scandal:” Eight Major Leaguers, Five Losses, and One New “Mountain” of a Commissioner**

It is widely considered a straightforward tenet in modern sports that players should not be allowed to place bets on games in their league. Gambling schemes can impugn the very integrity of the games, as fans want to know that the athletes are performing at their peaks in order to win and to earn their results fairly. Indeed, a “scripted” game where players aim to achieve a predetermined result would be unsatisfactory, and fans could easily lose interest when conclusions may be foregone. One of the first, and most famous, instances of match fixing allegedly involved—but irreversibly implicated—eight members of the 1919 pennant-winning Chicago White Sox, in the infamous Black Sox Scandal (later to be immortalized in the book and motion picture, *Eight Men Out*).

This era of baseball was governed by the longstanding and infamous (though now severely limited) “reserve clause.” During that era, owners of Major League Baseball (hereinafter “MLB”) teams owned


44. Goff, *supra* note 15.


47. *Id.*
their players' rights in perpetuity. This virtually eliminated the players' ability to negotiate their contracts, and absolutely eliminated any rationale for an owner to negotiate a contract lasting longer than the upcoming baseball season. If a player were to desire to switch teams, he could request a trade or threaten to retire unless the owner should make a trade or grant a release to the player. In the meantime, the owners were never obligated to grant these accommodations, and they had ultimate leverage against the players: if a player refused the team's contract, that player would be enjoined from playing professional baseball with any other team.

Accordingly, Chicago White Sox owner Charles Comiskey paid his left fielder, "Shoeless Joe" Jackson, and his third baseman, Buck Weaver—two of the premier ballplayers in all of MLB at that time—a paltry $6,000 per season (equivalent to about $82,500 USD in 2014). Comiskey acquired a reputation as an impecunious tyrant, even though his team had the highest payroll in 1919. Starting in 1917, White Sox pitcher Eddie Cicotte had an incentive in his contract, whereby he would earn a $10,000 bonus for winning thirty games in a season. Cicotte came close twice, having won twenty-eight in 1917 and twenty-nine in 1919; however, Comiskey allegedly ordered that Cicotte be benched "in order to rest for the playoffs," and so Comiskey could avoid having to pay Cicotte the bonus. Comiskey is also said to have routinely slashed the laundry budget, making the players wait longer periods of time in between the laundering of their uniforms. (This is the origin of the sobriquet "Black Sox," seeing that the White Sox garb would rarely look pristine.) Furthermore, in the motion picture, as the White Sox return to their locker room after having clinched the American League pennant, the players

48. Id.
49. Id.
50. Id.
51. Id.
52. Id.
54. Linder, supra note 44.
55. Id.
57. Linder, supra note 44.
58. Id.
59. Id.
discover bottles of champagne, as gifts to the players. The bottles turn out to be flat, and the players learn that this not-so-bubbly champagne represents their bonuses for advancing to the World Series. With a palpable incentive to make easy money, and with some players in dire financial straits (Cicotte had recently purchased a Michigan farm that was saddled with high mortgage payments), a faction of the White Sox set the wheels of their scheme in motion. The first baseman, Chick Gandil, is widely credited as having a large role in “the fix,” if not that of the players’ ringleader in the conspiracy. Gandil made contact with an acquaintance, professional gambler “Sport” Sullivan, and initially suggested that for $80,000, Gandil could incorporate some of his teammates into “the fix,” helping to throw the World Series in favor of the Cincinnati Reds—the winners of the 1919 National League pennant. Outfielder Oscar “Happy” Felsch and Weaver came on board relatively quickly. Cicotte was more reluctant to “sell out,” but he eventually agreed to do it “for $10,000—before the Series begins,” in order to support his family and pay the mortgage.

Shortstop “Swede” Risberg, utility infielder Fred McMullin, fellow starting pitcher Claude “Lefty” Williams, and Jackson (the best hitter on the team) rounded out the “Eight Men Out.” Details as to the exact payment arrangement are murky, but it is believed that instead of having any upfront payment, the players were to be collectively paid $20,000 per World Series loss (five losses in a best-of-nine World Series would ensure a Cincinnati championship and full payment, now of $100,000, to the Eight Men Out), while the starting pitchers (Cicotte and Williams) each resolved to throw their first games. (Historian Eliot Asinof, in his book Eight Men Out, claimed that because the gamblers could not place odds more favorable than “even money,” they could not make any advance payments to the White Sox players.) Finally, on October 1, 1919, the World Series began in Chicago.

61. Id.
62. Linder, supra note 44.
63. Id.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
and with a hit batsman to start the game, the gamblers were assured that the fix was on.\footnote{70}

The transactions between the gamblers and Gandil were hardly smooth.\footnote{71} Cicotte threw Game 1 by a score of 9-1, and Williams lost his Game 2 by a score of 4-2.\footnote{72} In both games, the respective pitchers unraveled in the fourth inning.\footnote{73} In Game 1, Cicotte was unable to turn an otherwise-routine double play, extending the inning for the bottom of the order to blow the game open, culminating in Cincinnati pitcher Dutch Reuther hitting a two-run triple to left field.\footnote{74} In Game 2, Williams (who was famous for immaculate control) managed to walk three batters, who would all round the bases to score for Cincinnati.\footnote{75} After Game 2, Gandil realized that the gamblers had not been paying all the money as promised, so the White Sox double-crossed the gamblers in Game 3, and Gandil demanded a $20,000 payment before Game 4, or else the players would withdraw the fix.\footnote{76} The players were placated for Game 4, but were once again stiffed after a Game 5 loss.\footnote{77} The White Sox managed to win Games 6 and 7: at this point, Cincinnati was leading by a count of four games to three, and the gamblers had no desire to see the Series go the distance.\footnote{78} In Game 8, the White Sox wheels finally came off: Lefty Williams threw merely fifteen pitches, which yielded four hits and three runs for Cincinnati, en route to a Game 8 win by a score of 10-5, and thus clinching the 1919 World Series.\footnote{79}

On December 15, 1919, Chicago sportswriter Hugh Fullerton published a story in the New York World, entitled “Is Big League Baseball Being Run for Gamblers, with Ballplayers in the Deal?”\footnote{80} In his piece, he demanded that MLB rid itself of its gambling problem, and suggested that federal judge Kenesaw Mountain Landis oversee such an investigation.\footnote{81} This inquiry reached its conclusion at the end of the 1920 baseball season: it revealed testimony that New York Giants pitcher Rube Benton saw a damning telegram from “Sleepy” Burns (one of the gamblers in the orchestration of the 1919 World Series) to

\begin{footnotesize}
\footnote{70. Id.}
\footnote{71. Id.}
\footnote{72. Id.}
\footnote{73. Id.}
\footnote{74. Id.}
\footnote{75. Id.}
\footnote{76. Id.}
\footnote{77. Id.}
\footnote{78. Id.}
\footnote{79. Id.}
\footnote{80. Id.}
\footnote{81. Id.}
\end{footnotesize}
a Giants teammate, stating that the White Sox were going to lose the Series, and it also produced a story in the Philadelphia North American, in which gambler Billy Maharg divulged some juicy details. Accordingly, Comiskey suspended the Eight Men Out indefinitely.

The players and gamblers were all indicted on October 22, 1920, during a transition period in which Cook County Attorney Maclay Horne was to be replaced by the newly elected Robert Crowe. In this transition, Horne’s secretary, George Kenney, mysteriously walked out with confessions and waivers of immunity for Cicotte, Jackson, and Williams. This proved to handcuff the prosecution, as all evidence from the confessions (announced to have been missing in March 1921) would be suppressed. Despite these obstacles, the trial, State of Illinois v. Eddie Cicotte et al. commenced on June 27, 1921, with Judge Hugo Friend presiding.

The players faced charges of (1) conspiring to defraud the public, (2) conspiring to defraud Sox pitcher Ray Schalk, (3) conspiring to commit a confidence game, (4) conspiring to injure the business of the American League, and (5) conspiring to injure the business of Charles Comiskey. Jury selection comprised of screening 600 prospective jurors who were quizzed on their White Sox fandom, their betting habits, and their views on baseball. One prospective juror, William Kiefer, was struck specifically for being a Cubs fan. On July 18, the prosecution delivered its opening statement; the defense closed on the 29th. Judge Friend then charged the jury, instructing them that to return a guilty verdict, they must find the players conspired “to defraud the public and others, and not merely throw ballgames.” After less than three hours of deliberation, the jury acquitted all of the defendants. Despite the eight players’ legal innocence, Landis—now installed by the owners as the first Commissioner of MLB—refused to lift their bans, stating that

82. Id.
83. Id.
84. Id.
85. Id.
86. Id.
87. Id.
88. Id.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id.
regardless of the verdict of juries, no player who throws a ball-game, no player that undertakes or promises to throw a ballgame, no player that sits in conference with a bunch of crooked players and gamblers where the ways and means of throwing a game are discussed and does not promptly tell his club about it, will ever play professional baseball.\textsuperscript{94}

This precedent is not legally unsound, for MLB was (and is) a private actor that is not necessarily bound by the government’s failure to convict, or any other provision under the United States Constitution. However, because Landis was the first ever commissioner of a professional sports league, his precedent has enabled future commissioners to wield immense power within their sports.

\textbf{[B-2]. Post-“Black Sox” Gambling Episodes, and Respective Aftermaths}

\textbf{[B-2-a]. Pete Rose}

After Landis’s decisive actions against the “Eight Men Out” for their roles in the Black Sox Scandal, sports leagues have consistently taken decisive actions against gambling, as even mere allegations of impropriety are damaging towards the legitimacy of the games that the leagues sanction. Landis also established a now-traditional authority for commissioners to punish athletes beyond traditional jurisprudence, in that he was able to ban eight players on behavior for which they were all deemed “not guilty” by a competent court of law that had valid jurisdiction over the case. One of the highest-profile cases of sports gambling centered on longtime Major League Baseball player Pete Rose.

Rose had a long and successful playing career from 1963 to 1986, during which he mostly, and most memorably, played for the Cincinnati Reds.\textsuperscript{95} (From 1979 to 1983, Rose was a member of the Philadelphia Phillies, and he played for the Montreal Expos in 1984 before he was traded back to the Reds on August 16 of that year.)\textsuperscript{96} Rose’s career accolades as a player are numerous, including the 1963 National League Rookie of the Year Award,\textsuperscript{97} three National League “batting titles” for the highest batting average,\textsuperscript{98} the 1973 National League

\begin{footnotesize}
\textsuperscript{94}. Id.
\textsuperscript{96}. Id.
\textsuperscript{97}. Id. (see “Standard Batting” table, “1963” row, “Awards” column).
\textsuperscript{98}. Id. (see “Standard Batting” table, “BA” row, and note that values for 1968, 1969, and 1973 are all bolded to denote the year’s league-high value).
\end{footnotesize}
Most Valuable Player (“MVP”) award, the 1975 World Series MVP award, two Gold Glove awards for fielding excellence, seventeen selections to play in the annual All-Star Game, three World Series championships, and the record for the most base hits in a MLB career, with 4,256 hits. In his second stint with the Reds, Rose actually served as a player-manager until his official retirement as a player, after which he remained manager of the Reds until his banishment from MLB.

Rose had long been known to be an avid gambler, and was often seen at racetracks to bet on horse races. If that were to have been the extent of Rose’s gambling activity, then it is debatable as to whether or not Rose—a hometown hero of Cincinnati, a legendary figure in MLB, and an otherwise-surefire Hall of Famer—would have been disciplined by Commissioner A. Bartlett Giamatti. However, in 1989, Giamatti’s hand was forced, as a result of mountains of evidence linking Rose to gambling on MLB. MLB found countless instances of telephone calls placed from Rose to known bookies, as well as betting slips seized by the IRS (with Rose’s handwriting on them) revealing that Rose bet up to $16,000 per day on games as early as 1987. This evidence, along with depositions, documents, reports, and transcripts, was included in a 225-page report (“the Dowd report”) compiled by investigator John Dowd to Giamatti, which concluded that Rose gambled on MLB while under contract with MLB via the Reds.

With this report in hand, Giamatti exercised his authority, as Commissioner, to banish Rose for life. According to Giamatti, “[t]here had not been such grave allegations since the time of Landis.”

100. Id. (see “Postseason Batting” table, second “1975” row (with opponent Boston Red Sox [BOS]), and note the “MVP” inscription).
102. Id. (see “Appearances on Leader Boards, Awards, and Honors” table, “All-Star Games” cell).
103. Id. (see “Postseason Batting” table, and note the rings next to the years 1975, 1976, and 1980).
104. Id.
105. Id. (see “Salaries” table, and note “Player-manager” notation for years 1985 and 1986).
the evening of August 23, 1989 (before a news conference the following morning), Rose signed a document agreeing to a lifetime ban while maintaining the opportunity to apply for reinstatement in the future, despite neither confirming nor denying the gambling allegations against him.\textsuperscript{112} Contrary to Giamatti’s address at that press conference, that day was not “the sad end of a sorry episode.”\textsuperscript{113} Initially, Rose vocally denied the allegations that he gambled on baseball, instead insisting that this punishment reflected mistakes that he made by virtue of “betting on other things.”\textsuperscript{114} Meanwhile, Giamatti stood by his ruling and the Dowd report, by declaring that “[i]n absence of evidence to the contrary . . . yes, I have concluded that he bet on baseball,” including on Rose’s Reds.\textsuperscript{115}

Since his banishment, in 1991, the Baseball Writers Association of America (“BBWAA”) codified a before-then-unwritten rule that players on the “permanently ineligible” list shall not be eligible for Hall of Fame consideration.\textsuperscript{116} Beginning in 1992, Rose periodically applied for reinstatement to Fay Vincent and Allan H. (Bud) Selig, the two commissioners of MLB proceeding Giamatti, but to no avail as of this writing.\textsuperscript{117} In 2004, Rose published a memoir, \textit{My Prison Without Bars},\textsuperscript{118} in which he finally admitted to having bet on baseball. Today, Rose is still banned from baseball, even though this ban has been occasionally lifted to accommodate his participation in a select handful of MLB events.

\textit{[B-2-b]. Basketball}

\textit{[B-2-b-i]. NCAA Men’s Basketball}

Whereas baseball can be easily manipulated through individual outcomes, e.g.: “grooved” pitches and misplayed fielding situations, and whereas football has a wide variety of prop bets on offense, defense, and the overall game, basketball has been a focal point of gambling scandals due to its high-scoring nature and a relatively easy ability to

\begin{itemize}
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id\textsuperscript{nd}237, Pete Rose Banned from Major League Baseball – CNN Coverage, \textsc{youtube} (Oct. 27, 2011), \url{https://www.youtube.com/watch?v=bm_baoPBC-c}.
\item \textsuperscript{114} Weinberg, supra note 95.
\item \textsuperscript{115} Id.
\item \textsuperscript{116} \textit{Hall of Fame Election Requirements}, \textsc{Baseball Writers’ Association of America}, \url{http://bbwaa.com/hof-elec-req} (last visited Jan. 16, 2015); \textit{see also} Greg Noble, \textit{Will Pete Rose ever get into the Hall of Fame?}, \textsc{WCPO} (Aug. 26, 2014, 3:47 AM), \url{http://www.wcpo.com/sports/baseball/reds/will-pete-rose-ever-get-into-the-hall-of-fame}.
\item \textsuperscript{117} Katherine LaGrave, \textit{6 Things to Know About the Pete Rose Ban}, \textsc{Sports Cheat Sheet} (Jan. 19, 2015), \url{http://wallstcheatsheet.com/sports/6-things-to-know-about-the-pete-rose-ban.html}?
\item \textsuperscript{118} \textsc{Pete Rose with Rick Hill, My Prison Without Bars} (2004).\end{itemize}
manipulate the spread. Numerous such scandals have implicated National Collegiate Athletic Association (hereinafter “NCAA”) men’s basketball teams. Of note, the 1950-51 CCNY scandal implicated thirty-three players involved in point shaving among seven schools: the City University of New York, City College (the 1950 champions of both the NCAA Tournament and the National Invitational Tournament); New York University; Long Island University; Manhattan College (all four of these within the New York City area); Bradley University in Peoria, IL; the University of Toledo in Toledo, OH; and the University of Kentucky in Lexington, KY. The aftermath of the CCNY scandal was profound. The 1951 NCAA Tournament’s Most Outstanding Player, Bill Spivey, would never again play for the University of Kentucky, and he would later find himself blackballed by the National Basketball Association (hereinafter “NBA”), under President Maurice Podoloff. A subsequent scandal in 1961 was the “last straw” for Madison Square Garden, as the NCAA Tournament would not return to New York City until 2014. Later, members of the 1978-79 Boston College basketball team faced RICO convictions for ensuring pre-planned outcomes (either allowing the other team to cover the spread, or, as an alternate strategy to reduce suspicion, to affirmatively beat the spread) in exchange for cash

119. “The spread” (sometimes called “the line”) refers to an automatic handicap that bookies place on each game, in order to provide more equitable odds between the teams by offsetting the superior team’s inherent advantage. For example, if the Green Bay Packers (-13.5) were to play against the Minnesota Vikings, the spread would be 13.5 points. In this example, bets in favor of the favorite (the Packers), would have to “give” 13.5 points to the Vikings, and bets in favor of the Vikings would “take” the points.” In other words, even if the Packers were to win the actual game, bettors would need the Packers to “cover the spread” by beating the Vikings by more than 13.5 points, in order to return winning bets. Fractional spreads are often used in order to eliminate the possibility of “pushes,” which are ties according to sports books. When pushes occur, bookies must refund all bets, yielding no winners or losers, and they also must bear the costs of overhead. Accordingly, “point shaving,” or “manipulating the spread,” refers to deliberate efforts to guarantee outcomes against the spread, with the reward of a financial benefit from the enriched bookie.


payments. In addition, in 1994, Arizona State Sun Devil Isaac Burton, Jr. agreed to miss some free throws to manipulate the spread as a favor to college teammate Stevin Smith, who had gambling debts of his own. They agreed to plead guilty to fixing four NCAA games, pursuant to a 1997 plea deal.

NCAA basketball games have previously implicated not only NCAA players, but other NCAA members as well. In another high-profile episode, then-University of Washington head football coach Rick Neuheisel was accused of wrongdoing through participation in a “March Madness pool” with his co-workers. March Madness pools are not uncommon in workplaces in the United States: as a general rule, they require “buy-ins” from workers to participate, and award points for each correctly predicted winning team (with increasing point values as the tournament progresses), ultimately awarding the pot to the worker with the best bracket. In fact, bracket pools are so ubiquitous in popular culture today, that investment mogul and Berkshire Hathaway chairman Warren Buffett hosted his own billion-dollar bracket challenge in 2014. Buffett would have paid one billion dollars to a perfect prognosticator, but that did not happen; accordingly, he claims that he wants to make a bracket challenge with easier payouts in 2015.

The University of Washington football staff’s March Madness pools required buy-ins ranging from $3 to $5 from 1999 to 2002 (Neuheisel’s tenure as head coach at Washington), and Neuheisel relied on memoranda from compliance officer Dana Richardson that the pools were permissible. Despite these safeguards, Washington decided to fire Neuheisel, citing allegations of ordering staff members to deny the existence of other pools, and for denying his own participation when he actually won more than $11,000 through pools—money he donated


126. Id.


129. Id.

130. Keeney, supra note 114.
to area schools. Later, the NCAA cleared Neuheisel of wrongdoing, because the evidence could not support a finding that he intentionally violated prohibitions against gambling; however, the league placed the school on probation for a failure to sufficiently monitor the football staff’s activities.

[B-2-b-ii]. Tim Donaghy and the NBA

More recently, the NBA was affected by an infamous event of its own. This NBA scandal has so far been restricted to one man’s actions: former NBA referee Tim Donaghy. As a thirteen-year veteran of the NBA, Donaghy served as a referee from 1994 to 2007, officiating 772 regular season games and 20 post-season games. On July 20, 2007, New York Post columnist Murray Weiss published a story that confirmed the existence of an FBI investigation on Donaghy. The investigation concluded that Donaghy had personal gambling liability, and worked to pay off his debts by placing tens of thousands of dollars on his assigned NBA games from 2005 to 2007. The Donaghy scandal sent shockwaves through the NBA: despite the NBA’s own systems of monitoring its referees, the league insisted it had no knowledge of Donaghy’s illicit acts before the FBI identified Donaghy as a participant in a larger organized crime investigation.

In studying the Donaghy scandal, sports gambling expert R.J. Bell, who serves as the president of betting website pregame.com, studied the last four years of Donaghy’s career. Bell analyzed Donaghy’s worked games from 2003 to 2005 as a two-year control for 2005 to 2007, which were the years in which Donaghy was accused of manipulating the spread. Bell found that in the control years, the teams combined to score more points than Las Vegas expected in 44% of games. In the latter two years, this percentage rose to 57%.
cording to Bell, this discrepancy only had a 1-in-1000 chance of happening without an external influencing factor; in other words, there was a 99.9% chance that this increased frequency of “beating Vegas” on points was due to a game-fixing scheme.141 More alarmingly, Bell found ten consecutive Donaghy games in which the point spread moved by at least 1.5 points, which is an indication that “big money” had been placed on the respective games.142 Each of these ten times, the “big money” team represented the winning bid.143 Despite the fact that “hindsight is 20/20,” Bell insisted that these manipulations, while easy for Donaghy to make, would have been imperceptible to people not involved in the fix, as there was no reason to have been suspicious of any Vegas irregularity at the time.144 Another handicapper, Brandon Lang, estimated that an official could have a 75% chance of being able to directly influence an outcome, if he had a financial stake in the game.145 As of now, the NBA has maintained that Donaghy was a rogue official, and that no other referees have ever placed bets on its games.

On August 15 (less than one month after the Weiss story), Donaghy appeared in federal court in Brooklyn, where he pled guilty to conspiracy to engage in wire fraud and transmitting wagering information through interstate commerce.146 Donaghy specified that he was initially paid $2,000 per correct pick to his bookies (who were high school classmates of Donaghy); however, he would eventually be awarded $5,000 per correct pick due to his consistent accuracy.147 Donaghy earned $100,000 worth of “dirty money” for inside information he provided as a referee, most often pertaining to a player’s injury status and players’ relationships with other referees.148

In the NBA’s efforts to regain the public’s confidence and to prevent a future similar episode, the NBA made several changes in its

141. Id.
142. Id.
143. Id.
144. Id.
relationship with the referees. Most notably, instead of merely ninety minutes prior to tip-off, the NBA would publicly disclose which referees were assigned to which games on the morning of each game.\textsuperscript{149} By announcing the referee crews earlier, the NBA reduced the “insider” value of this information.\textsuperscript{150} In addition, the league relaxed its formerly absolute ban on gambling, by allowing referees to partake in some gambling activities outside of sports gambling.\textsuperscript{151}

[C]. Classifying Fantasy Football: Gambling, or a Game of Skill?

[C-I]. Arguments in Favor of Fantasy Football as a Game of Skill

If it should be deemed that fantasy football is gambling, then the NFL’s active endorsement of fantasy football would clearly be inappropriate. However, even if fantasy football is actually determined to be a game of skill, Commissioner Roger Goodell may be able to ban fantasy football participation among NFL employees, if such participation were to be sufficiently inappropriate. This would be due, in part, to the broad powers granted to each professional sports league’s commissioner by their bosses: the team owners in each respective league. Generally, commissioners are tasked with upholding the integrity of their respective professional leagues; furthermore, as private actors that agree to be bound by collective bargaining agreements, the owners and the players’ associations are afforded broad discretion in stipulating which actions are to be forbidden, as well as stipulating penalties and disciplinary processes.

The first threat against fantasy football was filed in federal court in 2006.\textsuperscript{152} In a complaint against the three main providers of online fantasy leagues (SportsLine, ESPN, and The Sporting News), Charles E. Humphrey, Jr., claimed that pay-to-play fantasy sports constitute illegal gambling (and thus violating Qui Tam Gambling-Loss Recovery Laws) in multiple U.S. jurisdictions: New Jersey, Georgia, Illinois, Kentucky, Massachusetts, Ohio, South Carolina, and the District of Columbia.\textsuperscript{153} New Jersey’s Qui Tam laws provide that if a person who loses money gambling does not sue to recover the lost money within six months, a third party may sue and recover on behalf of the money-
losers; if that third party were to prevail, then the proceeds would be split with the state.\textsuperscript{154} In Mr. Humphrey’s complaint, he petitioned the court to (a) consider fantasy sports as gambling, (b) consider entry fees as money lost to gambling, and (c) declare Mr. Humphrey a prevailing third party, entitling him to a portion of the proceeds.\textsuperscript{155}

In support of finding fantasy football as a game of skill, and not as a form of gambling, M. Christine Holleman identified three policy considerations: (1) the inapplicability of traditional rationales for outlawing gambling to fantasy sports, (2) recent Congressional legislation to serve as Congressional support for fantasy sports, and (3) the consequences of damaging an innocuous billion-dollar industry (emphasis added) that would directly result from declaring fantasy sports as a form of gambling.\textsuperscript{156} Ms. Holleman notes that in New Jersey, recovery of money under this statute may only be of “wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event.”\textsuperscript{157} To counter this point, the defendant fantasy football providers noted that entry fees are fixed and unconditional, the prizes are guaranteed regardless of the number of participants, and “the party offering the prize . . . is not also competing for it.”\textsuperscript{158} Meanwhile, Mr. Humphrey asserted that fantasy football is subject to a larger chance impact than skill, and that staking success to future performance of players and sections of teams is just like gambling on the sports games themselves.\textsuperscript{159}

\[C-2\]. Arguments in Favor of Fantasy Football as Gambling

Anthony Vecchione, writing for the SMU Law Review, noted that for more than three decades, the NFL itself opted to keep its relationship with fantasy football at arm’s length, for fear of inherent connotations of gambling.\textsuperscript{160} To this day, the Fantasy Sports Trade Association, an organization founded in 1998 in order to teach fantasy football to the public and to promote the industry through interested

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\textsuperscript{154} Id. at 66.
\textsuperscript{156} Holleman, 8 N.C. J.L. & Tech. at 59.
\textsuperscript{157} Id. at 69.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 71.
\textsuperscript{160} Anthony Vecchione, Comment, Fantasy Sports—Has Recent Anti-Gambling Legislation ‘Dropped the Ball’ by Providing a Statutory Carve-Out for the Fantasy Sports Industry?, 61 SMU L. Rev. 1689, 1701 (2008).
companies, has recognized gambling as a touchy subject. Gambling and fantasy football are intertwined, and arguably too intertwined to have ever expected Congress to make a seamless fantasy football exception. In fact, Daniel Okrent—who is considered to be the father of fantasy baseball due to his efforts in 1979—could not help but think of gambling when he established the first rules. He and his league’s founders settled on a $250 salary cap for player drafting purposes, “because it seemed a reasonable amount to ante into what was essentially a summer-long poker game.”

If fantasy sports were acknowledged as derivatives of sports gambling, then there, by nature, has to remain some vestiges of gambling that cannot possibly be explained by skill. No matter how methodical a fantasy sports participant may be in selecting his players for his overall roster and for selecting his “starting lineup,” even fantasy players themselves acknowledge that winning results from a combination of luck and skill. Anecdotes of players “ruining fantasy teams” are endless, from stories of in-real-game strategy, e.g.: a 2009 play in which Jacksonville Jaguars running back Maurice Jones-Drew refused a “free” touchdown against the New York Jets, and instead took a knee at the one-yard line, valuing a running clock late in the game and the chance to end on a winning field goal instead of taking the touchdown and kicking off to the Jets with time to spare, to stories of complete and utter personal and inexplicable bad luck, e.g.: an episode in which John Smoltz injured himself by burning his chest with an iron, in an attempt to iron a shirt he was wearing at the time.

Of more recent vintage, a fantasy football dilemma was created out of the new dependence on the Internet. Some fantasy football leagues, including “standard leagues” on ESPN.com, employ a list of undroppable players. This is done in order to eliminate collusion in leagues and to maintain competitive balance within the fantasy league. The rationale behind this policy is that in a league without

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161. Id. at 1691.
162. Id. at 1701.
163. Id. at 1693.
164. Id. at 1701.
165. Id. at 1702.
such an undroppable list, fantasy managers could drop star players from their teams, let those star players go to the “waiver wire,” and, basically, allow other fantasy managers to claim the star players.169 Minnesota Vikings running back Adrian Peterson was on the no-cut list for ESPN and Yahoo fantasy football before September 12, 2014.170 This date was significant to Vikings fans, sports fans, and fantasy football fans alike, as Peterson was indicted, in Texas, on charges of child abuse, stemming from injuries observed on his child consist with being “whooped” with a tree branch (better known in Texas parlance as a “switch.”)171 With little advance notice, Peterson was deactivated for the Vikings’ Week 2 game against the New England Patriots, which resulted in mass hysteria among fantasy managers who were saddled with dead weight on their fantasy rosters.172 In this case, a fundamental move of cutting a player from one’s fantasy team when that player was known to be ineligible for an upcoming game was impossible, overriding any and all skill-based fantasy preparation that might have taken place otherwise, or without Internet interference.

[C-3]. Resolution, and Public Policy Impacts

Mr. Humphrey’s complaint was dismissed from the outset, due to a successful 12(b)(6) motion by the defendants.173 Fortunately for the NFL and fantasy football organizers and participants throughout the Internet with vested interests in fantasy football, dismissal of this complaint was proper, because as of October 13, 2006, U.S. Congress explicitly deemed fantasy football to be legal.174 In carving out this special exception from the anti-internet gambling statutes, benefitting fantasy sports operations and enabling Congress to easily and readily subject fantasy football winnings to taxation, Congress appears to have employed deficient logic, or else willfully elected to ignore fan-

170. See Timothy Burke, Yahoo! Won’t Let You Cut Adrian Peterson From a Fantasy Team [UPDATE], Deadspin (Sept. 13, 2014, 2:32 PM), http://deadspin.com/yahoo-wont-let-you-cut-adrian-peterson-from-your-fanta-1634359931 (noting that if fantasy managers were unsuccessfully attempting to cut Peterson on the 13th, he would have been on the no-cut list prior to that date).
172. Burke, supra note 156.
tasy sports in order to render other, “more obvious” internet gambling as illegal.

As the Unlawful Internet Gambling Enforcement Act stipulates, even though a “bet or wager” is:

The staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome[.]

for the specific purpose of this statute, among activities explicitly excluded from the definition of “bets and wagers” is the:

participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28 [U.S.C. § 3701]) and that meets the following conditions:

(I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.

(II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

(III) No winning outcome is based -

(aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or

(bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.

In specifically, and slightly awkwardly, exempting fantasy sports leagues, Congress has instituted a regime whereby “basic sports gambling,” such as betting on the score, the point spread, parlays, and over-under wagers would all be illegal by statute. On the other hand, fantasy sports, which is essentially “complicated sports gambling” based, in part, on combinations of real-world team units (most often team defense performance) and performances of individual athletes

177. 61 SMU L. Rev. at 1703.
(whereby every ten or fifty yards gained can be analogized to a chain of over-under wagers for fantasy points) would be permissible.

At the time of Ms. Holleman’s commentary, there was no explicit ruling on fantasy football, so her closest comparable was from video poker. Courts have found that even though a video poker machine might have a large element of chance, this finding alone cannot classify video poker as gambling per se. Instead, courts tend to examine each instance on a case-by-case basis. In this case-by-case basis, Mr. Vecchione’s viewpoint should have been given more weight than that of Ms. Holleman. In highlighting propositions supporting fantasy football prognostication as a game of skill, Ms. Holleman quotes Mr. Glenn Colton, who in turn purports “that there are many ‘ways in which someone can skillfully and intellectually predict how a player is going to perform,’” including studying offensive coordinators’ techniques, quarterbacks’ performance, and whether teams are run- or pass-oriented. Using this logic, it is difficult to delineate a significant difference between fantasy football and gambling on horse racing. In placing bets on horses, gamblers can consider the condition of the track (recent rain can favor “mudders”), the length of the race, and how well rested each horse may be.

Ms. Holleman also considers public policy, to the extent that the average fantasy player is university educated, earns $90,000 per year, and earmarks $500 per year for fantasy sports. Even though this $500 is less than one percent of the average fantasy player’s annual income, this should be indistinguishable from a buy-in at the World Series of Poker, which, in turn, has sprawled beyond the confines of the casino, to private living rooms, where gambling websites offer to cover players’ buy-ins and enable players to play initial rounds remotely. $500 was also, at one time, more than enough for the wife of New Jersey physician and fantasy player Edgar Chou to match a $300 fantasy pot in an effort to get her husband to focus on more important, and ultimately more beneficial, investments and savings.

Mr. Vecchione accused Ms. Holleman’s assertions that fantasy players are “typically normal and well-adjusted” of being unsupported. Football fandom is widespread in American culture, spanning all
states and socioeconomic levels. Similarly, fantasy football fever has manifested symptoms in a sixty-year-old Fay Shutzer of New York (spending “fifteen to thirty minutes per day” on “probably an incredible waste of brain cells and time”),\textsuperscript{186} a fifty-eight-year-old Kent Thomas Spellman (who once woke up at 3 AM just to check the West coast results that would implicate his fantasy team),\textsuperscript{187} and a twenty-five-year-old Josh Jackson (who thinks about “this obsession” all day and night).\textsuperscript{188} Mr. Vecchione’s opinions on public policy give much more appropriate weight to fantasy football’s potential to create marital strife. In addition to the Edgar Chou example,\textsuperscript{189} Mr. Vecchione cited Raphael Poplock, vice president of games at ESPN, who disappeared to manage his fantasy team on his wedding day, and that he “had an itch the whole time” while experiencing “withdrawal” during his honeymoon in Greece.\textsuperscript{190} Finally, Mr. Vecchione returned to Mr. Okrent, who, during his lifetime, amassed a number of written letters in which wives accused him of ruining their marriages through his invention.\textsuperscript{191} Mr. Okrent recalled a specific story about Robert Sklar, a charter member of his league.\textsuperscript{192} Mr. Sklar’s girlfriend gave him an ultimatum to choose between doing the fantasy draft and their relationship, telling him “[i]f you participate in this crazy draft, we are through.”\textsuperscript{193} Mr. Okrent recalled that “[M]r. Sklar didn’t spend enough money on pitching but otherwise[,] he had a pretty decent draft.”\textsuperscript{194}

Football can manifest ugly consequences in anybody, from a high school student,\textsuperscript{195} to a college player,\textsuperscript{196} to a drafted professional with limited “cups of coffee” worth of experience in the NFL,\textsuperscript{197} to the Hall of Fame player and civic icon who, miraculously, had enough sense to end his post-retirement physical suffering by shooting himself in the
chest so that his brain could be free of gun debris and studied for signs of chronic traumatic encephalopathy.\textsuperscript{198} Similarly, fantasy football can become anybody’s addiction and ruin any number of cherished friendships or relationships, exactly like gambling.\textsuperscript{199} In fact, Mr. Vecchione theorized that the Internet truly has been a game-changer in turning fantasy football from a geeky and time-consuming hobby into an addiction.\textsuperscript{200}

In his analogy, he compared Internet-based fantasy football to video slot machines, as analog fantasy football would be to scratch-off tickets, poker, or other forms of gambling.\textsuperscript{201} He, in turn, cited a study conducted by Rhode Island clinical psychologist Robert Breen, who discovered that slot machine devotees can be addicted as soon as within one year, while other forms of gambling tended to take at least three years to render the participants addicted.\textsuperscript{202} Breen’s hunches, as to why, include that similar to how slot machines do not intimidate novices, internet fantasy football greatly mitigates the intimidation factor for new players, enabling them to create teams and instantly see feedback and “feel the rush” of winning.\textsuperscript{203} Given these societal ills, Congress should not have rushed to Ms. Holleman’s “harmless” judgments, and the NFL is probably acting inappropriately, and definitely out of character, in its shameless support of fantasy football.

[D]. THE NFL’S ROLE IN FANTASY FOOTBALL

Gambling is illegal for NFL players. As provided in Paragraph 15 of the standard player contract, which is entitled “Integrity of Game,” players are enjoined from “knowingly associat[ing] with gamblers or gambling activity,”\textsuperscript{204} as well as from “any other form[s] of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football.”\textsuperscript{205} Violations of this provision may result in fines, suspension, or the termination of the player’s con-


\textsuperscript{199}. 61 SMU L. Rev at 1708-9.

\textsuperscript{200}. Id. at 1706-9.

\textsuperscript{201}. Id. at 1708-9.

\textsuperscript{202}. Id.

\textsuperscript{203}. Id. at 1709.


\textsuperscript{205}. Id.
tract.\textsuperscript{206} The same prohibition applies to practice players, as can be found in Paragraph 14 of their own standard form contract.\textsuperscript{207} These contracts are attached as appendices to the NFL/NFLPA Collective Bargaining Agreement (hereinafter “NFL CBA” or “CBA”), which, as a whole, applies to all NFL players under contract, all prospective players who seek employment as a NFL player, all drafted rookies, and all undrafted rookies once they commence negotiations with a NFL member club.\textsuperscript{208}

Though arguably not as infamous as the Black Sox Scandal,\textsuperscript{209} Pete Rose of the MLB’s Cincinnati Reds,\textsuperscript{210} or former NBA referee Tim Donaghy,\textsuperscript{211} the NFL was once plagued with a gambling scandal. On April 17, 1963, Commissioner Pete Rozelle suspended two of the biggest marquee stars of the league, Paul Hornung of the Green Bay Packers and Alex Karras of the Detroit Lions, for the 1963 season for gambling on football and associating with “known hoodlums.”\textsuperscript{212} In addition, Rozelle fined five of Karras’s Detroit teammates: Joe Schmidt, Wayne Walker, John Gordy, Gary Lowe, and Sam Williams, $2000 each for their respective $50 bets on the 1962 NFL Championship Game between the Packers and the Giants.\textsuperscript{213} (The players took the points, but the Packers covered the spread, so the players lost.)\textsuperscript{214} Hornung maintained that his bets, similar to Donnell’s participation in his fantasy league, were with friends, and that he only wagered one or two hundred dollars per game.\textsuperscript{215} On the other hand, Rozelle concluded that Hornung’s bets were as rich as $500, while Karras made at least six bets, each of $50 or $100.\textsuperscript{216}

Despite Hornung and Karras’s suspensions, they later returned to their NFL careers, after respective apologies of varying contrition.\textsuperscript{217} Karras would be nominated for one more annual All-Pro selection before retiring in 1970, while Hornung would eventually be enshrined in the Pro Football Hall of Fame in 1986.\textsuperscript{218} Meanwhile, fantasy foot-

\textsuperscript{206} CBA at 261-2.
\textsuperscript{207} Id. at 286.
\textsuperscript{208} Id. at xiv.
\textsuperscript{209} See supra Part [B-1].
\textsuperscript{210} See supra Part [B-2-a].
\textsuperscript{211} See supra Part [B-2-b-ii].
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
ball was in its infancy, barely known beyond the confines of Winkenbach’s circle of close personal friends.\textsuperscript{219} If Hornung would have known about fantasy football at that time, he might have considered it a form of gambling, or, in the alternative, an activity that would have invited further scorn from Commissioner Rozelle. Prior to a 1964 game, Karras, despite being a team captain, refused to participate in the pre-game coin toss (used to determine which team will kick to whom to start the game, and which team will defend which end zone to start the game), citing his prohibition against gambling.\textsuperscript{220} Accordingly, even if fantasy football is not illegal due to the UIGEA, there is at least some cognitive dissonance, in that the NFL supports state bans on sports gambling, but actively promotes the fantasy football game.

\textbf{[E]. Recommendations}

Despite the fact that Congress has exempted fantasy football from the UIGEA, the NFL is not on solid moral ground in allowing its active players to associate with fantasy football. As is, fantasy football is explicitly permissible federally, but there is still some variation among the states.\textsuperscript{221} For example, through court decisions and statutes, the following states do not distinguish between games of chance and games of skill in their respective anti-gambling laws: Arizona, Arkansas, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, and Tennessee.\textsuperscript{222} This impacts fantasy managers throughout the country—not just managers who live in a state with a NFL team. If we were to allow the possibility that NFL players could manage their own fantasy teams, then nine teams’ players should have a special incentive to abstain from playing fantasy football for fear of state law liability: the Arizona Cardinals, the Jacksonville Jaguars, the Miami Dolphins, the Tampa Buccaneers, the Chicago Bears, the New Orleans Saints, the Baltimore Ravens, the Washington Redskins, and the Tennessee Titans. Furthermore, the NFL’s “unclean hands” problem became even more complicated, thanks to Richard Sherman’s sponsorship deal with FanDuel.\textsuperscript{223} FanDuel is a fantasy football site that allows players to

\footnotesize{\textsuperscript{219} See supra Part [A].}

\footnotesize{\textsuperscript{220} Paul Hornung and Alex Karras, BETTING SPORTS, http://www.bettingsports.com/sports-betting-scandals/paul-hornung-and-alex-karras/ (last visited Nov. 27, 2014).}


\footnotesize{\textsuperscript{222} Id. at 1264 n. 48.}

play against other players on a week-to-week basis, instead of having to join a season-long league. Meanwhile, Richard Sherman is a star cornerback for the Seattle Seahawks, and despite his endorsement, FanDuel’s own Terms of Service blocks activity in the State of Washington.224

To eliminate the most blatant appearance of impropriety, and to properly assert the maximum amount of authority a private actor will be able to assert, the NFL should prohibit its players from engaging in fantasy football. This can be easily accomplished with a reasonable reading of the NFL CBA, stemming from Hornung and Karras’s example. Even if the CBA might already ban fantasy football, the NFL should clarify such a prohibition. As a private actor that has a significant need for specific uniformity due to specialized league knowledge and the otherwise implication of multiple state laws, the NFL is allowed to establish its own rules on certain delineated acts. For example, the NFL has the power to suspend players based on as little as mere allegations that could be perceived as damaging “the integrity of the shield,” i.e.: the public’s perception of the NFL.225 The NFL, through its CBA, is also cogently able to prohibit its players from using marijuana, even though it is a medical drug in some members’ jurisdictions and recreationally legal in two.226 It logically follows then that the NFL can do the same for fantasy football, without alienating football fans’ rights under the UIGEA or by usurping congressional action, while still acting in a manner consistent with the CBA.

Alternatively, if the NFL insists on flexing its marketing muscle, perhaps it could establish a special players-only league, while banning other external, non-NFL-approved fantasy leagues. In this vision of a players-only league, a title sponsor might give players “entrance fee money,” players could manage fantasy teams (probably subject to special NFL rules to eliminate conflicts of interest from the actual NFL schedule, and even with some possibility of fans’ influence), and the winner could then win the fantasy pool money for the charity of his choice. While a more absolute ban on NFL players’ participation in fantasy football would be preferable for moral standing and uniformity, this alternative type of league might be a reasonable concession, if it should be shown that fantasy football were popular among the

224. Id.
NFLPA. However, this concession should not be considered the best option, because the NFL would still be left with unclean hands, by virtue of failing in its moral obligations to the players for their well being.

Recognizing this unclean-hands problem, the NFL should ban fantasy football among its players, to avoid being portrayed as a proximate cause to alumni’s post-career personal troubles. While the average NFL career is estimated to be merely three years long, the NFL is currently fighting numerous battles in the court of public opinion, such as issues relating to head trauma, domestic violence, and sexual assault. Specifically, in the aftermath of Minnesota Vikings running back Adrian Peterson and his child abuse misdemeanor convictions, the NFL moved to expand its anti-violence training program to all employees to include discussions of child abuse.\textsuperscript{227} In addition to the public relations beatings the league takes on physical issues, the league has many examples of its players filing for bankruptcy, despite having earned millions of dollars in lifetime salary.\textsuperscript{228} This issue was especially magnified during the 2011 NFL lockout, as players became unable to earn money from their contracts.\textsuperscript{229} Because the players were so dependent on their special football skills and regimented work schedules (most contracts call for payment after games, and many also include “workout bonuses,” which were all suspended during the lockout), the players opted for predatory cash loans.\textsuperscript{230} During the NBA’s own lockout in 2011, at the urging of the NBPA, some players, such as André Iguodala of the Philadelphia 76ers, secured internships to educate themselves about smarter money management.\textsuperscript{231} The NFLPA should follow a similar course of action instead of encouraging its players to strike out on their own, as these players often resort to common yet risky business models such as opening restaurants, and as a result find themselves in significant financial trouble.

In explaining why he gambled on baseball, Pete Rose explained that while growing up in Cincinnati, gambling was a way of life, and that he always thought it was thrilling to have a financial stake in an out-


\textsuperscript{230} \textit{Id.}

He had frequented horse racetracks since he was six years old, and he considered them to be sanctuary, as outlets for his frustrations from everyday life. For Rose, gambling was never about the money, but it was about the “action high,” which he found to be especially missing after he eclipsed Ty Cobb’s career record for the most base hits in a MLB career. According to Rose, most athletes like to gamble. Imagine Rose’s mindset in a NFL player who manages a fantasy football team, this player might be attracted to fantasy football for “action highs,” and he might risk a lot of money on his ventures because of his perceived specialized knowledge and because of his need to risk enough money for him to feel the action high.

In tacitly condoning NFL players’ participation in fantasy football leagues, the NFL is creating a potent cocktail for financial ruin for NFL players, as well as risking that its product is perceived as illegitimate. Even if some players might dislike being told how and how not to spend their earned money, a prohibition on professional athletes from operating fantasy leagues within their own organization (which necessarily depend on the successes and failures of fellow union members) would not only benefit their own lives, but it would represent a small, yet necessary, step in ensuring that all results are legitimate. With respect to players’ best interests, gambling was dubbed “an addiction of the 90’s” when the Arizona State point-shaving scandal was uncovered. As fantasy football has evolved from analog record keeping based on newspaper box scores to instant Internet feedback, and from basements to worldwide participation, it is clear that fantasy football is either an addiction of the 21st century, or a signature pastime of the 21st century.

Regardless as to the overall societal impact of fantasy football, it should behoove sports leagues to ban its players from participating in fantasy football leagues, due to fantasy sports’ intertwined legacies with gambling, the strong whiff of potential impropriety in the aftermaths of numerous sports betting scandals, and the fact that the Commissioner can reasonably interpret this action as consistent with

233. Id.
234. Id. at 225.
235. Id. at 226.
236. Point-Shaving Scandal Hits Arizona State, supra note 111.
237. See generally supra Part [A].
238. Vecchione, 61 SMU L. Rev. 1689 (2008); see generally supra Part [C-2].
239. Holleman, 8 N.C. J.L. & Tech. 59 (2006); see generally supra Part [C-1].
240. 61 SMU L. Rev. at 1701, supra note 149.
241. See generally supra Part [B] et seq.
the CBA and in accordance with Judge Kenesaw Mountain Landis’s and former NFL Commissioner Pete Rozelle’s legacies. After all, if players like Larry Donnell were unable to participate in fantasy leagues, to paraphrase Mr. Donnell, “we can bench all fantasy controversies, and we can all win on Sunday.”