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Unsportsmanlike Conduct – Calling a Penalty on the NFLPA and NHLPA’s Duty of Fair Representation for Entering Players

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I. INTRODUCTION

The 2019 National Football League (“NFL”) season saw Michael Thomas of the New Orleans Saints shatter the league’s single-season receptions record.¹ But a look at the situation that transpired in the summer before this record-breaking campaign shows how close it was to not happening.² Thomas, like an increasing number of young, superstar athletes, was unhappy with the terms of his rookie contract³—a contract that was provided to Thomas by the New Orleans Saints after he was selected as the forty-seventh overall pick in the 2016 NFL Draft.⁴ Thomas’ initial deal with the Saints was predetermined by the rookie compensation restrictions in the 2011 collective bargaining agreement agreed upon by league owners and the National Football League Players’ Association (“NFLPA”).⁵

As a second-round pick, Thomas was given a four-year, \$5.1 million contract of which \$2.6 million was guaranteed.⁶ After being selected to the Pro Bowl following the 2017 and 2018

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¹ See *NFL Single Season Leaders – Receptions*, FOOTBALL DATABASE, <http://www.footballdb.com/leaders/season-receiving-receptions> [http://perma.cc/J42C-TWUP] (last visited Mar. 23, 2020).

² See Mike Triplett, *Why the Saints had to break the bank for Michael Thomas*, ESPN (Jul. 31, 2019), http://www.espn.com/nfl/story/_id/27294194/why-saints-had-break-bank-michael-thomas [http://perma.cc/GL9Q-EZJV].

³ *Id.*

⁴ *Id.*

⁵ See generally Nat’l Football League, *Collective Bargaining Agreement 2011-2020*, Art. 7, <https://nflpaweb.blob.core.windows.net/media/Default/PDFs/2011%20CBA%20Updated%20with%20Side%20Letters%20thru%201-5-15.pdf> [http://perma.cc/3AJX-R4FV] (last visited May 3, 2020).

⁶ *Michael Thomas*, SPOTRAC, <http://www.spotrac.com/nfl/new-orleans-saints/michael-thomas-18996/> [http://perma.cc/7F78-V8Z8] (last visited Mar. 23, 2020) (showing that, when broken down on a per-year basis, Thomas was earning an average salary of \$1,279,743 on his rookie contract).

seasons, and being named a First-Team All-Pro in 2018⁷, Thomas was prepared to not report to Saints' training camp in an attempt to secure a better contract.⁸ Ultimately Thomas and the Saints agreed on a five-year, \$96.25 million contract extension—with a touch over \$35.6 million guaranteed—that allowed him to be in training camp with his teammates in preparation for the 2019 season⁹, a season that saw Thomas ultimately put out one of the most dominating performances by a wide receiver in NFL history.

In just three years, Thomas had secured a deal worth over fifteen times that of his restrictive rookie deal that was mandated by the collective bargaining agreement. Was Thomas suddenly fifteen times the player he was when he was drafted? Or was this new deal a much more accurate reflection of Thomas' correct value? In an industry where the average career length is measured in single-digit years and not decades, which dwarfs in comparison to the time spent preparing to reach the pinnacle, players must capitalize on their worth quickly.¹⁰

There are a select number of players who are able to successfully negotiate a significantly more lucrative contract without the threat of a holdout.¹¹ Unfortunately, Thomas' story is quickly becoming the rule rather than the exception. A number of NFL and National Hockey League (“NHL”) players nearing the

⁷ *Michael Thomas*, PRO FOOTBALL REF., <http://www.pro-football-reference.com/players/T/ThomMi05.htm> [<http://perma.cc/LZE8-YM6V>] (last visited Jan. 26, 2020).

⁸ See Jenna West, *Michael Thomas Doesn't Report to Saints' Training Camp While Seeking New Deal*, SPORTS ILLUSTRATED (July 25, 2019), <http://www.si.com/nfl/2019/07/25/michael-thomas-contract-saints-training-camp> [<http://perma.cc/44TH-85XG>].

⁹ See Mike Florio, *Inside the Michael Thomas deal*, NBC SPORTS (July 31, 2019, 8:27 PM), <http://profootballtalk.nbcsports.com/2019/07/31/inside-the-michael-thomas-deal/> [<http://perma.cc/5V38-V7CG>] (stating that, when broken down on a per-year basis, Thomas' new deal pays him an average base salary of \$19.25 million per year).

¹⁰ See generally Heather Brown, *Good Question: How Long Can Athletes Stay In The Game?*, WCCO CBS MINNESOTA (Feb. 8, 2016, 10:44 PM), <http://minnesota.cbslocal.com/2016/02/08/good-question-how-long-can-athletes-stay-in-the-game/> [<http://perma.cc/4N67-ULG6>]; SI Wire, *WSJ data analysis shows average length of NFL careers decreasing*, SPORTS ILLUSTRATED (Mar. 1, 2016), <http://www.si.com/nfl/2016/03/01/nfl-careers-shortened-two-years-data-analysis> [<http://perma.cc/E3XM-XBG3>].

¹¹ See Mike Florio, *Inside the Christian McCaffery contract*, NBC SPORTS (Apr. 16, 2020, 10:22 PM), <http://profootballtalk.nbcsports.com/2020/04/16/inside-the-christian-mccaffrey-contract/> [<http://perma.cc/36QZ-Y7Q7>] (“McCaffrey got his new deal after only three seasons, without a holdout or any other public ugliness. It's a testament to Panthers owner David Tepper, who recognized that McCaffrey is a high-talent, high-integrity core player who will be part of the franchise's nucleus for years to come.”); see also Sportsnet Staff, *Connor McDavid signs eight-year, \$100M extension with Oilers*, SPORTSNET (July 5, 2017, 3:06 PM), <http://www.sportsnet.ca/hockey/nhl/connor-mcdavid-signs-eight-year-extension-oilers/> [<http://perma.cc/6AQQ-3LBQ>] (“McDavid . . . still has one year remaining on his entry-level contract, so the extension doesn't kick in until the 2018-19 season.”).

end of their existing contracts are using the leverage that their performances have created to secure themselves the money that they rightfully deserve. Le’Veon Bell¹², Ezekiel Elliott¹³, Melvin Gordon¹⁴, Trent Williams¹⁵, and William Nylander¹⁶ are amongst the most recent high-profile names that are dissatisfied enough with their current contract situation to justify missing playing time to seek out a new contract. The parameters restricting rookie compensation in the NFL and NHL can and must be improved. The NFLPA and The National Hockey League Players’ Association (“NHLPA”)—the unions that represent these athletes in collective bargaining negotiations with league management—must act with the best interest of *all* their members in mind, not solely veteran players.

Part II of this Article discusses the background and purpose of collective bargaining in American professional sports, the consequences of collective bargaining failure, and the results of player dissatisfaction. Part III of this Article describes the interconnected relationship between antitrust law and labor law in sports and details a current problem in the collective bargaining agreements of the NFL and the NHL—rookies are disproportionately subjected to unduly restrictive contract compensation as a result of bad faith negotiation by their respective players’ associations, in violation of the National Labor Relations Act. Part III continues with comparisons to past collective bargaining agreements and shows how players have responded to these restrictions by refusing to play under the existing terms of their contracts and their justification for seeking increased compensation. Finally, Part IV advocates for a proposal that prohibits players’ associations from negotiating different rights based on the time a player—or a class of players—has spent

¹² See Danny Heifetz, *Le’Veon Bell’s Holdout Feels Real This Time*, RINGER (Sept. 5, 2018, 4:46 PM), <http://www.theringer.com/nfl/2018/9/5/17824408/leveon-bell-holdout-contract-franchise-tag-pittsburgh-steelers> [<http://perma.cc/KBG9-LPL4>].

¹³ See Bill Williamson, *All You Need To Know About The Ezekiel Elliott Holdout*, FORBES (Aug. 7, 2019, 7:42 PM), <http://www.forbes.com/sites/billwilliamson/2019/08/07/all-you-need-to-know-about-the-ezekiel-elliott-holdout/#6290f80471c2> [<http://perma.cc/3MPY-4ZJK>].

¹⁴ See Dan Cancian, *Melvin Gordon Holdout: Will Los Angeles Chargers Star Play This Year?*, NEWSWEEK (Sept. 3, 2019, 12:07 PM), <http://www.newsweek.com/will-melvin-gordon-play-holdout-contract-los-angeles-chargers-1457433> [<http://perma.cc/QJD9-WQBK>].

¹⁵ See Ethan Cadeaux, *A timeline of the Trent Williams holdout: how did we get here?*, NBC SPORTS WASHINGTON (Sept. 16, 2019, 11:18 AM), <http://www.nbcsports.com/washington/redskins/timeline-trent-williams-holdout-how-did-we-get-here> [<http://perma.cc/6YQ4-K5E5>].

¹⁶ See Mike Johnston, *Report: Rival NHL execs question Maple Leafs forward Nylander’s value*, SPORTSNET (Oct. 19, 2018, 7:16 PM), <http://www.sportsnet.ca/hockey/nhl/report-rival-nhl-exec-question-maple-leafs-forward-nylanders-value/> [<http://perma.cc/ZJN7-UKQD>].

in the league when negotiating future collective bargaining agreements. Part IV draws comparisons to both sports and non-sports examples of players' associations or unions not setting a maximum amount that entering talent is able to earn and further discusses the importance of implementing uniformity in the rights afforded to players when negotiating with league ownership.

II. BACKGROUND

A. Origins of Collective Bargaining Agreements

Collective bargaining agreements are “document[s] by which a labor union and an employer stipulate to the terms of employment for those employees that are party to the collective bargaining agreement which formulate the foundation for dealings between players' unions and league ownership”.¹⁷ Collective bargaining agreements allow these unions—representing the players and their interests—and employers—representing the team owners and their interests—to negotiate and come to terms on crucial matters affecting league play.¹⁸

The National Labor Relations Act (“NLRA”) was introduced by Congress in 1935 “to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.”¹⁹ Section 9 of the NLRA provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.²⁰

The NFLPA has been the unionized representative body of football players in the NFL since 1956²¹, although NFL club owners did not recognize the union until 1968, when the first collective bargaining agreement was entered into.²² The NHLPA

¹⁷ Blake Yagman, *Weekly Legal Brief: Collective Bargaining, Lockouts, and Strikes*, FRONT OFFICE SPORTS (Apr. 27, 2018), <http://www.frntofficesport.com/weekly-legal-brief-collective-bargaining-lockouts-and-strikes> [<http://perma.cc/68N5-8F8C>].

¹⁸ *Id.*

¹⁹ *National Labor Relations Act*, NAT'L LAB. RELS. BD., <http://www.nlr.gov/how-we-work/national-labor-relations-act> (last visited Mar. 1, 2020).

²⁰ 29 U.S.C. § 159(a) (2012).

²¹ *About the NFLPA*, NFL PLAYERS ASS'N, <http://www.nflpa.com/about> [<http://perma.cc/33L5-U6S2>] (last visited Feb. 29, 2020).

²² *NFL labor history since 1968*, ESPN (Mar. 3, 2011), http://www.espn.com/nfl/news/story?page=nfl_labor_history [<http://perma.cc/DB2X-78SG>].

was formed in 1967 and was recognized that same year by NHL club owners.²³ The first collective bargaining agreement between the NHLPA and the NHL was reached in 1975.²⁴ In the early stages of the respective players' associations, the collective bargaining agreements between the sides were focused on "basic economic rights."²⁵ It was not until the players garnered more leverage vis-à-vis the owners that they began to redirect the narrative and push for more in their collective bargaining discussions, including securing a share of league revenues, and other salary related issues.²⁶

While labor negotiations between players' unions and league owners may appear to be identical to that of non-sports industries, there are much deeper layers of factors to consider.²⁷ The sports industry combines an employee base that possesses a unique set of skills with a monopolistic employer.²⁸ There are few, if any, substitute leagues for athletes that wish to ply their trades at the highest level and thus they must subject themselves to a lesser bargaining power vis-à-vis league owners.²⁹

B. Purpose of Collective Bargaining Agreements: Parity and Control

Professional sports in North America are part of a large and ever-growing industry.³⁰ While millions of North Americans enjoy sports on some level, team ownership is a privilege reserved for the ultra-rich.³¹ The Dallas Cowboys, often regarded as the benchmark franchise in North American sports, have a valuation of \$5.5 billion while the Buffalo Bills, the NFL franchise with the lowest valuation, is still worth just south of \$2 billion.³² The four major sports leagues—the NFL, NHL, National Basketball Association ("NBA"),

²³ *Frequently Asked Questions*, NHLPA, <http://www.nhlpa.com/the-pa/what-we-do/faq> [<http://perma.cc/UF8F-H8LP>] (last visited Mar. 1, 2020).

²⁴ *Id.*

²⁵ Gabe Feldman, *Collective Bargaining in Professional Sports: The Duel Between Players and Owners and Labor Law and Antitrust Law*, in *OXFORD HANDBOOK OF AMERICAN SPORTS LAW 5* (Michael A. McCann ed., 2018).

²⁶ *Id.*

²⁷ *Id.* at 6.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Darren Heitner, *Sports Industry To Reach \$73.5 Billion By 2019*, *FORBES* (Oct. 19, 2017, 7:15AM), <http://www.forbes.com/sites/darrenheitner/2015/10/19/sports-industry-to-reach-73-5-billion-by-2019/#7e94448c1b4b> [<http://perma.cc/8AE2-U8SS>].

³¹ See Michael Ozanian et al., *The NFL's Most Valuable Teams 2019: Cowboys Lead League at \$5.5 Billion*, *FORBES* (Sept. 4, 2019, 7:25 AM), <http://www.forbes.com/sites/mikeozanian/2019/09/04/the-nfls-most-valuable-teams-2019-cowboys-lead-league-at-55-billion/#2b6b29212f1b> [<http://perma.cc/8FRJ-DY9Z>].

³² See *id.*

and Major League Baseball (“MLB”)—collectively recognized approximately \$31 billion dollars in revenue in their most recent seasons.³³ All thirty-two NFL teams experienced positive operating incomes in 2019, with profits ranging from \$28 million to \$420 million.³⁴ These revenue figures are driven by television deals, advertisements, corporate sponsorships, gate revenues, and merchandise sales.³⁵

A vital consideration for these revenue drivers is the concept of parity or “fairness in play.”³⁶ “In order to be successful . . . the public must believe that there is relative parity among the member teams and that each team has the opportunity of becoming a contender over a reasonable cycle of years”³⁷ Aiming to meet these parity goals, league collective bargaining agreements set forth and detail important competitive balance measures such as: (1) draft selection order, (2) restriction on player movement, and (3) salary control measures, or “salary caps.”³⁸

Most incoming players to the NFL and NHL enter through the draft process.³⁹ It is through this process that organizations are given the “exclusive rights” to secure the services of the player.⁴⁰ The NFL determines their draft selection order with a true reversal of the standings from the previous year.⁴¹ The NHL uses a lottery system where each non-playoff team has the

³³ Devon Anderson, *Ranking Professional Sports Leagues by Revenue*, ULTIMATE CORP. LEAGUE (Apr. 10, 2019), <http://www.ultimatecorporateteague.com/ranking-professional-sports-leagues-by-revenue/> [<http://perma.cc/5BCB-XRPD>].

³⁴ See Ozanian, *supra* note 31, (showing that the Oakland Raiders realized \$28 million in operating income from revenue of \$357 million while the Dallas Cowboys realized \$420 million in operating income from revenue of \$950 million).

³⁵ See generally TJ Mathewson, *TV is biggest driver in global sport league revenue*, GLOB. SPORT MATTERS (Mar. 7, 2019), <http://globalsportmatters.com/business/2019/03/07/tv-is-biggest-driver-in-global-sport-league-revenue/> [<http://perma.cc/8DJS-6B9B>].

³⁶ Duane W. Rokerbie, *Exploring Interleague Parity in North America: The NBA Anomaly*, 17 J. OF SPORTS ECON. 286, 286 (2016).

³⁷ *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 486 (E.D. Pa. 1972).

³⁸ *Collective Bargaining Agreements in Sports: How Do They Work in the United States vs. Europe*, MONEY SMART ATHLETE BLOG (Aug. 29, 2018), <http://moneysmartathlete.com/2018/08/29/collective-bargaining-agreements-in-sports-how-do-they-work-in-the-united-states-vs-europe/> [<http://perma.cc/8QCF-FVLU>].

³⁹ See Travis Lee, *Competitive Balance in the National Football League After the 1993 Collective Bargaining Agreement*, 11 J. SPORTS & ECON. 77, 78 (2010); see generally Sam McCaig, *From the draft to the NHL: A round-by-round look at the league's skaters and goalies*, HOCKEY NEWS (Oct. 21, 2018), <http://thehockeynews.com/news/article/from-the-draft-to-the-nhl-a-round-by-round-look-at-the-leagues-skaters-and-goalies> [<http://perma.cc/Y3Q3-J25V>].

⁴⁰ Lee, *supra* note 39.

⁴¹ *The Rules of the Draft*, NFL OPERATIONS, <https://operations.nfl.com/journey-to-the-nfl/the-nfl-draft/the-rules-of-the-draft/> (last visited Nov. 3, 2019) [<http://perma.cc/TX63-92Z8>].

chance to select first in the draft, with the team that has the worst record given the highest probability to earn the right to select first.⁴² Both of these systems seek to provide the least-successful teams in a given year with the opportunity to turn their franchise fortunes around by selecting higher-rated prospects that are available through the draft.

In an effort to allow teams to retain their top-tier talent and remain competitive, collective bargaining agreements also include restraints on player movement. In the early days of sports, perpetual reserve clauses allowed teams to retain the services of their players indefinitely until they were released from their obligations by the team.⁴³ In modern sports, where perpetual reserve clauses have been abolished, players are under club control for a set period of years before hitting “free agency.”⁴⁴ It is at this point that a player can then decide on their own where they wish to take their services.⁴⁵ Many players elect to spend their entire career with one organization, but many also choose to explore the market and peddle their skills elsewhere upon satisfying their obligations under their respective contracts.⁴⁶

In addition, league collective bargaining agreements also implement a salary control tool that is more or less exclusive to American sports: the salary cap. The NFL⁴⁷ and NHL⁴⁸ are both governed by a “hard” salary cap, which operates by setting the upper limit of player salaries that a team is permitted to spend in a given league year.⁴⁹ These salary control devices aim to foster an environment of parity in American sports by preventing teams with deeper pockets from monopolizing high-end talent in the league, empowering franchises in smaller markets to obtain

⁴² See Adam Kimelman, *2019 NHL Draft Lottery Will Determine First Three Teams to Pick*, NHL (Apr. 8, 2019), <http://www.nhl.com/news/2019-nhl-draft-lottery-faq/c-306581364> [<http://perma.cc/AY7U-RMLZ>].

⁴³ Jonathan B. Goldberg, *Player Mobility in Professional Sports: From the Reserve System to Free Agency*, 15 SPORTS L. J. 21, 22–25 (2008).

⁴⁴ *Id.* at 44.

⁴⁵ *Id.*

⁴⁶ *See id.* at 56–57.

⁴⁷ Grant Gordon, *NFL salary cap for 2019 season set at \$188.2M*, NFL (Mar. 1, 2019, 5:37 PM), <http://www.nfl.com/news/story/0ap3000001020137/article/nfl-salary-cap-for-2019-season-set-at-1882m> [<http://perma.cc/JJ85-LZNM>] (“Officially, the salary cap for 2019 will be \$188.2 million . . .”).

⁴⁸ Dan Rosen, *NHL announces salary cap for next season*, NHL (June 22, 2019), <http://www.nhl.com/news/nhl-announces-salary-cap-for-2019-20-season/c-308008530> [<http://perma.cc/GTH3-QQZ4>] (“The NHL salary cap for the 2019-20 season will be \$81.5 million . . .”).

⁴⁹ Jim Pagels, *Are Salary Caps for Professional Athletes Fair?*, PRICEONOMICS (Aug. 19, 2014), <http://www.priceonomics.com/are-salary-caps-for-professional-athletes-fair/> [<http://perma.cc/MJP8-SFPG>].

player services, and allowing overall league prosperity by encouraging reasonable competitiveness.⁵⁰

The salary control exhibited in American sports can be contrasted with the five major European soccer leagues: England's Premier League, Italy's Serie A, Spain's La Liga, Germany's Bundesliga, and France's Ligue 1, which all lack a salary cap or luxury tax structure, resulting in staggering salary inequality.⁵¹ In 2018, a survey examining salary inequality was conducted based on the average first-team salaries of teams in major professional sports leagues.⁵² From these salaries a fairness metric was created: a ratio calculated by taking the average first-team salaries of the highest spender in a respective league and dividing it by the amount spent by the lowest spender.⁵³

Of the eighteen leagues studied in the survey, the major European soccer leagues occupied five of the seven lowest rankings in salary inequality based on the fairness metric.⁵⁴ American sports, with their salary caps and luxury tax provisions, all ranked in the top half of fairness metric rankings in that same study.⁵⁵ If the raw "fairness metric" ratios are compared, the gap is increasingly apparent: each North American sport has a ratio of less than 4:1, while the Premier League is the only European league with a ratio of less than 10:1.⁵⁶ Each of the other four European leagues double the ratio seen in the Premier League.⁵⁷

It would appear that the strive for parity in American sports through salary control devices has been largely successful. Of the forty major American championships in the last decade, 70% have been won by unique teams.⁵⁸ In the major European soccer

⁵⁰ *What is a Salary Cap in Sports?*, UNIV. KAN. (Apr. 2, 2018), <https://onlinesportmanagement.ku.edu/community/salary-caps-in-sports>, [<http://perma.cc/TN32-9E7H>].

⁵¹ *See generally Global Sports Salaries Survey 2018*, SPORTING INTEL. (Nov. 25, 2018), <http://www.globalsportssalaries.com/GSSS%202018.pdf> [<http://perma.cc/KQX9-GCJ7>].

⁵² *Id.* at 8.

⁵³ *Id.*

⁵⁴ *See infra* Appendix A.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See generally NBA & ABA Champions*, BASKETBALL REF., <http://www.basketball-reference.com/playoffs/> [<http://perma.cc/2SY6-CRR5>] (last visited Nov. 3, 2019); *NHL/WHA Playoffs*, HOCKEY REF., <http://www.hockey-reference.com/playoffs/> [<http://perma.cc/U9EP-LN9V>] (last visited Nov. 3, 2019); *Pro Football & NFL History*, PRO FOOTBALL REF., <http://www.pro-football-reference.com/years/> [<http://perma.cc/K6HW-RHWT>] (last visited Nov. 3, 2019); *World Series and MLB Playoffs*, BASEBALL REF., <http://www.baseball-reference.com/postseason/> [<http://perma.cc/QZ92-JR72>] (last visited Nov. 3, 2019) (calculations conducted by author and correct as of May 18, 2020).

leagues that lack the competitive balance measures of American sports, that number drops to 34%.⁵⁹

C. Consequences of Collective Bargaining Failures and Dissatisfaction

1. Lockouts/Strikes

Ultimately, the role of a collective bargaining agreement is to get the players out onto the field, ice, or court. Due to the high-risk nature of professional sports competition and the large considerations involved in each league's collective bargaining agreement, negotiations can be hostile and lead to lockouts instituted by owners or strikes instituted by players' unions.⁶⁰ The most notable lockout from a fan and media perspective was the 2011 NFL lockout, which lasted from March 12, 2011 until August 4, 2011 and garnered around-the-clock coverage on major sports news outlets.⁶¹ The NBA experienced a 161-day work stoppage during roughly that same time period when the owners locked the players out from July 1, 2011 to December 8, 2011.⁶²

In August of 1994, MLB players instituted a strike mid-season that caused the loss of over 900 scheduled games—including the entirety of the 1994 playoffs.⁶³ The strike was eventually resolved in April of the following year after 232 days of labor tensions.⁶⁴ The NHL is infamously known as the only North American professional sports league to forego an entire season due to a labor dispute.⁶⁵ The NHL lost the 2004–2005 season to a lockout before the NHL and the National Hockey League Players' Association (“NHLPA”) finally

⁵⁹ See generally *Bundesliga Seasons*, FB REF, <http://www.fbref.com/en/comps/20/history/Bundesliga-Seasons> [http://perma.cc/F7RC-RTMB] (last visited Nov. 3, 2019); *La Liga Seasons*, FB REF, <http://www.fbref.com/en/comps/12/history/La-Liga-Seasons> [http://perma.cc/7CYU-3HD2] (last visited Nov. 3, 2019); *Ligue 1 Seasons*, FB REF, <http://www.fbref.com/en/comps/13/history/Ligue-1-Seasons> [http://perma.cc/74XJ-NHGZ] (last visited Nov. 3, 2019); *Premier League Seasons*, FB REF, <http://www.fbref.com/en/comps/9/history/Premier-League-Seasons> [http://perma.cc/Y3RP-MR56] (last visited Nov. 3, 2019); *Serie A Seasons*, FB REF, <http://www.fbref.com/en/comps/11/history/Serie-A-Seasons> [http://perma.cc/X7KJ-AYX3] (last visited Nov. 3, 2019) (calculations conducted by author).

⁶⁰ See Alex Remington, *Lockouts, Strikes, And Labor Politics In Pro Sports*, FOOTNOTE (June 5, 2013), <http://footnote.co/lockouts-strikes-and-labor-politics-in-pro-sports/> [http://perma.cc/7C9D-VL76].

⁶¹ See generally CNN Library, *Pro Sports Lockouts and Strikes Fast Facts*, CNN, <http://www.cnn.com/2013/09/03/us/pro-sports-lockouts-and-strikes-fast-facts/index.html> [http://perma.cc/P7UJ-RZA3] (last updated June 4, 2020, 1:18 PM).

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *id.*

agreed to a six-year collective bargaining agreement in July of 2005.⁶⁶ After extending the agreement for one additional season, the NHL owners again locked out the players in September of 2012, causing the truncation of the 2012–2013 NHL season.⁶⁷

2. Player Dissatisfaction—The Holdout

Unfortunately for owners, players, and fans of sports, a ratified collective bargaining agreement does not ensure harmony for the duration of the agreement. Players who are unsatisfied with their contract terms (e.g., contract length, base salary, performance incentive bonuses, or guaranteed money) often holdout for a more lucrative contract.⁶⁸ A “holdout” is sports industry terminology for a player’s refusal to continue playing under the terms of a previously agreed-upon deal.⁶⁹ Holdouts are becoming increasingly common in professional sports and ultimately impact not only the team that is losing the services of a player, but also the perception of the team and league in the eyes of sponsors, advertisers, and fans.⁷⁰

In addition to the competitive balance and overall salary restraints detailed above, recent collective bargaining agreements have implemented additional provisions that put restrictions on the negotiable terms in rookie contracts.⁷¹ The restrictions include detailing and limiting the maximum salary payable under a rookie contract, fixing the length of years that a player must sign for under their first contract, and providing movement restrictions following the end of that first contract.⁷² With the average career length varying from “three to five years,” players realize that there is a sense of urgency to earn their fair share during the very brief window they have before injuries inevitably take a toll.⁷³ As a result of this short earning potential,

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See Jack Bechta, *Why Players Hold Out*, NAT’L FOOTBALL POST, <http://nationalfootballpost.com/why-players-hold-out/> [<http://perma.cc/DL4C-N68H>] (last visited Mar. 6, 2020).

⁶⁹ Jacob Salow, *Holdouts, Lockouts, and Payouts: The National Football League’s Bargaining Power Phenomenon*, 43 L. & PSYCH. REV. 239, 240 (2019).

⁷⁰ Peter B. Kupelian & Brian R. Salliotte, *The Use of Mediation for Resolving Salary Disputes in Sports*, 2 THOMAS M. COOLEY J. PRAC. & CLINICAL L. 383, 391 (1999).

⁷¹ See Blake Yagman, *The Weekly Legal Brief: Breaking Down NFL Rookie Contracts*, FRONT OFFICE SPORTS (May 4, 2018), <http://www.frntofficesport.com/the-weekly-legal-brief-breaking-down-nfl-rookie-contracts/> [<http://perma.cc/PEB9-Y3DX>].

⁷² See generally Nat’l Football League, *supra* note 5; Nat’l Hockey League, *Collective Bargaining Agreement 2012–2022 at Art. 9*, http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf [<http://perma.cc/PQ5N-KV87>] (last visited Nov. 3, 2019).

⁷³ Brown, *supra* note 10; see also Dave Siebert, M.D., *The Impact of Modern Medicine on the NFL*, BLEACHER REP. (May 16, 2013), <http://bleacherreport.com/articles/1639848->

a “majority of holdouts” occur when players are in the later stages of their rookie, or entry-level, contracts.⁷⁴ These players are on team-friendly deals by virtue of being locked into the restrictive terms set by the collective bargaining agreements of the NFL and NHL.⁷⁵ Oftentimes the teams wish to keep the player for longer but are in no rush to sign the player prior to their deal ending and while the player is under team control on less-expensive contracts.⁷⁶

D. NFL and NHL Collective Bargaining History

Before one can understand the gravity and significance of the terms and conditions of the current collective bargaining agreements in the NFL and NHL, it is important to take a brief look back at past agreements that have been negotiated between ownership and players’ associations. These agreements have paved the way for the current collective bargaining relationship between players’ associations and ownership and provide valuable insight into the circumstances that led to the current agreements.

1. Past NFL Collective Bargaining Agreements

Although collective bargaining in the NFL has been around since 1968⁷⁷, it was the 1993 agreement that was heralded as “a groundbreaking CBA that set the framework for every NFL CBA since.”⁷⁸ The success of the 1993 CBA was evident when that agreement was extended three times—in 1998, 2001, and 2006—without any strikes, lockouts, or litigation between the parties ensuing.⁷⁹ The latest renewal of the 1993 CBA saw the agreement last until 2011, at which point the NFL and NFLPA went back to the bargaining table and, eventually, the courtroom.⁸⁰

projecting-the-impact-of-advancing-modern-medicine-on-the-nfl [http://perma.cc/2K8J-CML6] (noting the progress that modern medicine has made regarding injury research in sports and stating that “[t]he medical community now knows that concussions carry not only short-term, but also long-term, consequences. The age of ‘shaking off’ a blow to the head is forever over.”).

⁷⁴ Jason Fitzgerald, *Looking at the NFL Training Camp Holdouts*, OVER CAP (July 29, 2019), <http://www.overthecap.com/nfl-training-camp-holdouts/> [http://perma.cc/3K7L-72KH].

⁷⁵ See Yagman, *supra* note 71.

⁷⁶ See Fitzgerald, *supra* note 74.

⁷⁷ See *NFL labor history since 1968*, *supra* note 22.

⁷⁸ Chris Deubert, et al., *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA ENT. L. REV. 1, 12 (2012).

⁷⁹ See *id.* at 13.

⁸⁰ See *id.* at 14.

The rookie compensation scheme that we see today was a contentious issue in the 2011 negotiations.⁸¹ Teams had begun choosing to give high-profile rookie players significant amounts of money⁸², money that some felt was out of balance, believing that the money should instead be used to pay proven veterans.⁸³

2. Past NHL Collective Bargaining Agreements

The 1995 NHL collective bargaining agreement (“1995 CBA”) was the first to implement a cap on entry-level players or, as the agreement referred to them, “Group I players.”⁸⁴ The 1995 CBA placed a prescribed contract length based on the age a player was when they signed their entry-level contract.⁸⁵ Players between the ages of eighteen and twenty-one were signed for a period of three years; players between the ages of twenty-two and twenty-three were signed for a period of two years; players that were twenty-four were signed for a period of one year, and there was no required number of years for players aged twenty-five or older, and those players were not in the entry-level system.⁸⁶

The 1995 CBA also delineated the maximum NHL compensation that a player could earn that was contingent on the year they were drafted into the NHL.⁸⁷ The amount of any “signing, reporting and roster bonuses” was limited to no more than 50% of the maximum compensation allowed under Section 9.3(a).⁸⁸ Although the imposition of a salary cap on entry-level players was a “supposed major victor[y] for the league,”⁸⁹ a loophole existed that was exploited by savvy player agents.⁹⁰ Article 9.3(c) of the agreement stated that “nothing contained in this Section 9.3 shall be deemed to limit the amount permitted to be paid to any Group I Player in respect of any Exhibit 5

⁸¹ See *id.* at 53.

⁸² *Rams give Bradford 50M guaranteed*, ESPN (July 31, 2010, 9:09 AM), <http://www.espn.com/nfl/news/story?id=5425041> [<http://perma.cc/SD89-TYJL>].

⁸³ See *Mawae: Big Rookie Contracts Like Ryans' Disheartening*, ESPN (May 21, 2008, 4:43 PM), <http://espn.go.com/nfl/news/story?id=3406508> [<http://perma.cc/4HMQ-E8D3>].

⁸⁴ See James Wilton Baillie, *An Examination of the Causes behind the Escalation of Player Compensation Between 1994 and 2004 Leading to the 2004–05 NHL Lockout*, QUEEN'S UNIV. INDUS. REL. CTR., 33 (August 2005), https://irc.queensu.ca/wp-content/uploads/articles/articles_investigation-into-the-collective-bargaining-relationship-between-nhl-nhlpa-1994-2005.pdf [<http://perma.cc/GPQ2-V6LQ>].

⁸⁵ See Nat'l Hockey League, *Collective Bargaining Agreement 1995–2004* at art. 9.1(b), (Jan. 13, 1995) http://www.letsgopens.com/nhl_cba-old.php?id=1 [<http://perma.cc/5FJU-ZWTX>].

⁸⁶ See *id.*

⁸⁷ See *infra* Appendix B.

⁸⁸ Nat'l Hockey League, *supra* note 85 art. 9.3(b).

⁸⁹ Baillie, *supra* note 84, at 33.

⁹⁰ *Id.* at 34.

Performance Bonus(es).”⁹¹ Among other things, Exhibit 5 allowed bonuses for meeting performance metrics such as ice time, goals scored, assists scored, and points scored.⁹²

After a lockout caused the loss of the 2004–2005 NHL season, the NHL and NHLPA agreed on the 2005 collective bargaining agreement (“2005 CBA”).⁹³ Most notably, the 2005 CBA was the first NHL CBA to include an overall salary cap on team salaries.⁹⁴ Like the 1995 CBA, the 2005 CBA also included the same prescribed length for entry-level contracts⁹⁵ and an entry-level compensation maximum based on the year in which the player was drafted,⁹⁶ although the compensation figure was scaled down dramatically from 1995 CBA figures.⁹⁷ A notable difference in the 2005 CBA was a stricter limitation on the signing and games-played bonus: Section 9.3(b) removed the reporting and roster bonuses, allowed entry-level players to only earn a signing and games-played bonus, and capped said bonuses at 10% of the player’s Section 9.3(a) compensation.⁹⁸

III. CURRENT STATE OF AFFAIRS: BAD FAITH NEGOTIATIONS DISPROPORTIONATELY IMPACT ROOKIES

A. Labor Law and Antitrust Exemptions in Sports

Antitrust law and collective bargaining—through federal labor law—are concepts that are in direct conflict with one another.⁹⁹ Simply put, “antitrust law promotes competition while labor law endorses activities that restrict it.”¹⁰⁰ The Sherman Act, the main federal antitrust statute states: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.”¹⁰¹ The NFL and NHL—and other North

⁹¹ Nat’l Hockey League, *supra* note 85, at art. 9.3(c).

⁹² *See id.* at Exhibit 5.

⁹³ *See generally* CNN Library, *supra* note 61.

⁹⁴ *See* Nat’l Hockey League, Collective Bargaining Agreement 2005–12 at art. 50.5(b), (July 22, 2005), <http://www.letsopens.com/NHL-2005-CBA.pdf> [<http://perma.cc/S7M2-JF2A>].

⁹⁵ *Id.* at art. 9.1(b).

⁹⁶ *See infra* Appendix C.

⁹⁷ *Compare infra* Appendix B with Appendix C.

⁹⁸ *See* Nat’l Hockey League, *supra* note 94, at art. 9.3(a)–(b). This number was down from the 50% allowable under the 1995 CBA.

⁹⁹ *See* Wood v. Nat’l Basketball Ass’n, 809 F.2d 954, 959 (2d Cir. 1987).

¹⁰⁰ *Antitrust Law – Nonstatutory Labor Exemption – Second Circuit Exempts NFL Eligibility Rules from Antitrust Scrutiny* – Clarett v. National Football League, 118 HARV. L. REV. 1379, 1379 (2005).

¹⁰¹ 15 U.S.C. § 1 (2018).

American sports leagues—are, by their very nature, violations of antitrust laws.¹⁰² The teams in these leagues “must cooperate on a business level to maintain competitive balance between them [and b]y cooperating economically instead of competing with one another, clubs are apparently violating antitrust laws.”¹⁰³ This dichotomy has been addressed and minimized in two ways: the “statutory labor exemption”—codified as the Norris LaGuardia Act and Sections 6 and 20 of the Clayton Act—and the “non-statutory labor exemption.”¹⁰⁴

In *Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, the Supreme Court interpreted the statutory labor exemption statutes to mean that “labor unions are not combinations or conspiracies in restraint of trade, and exempt[s] specific union activities . . . from the operation of the antitrust laws.”¹⁰⁵ The non-statutory labor exemption was first explored in the sports capacity in *Mackey v. National Football League*.¹⁰⁶ In *Mackey*, NFL players brought an antitrust challenge against the so-called Rozelle Rule, which permitted the Commissioner of the NFL to compensate a team losing the services of a player that was previously under contract with the said team by “nam[ing] and then award[ing] to the former club one or more players . . . of the acquiring club as the Commissioner in his sole discretion deem[ed] fair and equitable.”¹⁰⁷ The Rozelle Rule was instituted not through collective bargaining, but was instead adopted by league owners as a unilateral amendment to the NFL Constitution.¹⁰⁸

The *Mackey* court described the appropriateness of the non-statutory labor exemption by developing a three-prong test.¹⁰⁹ In order for the non-statutory labor exemption to apply, the restraint must (1) primarily affect only the parties to the collective bargaining agreement, (2) be a mandatory subject of collective bargaining, and (3) be the product of bona fide arm’s length bargaining.¹¹⁰ The court ruled that the Rozelle Rule met prongs one and two of the non-statutory exemption test, but failed on prong three as the court found the Rozelle Rule was not

¹⁰² See Leah Farzin, *On the Antitrust Exemption for Professional Sports in the United States and Europe*, 22 JEFFREY S. MOORAD SPORTS L. J. 75, 75 (2015).

¹⁰³ *Id.*

¹⁰⁴ Feldman, *supra* note 25, at 8.

¹⁰⁵ *Connell Constr. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975).

¹⁰⁶ *Mackey v. Nat’l Football League*, 543 F.2d 606 (8th Cir. 1976).

¹⁰⁷ *Id.* at 610–11.

¹⁰⁸ *Id.* at 610.

¹⁰⁹ *Id.* at 614.

¹¹⁰ *Id.*

the product of arm's length negotiation.¹¹¹ In its opinion, the court stated that the Rule was unilaterally implemented by team owners *prior* to any collective bargaining agreement between league ownership and the players' union and found that there was a lack of sufficient evidence that the union had received reciprocal consideration.¹¹² Following the Eighth Circuit, a number of lower district courts and sister circuit courts adopted the *Mackey* test as the barometer for the non-statutory labor exemption.¹¹³

The Supreme Court took up the non-statutory labor exemption in the sports context in *Brown v. Pro Football, Inc.*, and closed up the holes that the statutory labor exemption did not immediately address.¹¹⁴ *Brown* involved a challenge to the NFL's creation of a "developmental squad" of players that "would play in practice games and sometimes in regular games as substitutes for injured players."¹¹⁵ When the players' association and the NFL could not agree on the wages and benefits of the development squad, the league unilaterally implemented the last best proposal.¹¹⁶ In delivering the opinion of the Court, Justice Breyer succinctly stated the aim and purpose of the non-statutory labor exemption, stating:

As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable. Thus, the implicit exemption recognized that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.¹¹⁷

A particularly noteworthy sports antitrust case is *Clarett v. National Football League*, wherein Maurice Clarett, a former standout running back at Ohio State University, challenged the NFL's draft eligibility rules that required hopeful NFL players to wait three full football seasons after high school graduation before the player would be eligible to enter the NFL

¹¹¹ *Id.* at 615–16.

¹¹² *Id.* at 616.

¹¹³ *See, e.g.*, *Bridgeman v. Nat'l Basketball Ass'n*, 675 F. Supp. 960, 964 (D.N.J. 1987); *Cont'l Mar., Inc. v. Pac. Coast Metal Trades Dist. Council*, 817 F.2d 1391, 1393 (9th Cir. 1987); *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1197-98 (6th Cir. 1979); *Wood v. Nat'l Basketball Ass'n*, 602 F. Supp. 525, 528 (S.D.N.Y. 1984); *Zimmerman v. Nat'l Football League*, 632 F. Supp. 398, 403–04 (D.D.C. 1986).

¹¹⁴ *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

¹¹⁵ *Id.* at 234.

¹¹⁶ *Id.* at 235.

¹¹⁷ *Id.* at 237 (emphasis in original).

Draft.¹¹⁸ Clarett was the first freshman to be listed as the starting running back for Ohio State since 1943, and he did not disappoint as he led the Buckeyes to a national championship that season.¹¹⁹ Unfortunately for Clarett, that is where the positives stopped. Clarett was accused of receiving “preferential treatment” from Ohio State administrators,¹²⁰ “charged with misdemeanor falsification” of a police report,¹²¹ and eventually suspended by Ohio State and the NCAA for accepting improper benefits before he played a single snap in his sophomore season.¹²²

After his troubles at Ohio State, Clarett sought to enter the 2004 NFL Draft despite the NFL’s three-year rule.¹²³ Clarett, who had graduated from high school in December 2001¹²⁴, posited that NFL teams were “horizontal competitors for the labor of professional football players and thus may not agree that a player will be hired only after three full football seasons”¹²⁵ In overturning the district court, the Second Circuit ruled that that the non-statutory labor exemption applied and that Clarett did not have antitrust standing to bring his claim, as doing so would usurp federal labor law policies.¹²⁶ Clarett’s writ of certiorari was denied by the Supreme Court¹²⁷, and he was barred from entering the 2004 NFL Draft.¹²⁸ After he was forced to take a year off from football, Clarett eventually entered the 2005 NFL Draft where he was drafted 101st overall by the

¹¹⁸ Clarett v. Nat’l Football League, 369 F.3d 124, 126 (2d Cir. 2004).

¹¹⁹ *Id.* at 126.

¹²⁰ See *Timeline: The rise and fall of Maurice Clarett*, ESPN (Aug. 9, 2006), <http://www.espn.com/nfl/news/story?id=2545204> [<http://perma.cc/QSH4-LK8C>] (quoting a teaching assistant at Ohio State, who said Clarett “walked out of a midterm exam but passed the class after the professor gave him an oral exam.”).

¹²¹ See *id.* (stating that, in July of 2003, Clarett had claimed that “more than \$10,000 in clothing, CDs, cash and stereo equipment was stolen in April” from a car Clarett had “borrowed from a local dealership.” Less than two month later, he was facing charges for falsifying information.).

¹²² See *id.* (explaining that Ohio State athletic director Andy Geiger suspended Clarett one day after Clarett was charged by police, claiming that Clarett had “received special benefits worth thousands of dollars from a family friend and repeatedly misled investigators).

¹²³ *Clarett*, 369 F.3d at 126.

¹²⁴ *Id.*

¹²⁵ *Id.* at 130.

¹²⁶ *Id.* at 143.

¹²⁷ Clarett v. Nat’l Football League, 369 F.3d 124 (2d Cir.), *cert. denied*, 544 U.S. 961 (2005).

¹²⁸ In what can be described as adding insult to injury, when the 2011 NFL/NFLPA CBA was passed, Article 6, Section 2(b)—the provision which dealt with the three-year draft eligibility rule—gave an example to illustrate the rule with pointed similarities to Clarett’s situation: “For example, if a player graduated from high school in December 2011, he would not be permitted to apply for special eligibility, and would not otherwise be eligible for selection, until the 2015 Draft.” Nat’l Football League, *supra* note 5, at 17.

Denver Broncos.¹²⁹ Clarett was cut by the Broncos before ever playing a snap in the NFL.¹³⁰

The *Clarett* case provides some rather pivotal language regarding prospective rookie players entering the NFL. Clarett had argued that the rules governing eligibility for prospective players were “an impermissible bargaining subject” due to their impact on those who had not been parties to the agreement, i.e. those college football players that were otherwise not members of the NFLPA.¹³¹ In ruling on the eligibility rules, the court stated: “prospective players no longer have the right to negotiate directly with the NFL teams over the terms and conditions of their employment. That responsibility is instead committed to the NFL and the players union to accomplish through the collective bargaining process.”¹³² It is well settled that once a group of employees has unionized and selected an exclusive bargaining representative, negotiation privileges lie with the union and not with individual players.¹³³ However, the Second Circuit appears to be misconstruing the NFLPA’s representation of the *prospective* players’ interests.¹³⁴

The preamble to the NFL/NFLPA collective bargaining agreement states that the agreement is between the “National Football League Management Council which is recognized as the sole and exclusive bargaining representative of present and future employer member Clubs of the National Football League” and the “[NFLPA].”¹³⁵ The NFLPA is 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;

¹²⁹ See *2005 Denver Broncos Draft*, FOOTBALL DATABASE, <http://www.footballdb.com/teams/nfl/denver-broncos/draft/2005> [http://perma.cc/3DVF-5QQA] (last visited Apr. 3, 2020).

¹³⁰ See John Clayton, *Broncos to release Maurice Clarett*, ESPN (Aug. 28, 2005), <http://www.espn.com/nfl/news/story?id=2145372> [http://perma.cc/7TZZ-SK8B].

¹³¹ *Clarett*, 369 F.3d at 140.

¹³² *Id.* at 138.

¹³³ See *National Labor Relations Act*, *supra* note 19.

¹³⁴ See Matthew Strauser, *Upon Further Review: Reconsidering Clarett and Player Access to the NFL*, 29 MARQ. SPORTS L. REV. 247, 250 (2018).

¹³⁵ Nat’l Football League, *Collective Bargaining Agreement 2020* at xvi, http://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf [http://perma.cc/888P-B2GN] (last visited Mar. 25, 2020).

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.¹³⁶

The plain language of the collective bargaining agreement negotiated and entered into by NFL Management Council and the NFLPA appears to explicitly exclude college players—or any other prospective player seeking to enter the league—from membership in the players' association until *after* they are selected in the “College Draft”¹³⁷ or until they begin negotiations with a team following the draft.¹³⁸ This notion is confirmed by an NFL player agent who states that “incoming [NFL] players aren't technically considered a part of the union.”¹³⁹ On the other hand, the NHL/NHLPA CBA preamble states that the agreement is “between the National Hockey League . . . which is recognized as the sole and exclusive bargaining representative of the present and future Clubs of the NHL, and the National Hockey League Players' Association . . . recognized as the sole and exclusive bargaining representative of present and future Players in the NHL.”¹⁴⁰

Retired players are on the reciprocal end of the playing spectrum from rookies, and it has been said that “the NFLPA negotiates with the League on behalf of the active players, and the interests of the active players . . . are not consistent with that of the retired players insofar as the League offers a single compensation pie to the players, such that any slice allocated to the retired players results in a smaller slice for the active players.”¹⁴¹ Here, a direct comparison can be drawn between the interests of the active players and retired players not having their interests aligned and veteran (active) players not having their interests aligned with entering rookie players, in the same sense that any slice allocated to the rookies results in a smaller slice for the veteran players.

¹³⁶ *Id.* (emphasis added).

¹³⁷ *See id.* The NFL-NFLPA CBA uses the phrase “College Draft” to mean the draft that a vast majority of players use as their method to enter the league, see discussion in Part II *infra*.

¹³⁸ *See id.*

¹³⁹ Joel Corry, *Agent's Take: Fixing the rookie wage scale, plus a look at its history and how it works*, CBS SPORTS (Apr. 24, 2019, 3:02 PM), <http://www.cbssports.com/nfl/news/agents-take-fixing-the-rookie-wage-scale-plus-a-look-at-its-history-and-how-it-works> [<http://perma.cc/T5HU-WU4Z>].

¹⁴⁰ Nat'l Hockey League, *supra* note 72, at 1.

¹⁴¹ *Eller v. Nat'l Football League Players Ass'n*, 872 F. Supp. 2d 823, 834 (D. Minn. 2012).

The statutory and non-statutory labor exceptions provide us with a glimpse of the preference that labor law, via collective bargaining, is given over antitrust law when the two are at odds, especially in the sports context.¹⁴² This deferment to labor law has been shown in numerous sports cases where courts have been reluctant to rule in favor of plaintiff-athletes' antitrust claims, instead opining that such claims are better left to the jurisdiction of the National Labor Relations Board as provided by federal labor law.¹⁴³ These decisions are "rooted in the observation that the relationships among the defendant sports leagues and their players were governed by collective bargaining agreements and thus were subject to the carefully structured regime established by federal labor laws."¹⁴⁴

B. Current Collective Bargaining Agreements

With an understanding of applicable antitrust and labor laws, it is time to turn to the current collective bargaining agreements that govern the NFL and NHL today and examine how they limit rookie athletes seeking to enter the league. While the overarching goals are the same—establishing a framework that details the terms and conditions of employment—collective bargaining agreements in sports are as unique as the leagues themselves.¹⁴⁵ MLB players are not permitted to engage in pro boxing, but receive their own room on the road.¹⁴⁶ NHL players must have established significant service time to receive their own room, but receive six months of mortgage or rent coverage if they are traded.¹⁴⁷ NBA players only receive three months coverage if they are traded, but receive extra-long beds and porter baggage service on the road.¹⁴⁸ NFL players can be fined twice a week for being overweight, but cannot be disciplined for hair preferences.¹⁴⁹ A main point of difference in league collective bargaining agreements deals with the terms surrounding the rookie, or entry-level, contract.¹⁵⁰

¹⁴² Feldman, *supra* note 25, at 9.

¹⁴³ See Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 693 (2d Cir. 1995) (noting "the soup-to-nuts" array of rules and remedies afforded under the labor laws).

¹⁴⁴ *Clarett*, 369 F.3d at 135.

¹⁴⁵ See Eric Macramalla, *Part 4 in A Series Comparing the CBAs: Weird & Quirky Clauses*, OFFSIDE SPORTS L. (Jan 31, 2011, 10:59 AM), <http://offsidesportsblog.blogspot.com/2011/01/part-4-in-series-comparing-cbas-weird.html> [<http://perma.cc/4UH4-55ND>].

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See generally Andrew Brandt, *The Differences in Rookie Contracts*, NAT'L FOOTBALL POST, <http://nationalfootballpost.com/the-differences-in-rookie-contracts/> [<http://perma.cc/WJR9-CDRA>] (last visited Apr. 20, 2020).

1. NFL/NFLPA

The NFLPA and NFL owners reached a new collective bargaining agreement on March 15, 2020.¹⁵¹ This new agreement comes with one year remaining on the previous deal that was entered into in 2011 and runs through the 2030 NFL season.¹⁵² Article 7 of the NFL/NFLPA collective bargaining agreement is entitled “Rookie Compensation and Rookie Compensation Pool.”¹⁵³ For the purposes of this Article, the relevant portions of Article 7 of the CBA are the “Total Rookie Compensation Pool” and the “Year-One Rookie Compensation Pool” as explained in Section 2¹⁵⁴ and the “Rookie Contract Length” as explained in Section 3.¹⁵⁵

Section 2 provides: “For the 2020 League Year, Total Rookie Compensation Pool . . . may not exceed \$1,430,000,000 [and] The Year-One Rookie Compensation Pool . . . shall equal \$260,000,000.”¹⁵⁶ Section 2 continues with a complicated formula for computing the increase(s) in the Total Rookie Compensation Pool and the Year-One Rookie Compensation Pool.¹⁵⁷ In addition to the amount of compensation to be afforded under Section 2, Section 3 provides:

Every Rookie Contract shall have a fixed and unalterable contract length: (i) four years for Rookies selected in the first round of the Draft, with a Club option for a fifth year as described in Section 7 below; (ii) four years for Rookies selected in rounds two through seven of the Draft (including any compensatory draft selections); and (iii) three years for Undrafted Rookies.¹⁵⁸

The full NFLPA membership vote on the passage of the new 2020 NFL/NFLPA collective bargaining agreement was very close, passing by a vote of 1,019 to 959.¹⁵⁹ The ratification of the agreement, which was proposed to the players by team owners, was a hot button topic in the football world and one that divided players in the league.¹⁶⁰ Many in the football community, players and pundits alike, thought that the players were giving up too

¹⁵¹ See Grant Gordon, *NFL player vote ratifies new CBA through 2030 season*, NFL (Mar. 15, 2020, 1:01 PM), <http://www.nfl.com/news/story/0ap3000001106246/article/nfl-player-vote-ratifies-new-cba-through-2030-season> [http://perma.cc/5JHV-R9EX].

¹⁵² See generally *id.*

¹⁵³ Nat'l Football League, *supra* note 135, at art. 7.

¹⁵⁴ *Id.* at art. 7 § 2.

¹⁵⁵ *Id.* at art. 7 § 3.

¹⁵⁶ *Id.* at art. 7 § 2.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at art. 7 § 3.

¹⁵⁹ Gordon, *supra* note 151.

¹⁶⁰ See Jordan Heck, *NFL CBA vote: Tracking which players are voting 'yes' and 'no'*, SPORTING NEWS (Mar. 11, 2020), <http://www.sportingnews.com/us/nfl/news/nfl-cba-vote-players-tracker-yes-no/dqf1q13xwyau1m40illiiattr> [http://perma.cc/22G4-X3DE].

much to the owners—including the addition of a 17th regular season game—by accepting the very first offer the owners proposed.¹⁶¹

Despite some significant changes to parts of the collective bargaining agreement, the structure of the rookie compensation article in the new 2020 agreement retains the same substantive information that was included in the 2011 agreement, with the 2020 agreement adding additional language.¹⁶² Interestingly, some of the players who were the most outspoken against the proposed collective bargaining agreement included established superstar players such as Russell Wilson, Aaron Rodgers, JJ Watt, and Richard Sherman, who felt that the players were being taken advantage of by team owners.¹⁶³ In a tweet to his followers indicating his stance on the issue, Russell Wilson drew comparisons to the NBA and MLB agreements that put the players first and said that “ALL @NFL players deserve the same.”¹⁶⁴

2. NHL/NHLPA

The most recent collective bargaining agreement between NHL owners and the NHLPA was ratified on January 12, 2013.¹⁶⁵ Much like the NFL/NFLPA agreement, the NHL/NHLPA agreement places strict guidelines on rookie contracts, or “entry level” contracts as they are referred to by the NHL.¹⁶⁶ Unlike the NFL, the NHL determines the length of an entry-level contract based on the player’s age when the contract is signed.¹⁶⁷ The signing age parameters are the same as they have been in the previous two NHL CBAs: players between the ages of eighteen and twenty-one are signed for three years; players between the

¹⁶¹ See generally *id.*; Dan Graziano, *NFL CBA approved: What players get in new deal, how expanded playoffs and schedule will work*, ESPN (Mar. 15, 2020), http://www.espn.com/nfl/story/_/id/28901832/nfl-cba-approved-players-get-new-deal-how-expanded-playoffs-schedule-work [<http://perma.cc/9M6U-U6N7>].

¹⁶² Compare Nat’l Football League, *supra* note 5, with Nat’l Football League, *supra* note 135 at art. 7 (showing that additions were made to the 2020 agreement that were not present in the 2011, primarily in the form of the calculations used to compute the relevant figures discussed; dates used in the 2011 agreement were updated to reflect the new time frame that would be covered by the 2020 agreement and baseline dollar amounts were updated to reflect the new financial position of the NFL and NFLPA at the time the 2020 agreement was proposed and agreed upon.).

¹⁶³ Jordan Heck, *NFL players think the proposed CBA by owners is awful: ‘Rip it up!’*, SPORTING NEWS (Feb. 26, 2020), <http://www.sportingnews.com/us/nfl/news/nfl-players-cba-owners/jcr7tof3e21s15wjh4bqzbo3h> [<http://perma.cc/LPD4-RZ99>].

¹⁶⁴ Russell Wilson (@DangeRussWilson), TWITTER (Feb. 26, 2020, 7:16 AM), <http://twitter.com/DangeRussWilson/status/1232685882915872769>.

¹⁶⁵ *Union ratifies new CBA*, NHL (Jan. 12, 2013), <http://www.nhl.com/news/union-ratifies-new-cba/c-649889> [<http://perma.cc/M6XV-JGR6>].

¹⁶⁶ Nat’l Hockey League, *supra* note 72, at 23.

¹⁶⁷ *Id.*

ages of twenty-two and twenty-three are signed for two years; players who are twenty-four are signed for one year, and players twenty-five and older are not subject to the entry-level system.¹⁶⁸ For age calculation purposes, a player's age is determined as of his "age on September 15 of the calendar year in which he signs [a contract], regardless of his actual age on the date he signs."¹⁶⁹

Unlike the formula used by the NFL/NFLPA, the NHL/NHLPA collective bargaining agreement allots a set compensation based on the year the player was drafted, with no consideration to where in the draft the player was taken.¹⁷⁰ Players drafted in 2005 or 2006 receive \$850,000 per year; players drafted in 2007 or 2008 receive \$875,000 per year; players drafted in 2009 or 2010 receive \$900,000 per year, and players drafted from 2011 to 2022, the entire length that this collective bargaining agreement covers, will receive \$925,000 per year under their entry-level contract.¹⁷¹

C. Rookie and Entry-Level Players are Not Adequately Represented

When it comes time to negotiate with the leagues and their ownership groups on collective bargaining agreements, players' associations turn to their leadership: the executive board and the player representatives from each league team.¹⁷² Every NFL and NHL team elects one player representative to serve on their respective players' association.¹⁷³ The tables in Appendix D and Appendix E detail the designated player representative for each NFL and NHL team, respectively.¹⁷⁴ The column on the far right side of each table indicates the number of years that the player has been in the league for purposes of determining if that particular player is on their rookie, or entry-level, contract.¹⁷⁵

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 24.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 24–25.

¹⁷² See generally Chris Bumbaca, *What we know about proposed NFL collective bargaining agreement, timeline of talks*, USA TODAY (Feb. 26 2020, 10:49 AM), <http://www.usatoday.com/story/sports/nfl/2020/02/26/nfl-collective-bargaining-agreement-facts-deal-details-players-association/4878534002/> [<http://perma.cc/S9PG-5PSU>].

¹⁷³ See *Board of Player Representatives*, NFL PLAYERS' ASSOC., <http://www.nflpa.com/about/nflpa-officers#board> [<http://perma.cc/X9T7-QMUS>] (last visited Apr. 10, 2020); see also *Executive Board*, NHL PLAYERS' ASSOC., <http://www.nhlpa.com/the-pa/executive-board> [<http://perma.cc/9SE9-8YD8>] (last visited Apr. 10, 2020).

¹⁷⁴ See *infra* Appendix D; see also *infra* Appendix E.

¹⁷⁵ See *infra* Appendix D; see also *infra* Appendix E.

NFL teams most recently selected their player representatives in the fall of 2018.¹⁷⁶ Of the players serving as player representatives for NFL teams, only one of the thirty-two player representatives—Ronnie Stanley of the Baltimore Ravens—was playing under the terms of his rookie contract when he was selected to be a player representative.¹⁷⁷ Christian Wilkins, the youngest player representative in terms of years of experience, was not yet drafted as a member of the Miami Dolphins during the last general election for player representatives,¹⁷⁸ but was selected when the original Dolphins player representative and alternates were traded or released from the team.¹⁷⁹ Of the NHL player representatives, only one of the thirty-one player representatives—Brady Tkachuk of the Ottawa Senators—is playing under the terms of his entry-level contract.¹⁸⁰ Although Matt Roy of the Los Angeles Kings is only in his third season in the NHL, he signed his entry-level contract at age 22 and thus that contract had a two-year term.¹⁸¹

Both the NFLPA and NHLPA Constitutions codify this barrier to player representation in their association bylaws. The NFLPA Constitution requires that “[i]n order to be eligible for election or temporary appointment as a Player Representative or Co-Alternate Player Representative, a person must have been a member in good standing of the NFLPA for at least one (1) year prior to his election or appointment.”¹⁸² The NHLPA Constitution

¹⁷⁶ See *Board of Player Representatives*, *supra* note 173.

¹⁷⁷ See *infra* Appendix D.

¹⁷⁸ *Christian Wilkins*, NFL, <http://www.nfl.com/prospects/christian-wilkins/32195749-4c08-1088-ad8a-aada01ec7ce9> [<http://perma.cc/4WNN-HLA2>] (last visited Apr. 17, 2020) (showing that Wilkins was drafted with the 13th overall pick in the 2019 NFL Draft).

¹⁷⁹ See NFLPA (@NFLPA), TWITTER (Oct. 21, 2018, 9:00 AM), <http://twitter.com/NFLPA/status/1054039680197509121> [<http://perma.cc/CA3J-AGVM>]; see also Herbie Teope, *Dallas Cowboys trade for Dolphins DE Robert Quinn*, NFL (Mar. 28, 2019, 3:28 AM), <http://www.nfl.com/news/dallas-cowboys-trade-for-dolphins-de-robert-quinn-0ap3000001024615> [<http://perma.cc/QAF9-LL8K>]; see also Josh Alper, *Dolphins release Ted Larsen, Andre Branch*, PRO FOOTBALL TALK (Mar. 7, 2019, 4:18 PM), <http://profootballtalk.nbcsports.com/2019/03/07/dolphins-release-ted-larsen-andre-branch/> [<http://perma.cc/NLY6-DXUQ>]; see also Kevin Nogle, *Dolphins cut John Denney*, SB NATION (Sept. 2, 2019, 10:14 AM), <http://www.thephinsider.com/2019/9/2/20844435/dolphins-cut-john-denney> [<http://perma.cc/6R45-GQSZ>]; see also Kevin Patra, *Texans trade for Dolphins' Laremy Tunsil, Kenny Stills*, NFL (Aug. 31, 2019, 7:24 AM), <http://www.nfl.com/news/texans-trade-for-dolphins-laremy-tunsil-kenny-stills-0ap3000001045889> [<http://perma.cc/6FVD-92H4>].

¹⁸⁰ See *infra* Appendix E.

¹⁸¹ *Matt Roy*, CAPFRIENDLY, <http://www.capfriendly.com/players/matt-roy> [<http://perma.cc/96L3-F5JB>] (explaining that Roy's 2019–20 contract was negotiated freely by him and his agent).

¹⁸² *NFL Players Ass'n Constitution*, NFL PLAYERS' ASS'N (Mar. 2017), <http://nflpaweb.blob.core.windows.net/media/Default/PDFs/NFLPAConstitution2017.pdf> [<http://perma.cc/CL5Y-ZPCY>].

takes this even further by requiring that player representatives must “have been on an NHL Club roster for at least 160 games.”¹⁸³

The discrepancy in the years of experience is undoubtedly apparent when it comes to the bargaining tables and the collective bargaining agreements that result therefrom. As was discussed in Part II.B, the salary cap structure of the NFL and the NHL exists to promote parity in the leagues and to avoid the wealthier teams from overspending.¹⁸⁴ With that limiting number in mind, there is only a finite amount of money that teams are permitted to spend. Limiting the compensation that is permitted to be paid to players entering the league guarantees that there is a higher percentage of the salary cap to be had by the veteran players. Without equality of representation on either the player representative staff or the association executive boards, there are no incentives for the interests of the continuous stream of incoming talent. To be certain, those that serve as veterans realize the inequality that they had to overcome as rookies, and now that they are in a more preferential position, they are certainly not going to give up less of their own rights to benefit the incoming class. Inevitably, that cycle repeats itself in perpetuity.

D. Unequal Position Runs Afoul of Policy Concerns Behind the Passage of the NLRA

Ingrained in the passage of the NLRA were underlying policy concerns that justify such action.¹⁸⁵ In enacting the NLRA, Congress realized that inherent differences in the “bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . by depressing wage rates.”¹⁸⁶ It was well understood that protecting employees’ rights to organize was important to the commerce and the hopes of resolving disputes that arose between employers and employees.¹⁸⁷

¹⁸³ *Constitution of the Nat’l Hockey League Players’ Ass’n*, NAT’L HOCKEY LEAGUE PLAYERS’ ASS’N, http://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/League%20Constitutions%20&%20Bylaws/nhlpa_constitution.pdf [http://perma.cc/NR76-LWBZ] (last visited May 4, 2020).

¹⁸⁴ See *Collective Bargaining Agreements in Sports*, *supra* note 38.

¹⁸⁵ See 29 U.S.C. §151 (2018).

¹⁸⁶ *Id.*

¹⁸⁷ See *id.*

The policy concerns were not solely limited to protection of employees but included protection from unwanted practices by unions.¹⁸⁸ In realizing that labor unions could take damaging action like employers, it was said:

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through . . . concerted activities which impair the interest of the public in the free flow of such commerce. *The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.* It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce.¹⁸⁹

However, despite these issues being plainly obvious over eighty years ago, it is these very practices that are rearing their heads today and causing the exact havoc that was sought to be eliminated. The NFLPA and NHLPA, through their representation comprised almost entirely of veteran players no longer concerned with the plight of the rookie, have engaged in practices that have the “effect of burdening or obstructing commerce” by preventing the free flow of goods—in this context, players services—through their unreasonable control of rookie salaries.¹⁹⁰ The plain language of the NLRA indicating the policy justifications for a lack of “obstructions to the free flow of commerce” can certainly be found to extend to services where those services themselves form the basis of the commerce in question.¹⁹¹

IV. GOOD FAITH BARGAINING AND FAIR REPRESENTATION FOR ALL

In order for there to be true pay equity in these professional sports leagues, the arbitrary maximum cap placed on rookie or entry-level contracts must be abolished. This Article proposes that any restrictions on rookie or entry-level contract earnings be abolished in any new collective bargaining agreements moving forward. This is not to suggest that every rookie or entry-level player should be making comparable salaries to those proven veterans, but rather that they have the *ability* to do so and are not otherwise unduly burdened by a blanket cap on their contracts merely based on their tenure status.

¹⁸⁸ *See id.*

¹⁸⁹ *Id.* (emphasis added).

¹⁹⁰ *Id.*

¹⁹¹ *See generally id.*

This Article is hardly the first to propose that the rookie wage structure, as it is currently structured, needs re-working.¹⁹² The rookie wage structure that is now in place has been called “an overcorrection to how incoming players were previously compensated.”¹⁹³ It has previously been suggested that the amount of time an NFL player is under his rookie contract can be shortened by one year—moving from five years to four years for first-round picks, from four to three years for other draftees, and from three to two years for undrafted players.¹⁹⁴ Under previous proposals, players would be able to renegotiate their rookie contracts one year earlier and the negotiation window would open following the second year of the contract, as opposed to the third.¹⁹⁵ However, these minor tweaks to an already-broken system do not adequately fix the problem and also discount the tremendous success that players on rookie or entry-level contracts are having in recent years.

The NFL’s role in this rookie wage problem is two-fold. First, the discussion in Part III.A above shows that there appears to be a very strong case that college athletes or other prospective NFL players are in fact not members of the NFLPA. This would appear to open the possibility that antitrust claims, potentially brought by the prospective players, would not be protected by the non-statutory labor exemption, based on the tests that circuit courts have developed in past opinions. Second, and alternatively, if the prospective players are deemed to be subject to the conditions of the CBA, the disparate treatment that they receive by virtue of being a new player in the league should be a ripe scenario for a duty of fair representation claim with the NLRB. The NFLPA is far from a bargaining unit that is above reproach and a recent claim by current NFL player Russell Okung accuses NFLPA Executive Director DeMaurice Smith with making threats of retaliation regarding players being outspoken against the recently ratified 2020 NFL/NFLPA CBA.¹⁹⁶

¹⁹² See generally Corry, *supra* note 139; Joel Corry, *Agent’s Take: Here’s how the NFL would look if the rookie wage scale didn’t exist*, CBS Sports (Apr. 24, 2018, 7:00 AM), <http://www.cbssports.com/nfl/news/agents-take-heres-how-the-nfl-would-look-if-the-rookie-wage-scale-didnt-exist/> [<http://perma.cc/UQF4-B33W>].

¹⁹³ Corry, *supra* note 192.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See Gregg E. Clifton, *NFL Players Association Executive Committee Member Files ULP Against Own Union and Its Leaders*, NAT’L L. REV. (Mar. 10, 2020), <http://www.natlawreview.com/article/nfl-players-association-executive-committee-member-files-ulp-against-own-union-and> [<http://perma.cc/Q475-AP7X>].

Young NFL and NHL players entering the league are not given adequate representation to ensure that their needs have a fair shot of being met and, in fact, history has provided us with examples of the exact opposite: player representatives are explicitly outspoken in their desire to throttle down the earning capacity of select members of the group they are elected to represent, merely because they are new to the league.¹⁹⁷ This is quite clearly a breach of the duty of fair representation and the “statutory obligation to serve the interests of *all* members without hostility or discrimination toward any.”¹⁹⁸ Instead of focusing on pumping up veteran players and their salaries by evidencing how they have proven themselves, the NFLPA and NHLPA seem intent on bringing rookie compensation down in a manner akin to the “cycles of abuse” of hazing where “members model for new members the accepted methods for initiation” which—in this scenario—is artificially throttled salaries.¹⁹⁹

Whatever the initial reasons or justifications for the rookie salaries in both the NFL and NHL, there are even stronger arguments for its removal. Rookie players are enjoying tremendous success in recent years, winning awards for both league²⁰⁰ and Super Bowl most valuable player honors.²⁰¹ One need look no further than MLB for a sports world example with no maximum rookie contracts.²⁰² MLB, as mentioned earlier in this Article, does not have a hard salary cap and there is also no

¹⁹⁷ See *Mawae: Big Rookie Contracts Like Ryans’ ‘Disheartening’*, *supra* note 83; see generally Liz Mullen, *The making of a union*, SPORTS BUS. J. (Jan. 23, 2017), <http://www.sportsbusinessdaily.com/Journal/Issues/2017/01/23/Labor-and-Agents/NHLPA.aspx> [<http://perma.cc/9T6R-BX24>].

¹⁹⁸ *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

¹⁹⁹ *Why do groups haze members?*, ELON U., <http://www.elon.edu/u/hazing/facts/theories-research/> [<http://perma.cc/D8MC-6QCZ>] (last visited Apr. 29, 2020).

²⁰⁰ *AP NFL Most Valuable Player Winners*, PRO FOOTBALL REFERENCE, <http://www.pro-football-reference.com/awards/ap-nfl-mvp-award.htm> [<http://perma.cc/96MY-UYRU>] (last visited May 4, 2020) (showing that Cam Newton in 2015, Patrick Mahomes in 2018 and Lamar Jackson in 2019 were all on their rookie contracts when they were voted most valuable player); see also *NHL Hart Memorial Trophy Winners*, HOCKEY REFERENCE, <http://www.hockey-reference.com/awards/hart.html> [<http://perma.cc/B4MQ-DAX9>] (last visited May 4, 2020) (showing that Sidney Crosby in 2006–07 and Connor McDavid in 2016–17 were on their entry-level contracts when they won the Hart Memorial Trophy for NHL most valuable player).

²⁰¹ *NFL History – Super Bowl MVPs*, ESPN, <http://www.espn.com/nfl/superbowl/history/mvps> [<http://perma.cc/6F2F-LAXN>] (last visited May 4, 2020) (stating that Von Miller in Super Bowl 50 and Patrick Mahomes in Super Bowl LIV were on their rookie contracts when they were awarded Super Bowl most valuable player).

²⁰² See Andrew Brandt, *The Differences in Rookie Contracts*, NAT’L FOOTBALL POST, <http://nationalfootballpost.com/the-differences-in-rookie-contracts/> [<http://perma.cc/5YHW-LW8U>] (last visited May 1, 2020).

limit on the amount that teams are permitted to pay their incoming players.²⁰³ Instead, the MLB league office provides clubs with recommendations for signing bonuses and overall compensation for rookies.²⁰⁴ These figures are merely suggestions that teams can choose to follow or not, but this format does provide for highly-talented players entering the league to have a fighting chance to earn themselves appropriate money right off the bat.²⁰⁵ It is the “truest free-market application to [the] selection process, giving players at the top leverage (whether real or perceived) to negotiate without any of the parameters imposed by the [rookie] caps of the other sports.”²⁰⁶

A related industry for comparison to professional athletes is the television and film industry. Here, like in professional sports, the most in-demand talent can be of any age and it is not uncommon for younger talent to be wildly successful, sometimes even more so than individuals that have been in the business for longer periods of time. These television and film personalities are represented by the Screen Actors Guild – American Federation of Television and Radio Artists (“SAG-AFTRA”).²⁰⁷ SAG-AFTRA is the unionized representative body of “approximately 160,000 actors, announcers . . . and other media professionals.”²⁰⁸ The union is responsible for “negotiating the best wages, working conditions and health and pension” benefits for its members.²⁰⁹

Those in charge of movies and television shows are very familiar with the salary cap-like implications of their projects: working talent salaries under budgets. While the comparison is not completely apples-to-apples, there is a logical nexus between the salary caps in sports and the budgets that film and television producers must work under.²¹⁰ The sums of money paid to television and film talent—including a specialized film industry salary that involves a portion of the profits of a film—is said to be “Hollywood’s version of a salary cap.”²¹¹ Similar to sports contracts, there are a number of

²⁰³ *See id.*

²⁰⁴ *See id.*

²⁰⁵ *See id.*

²⁰⁶ *Id.*

²⁰⁷ *About*, SAG-AFTRA, <http://www.sagaftra.org/about> [http://perma.cc/8EAL-52CB] (last visited Apr. 17, 2020).

²⁰⁸ *Id.*

²⁰⁹ SAG-AFTRA, Constitution of the Screen Actors Guild – American Federation of Television and Radio Artists, 1 (Oct. 11, 2019), https://www.sagaftra.org/files/sa_documents/2019%20Constitution%20-%20Updated%20Rules%202020%201214.pdf [http://perma.cc/N7Z8-4Z5F].

²¹⁰ Tim Ryan, *Who’s who on a film set?*, TAR PROD., <http://tarproductions.com/whos-who-on-a-film-set/> [http://perma.cc/D4RU-AQGG] (last visited May 4, 2020).

²¹¹ John Horn, *Hollywood Studios Rewriting Pay System for Their Talent*, L.A. TIMES (Jan. 13, 2006), <http://www.latimes.com/archives/la-xpm-2006-jan-13-fi-gross13-story.html> [http://perma.cc/955S-C7HZ].

additional benefits that can be negotiated into an actor's contract.²¹² Much like securing a top-end sports talent can favor a franchise on the field or at the gate, "[s]ecuring a proven movie star is one way to guarantee ticket sales."²¹³

One major difference between SAG-AFTRA and the NFL/NFLPA and NHL/NHLPA collective bargaining agreements deals with compensation. Article XI of the SAG-AFTRA Constitution deals with collective bargaining.²¹⁴ Despite the fact that SAG-AFTRA represents union members that must abide by the financial restrictions imposed by television and film budgets, there is a provision in the union constitution that explicitly prevents the union from artificially capping the amount of money to be made by a member: Subsection D Article XI states that "[t]he Union shall not negotiate or seek to regulate the maximum compensation that may be earned by any member under any collective bargaining agreement."²¹⁵ This is in direct contrast to what is present in both the NFL/NFLPA and NHL/NHLPA collective bargaining agreements.²¹⁶ Similar to television and film budgets that may vary from project to project, the NFL and NHL agreements are both silent on the exact salary cap figure on a year-to-year basis.²¹⁷ However, these agreements both specifically limit what certain members of their respective unions—rookies or entry-level players—are permitted to make,²¹⁸ while providing minimum amounts that preferred members of their unions—veteran members—are required to make.²¹⁹

An ancillary benefit of allowing rookie or entry-level compensation to be negotiated on a case-by-case basis allows the players to account for income tax considerations.²²⁰ Tax implications are a necessary evil of all professional sports contracts, but mandating that players be required to earn a predetermined amount, regardless of location, does an injustice

²¹² Margaret Heidenry, *How Hollywood Salaries Really Work*, VANITY FAIR (Feb. 12, 2018), <http://www.vanityfair.com/hollywood/2018/02/hollywood-movie-salaries-wage-gap-equality> [<http://perma.cc/LD8T-TV4P>].

²¹³ *Id.*

²¹⁴ SAG-AFTRA, *supra* note 209, at 37.

²¹⁵ *Id.* at 38.

²¹⁶ *See generally* Nat'l Football League, *supra* note 135; Nat'l Hockey League, *supra* note 72.

²¹⁷ *See* Nat'l Football League, *supra* note 135, at art. 13; Nat'l Hockey League, *supra* note 72, at art. 50.

²¹⁸ *See* Nat'l Football League, *supra* note 135, at art. 7; Nat'l Hockey League, *supra* note 72, at art. 9.

²¹⁹ *See* Nat'l Football League, *supra* note 135, at art. 9; Nat'l Hockey League, *supra* note 72, at art. 10.

²²⁰ Jeff Bowes, *Major Penalty for High Taxes*, AMS. FOR TAX REFORM 20 (Sept. 2015), <http://www.taxpayer.com/media/MajorPenalty-October2015.pdf> [<http://perma.cc/PH9N-Y6LZ>].

to those players who play for teams in states with higher state income tax. For example, taking the CBA-mandated \$925,000 entry-level salary for an NHL player drafted in the 2019 NHL Draft, a player drafted to one of the league's three California based teams—the Anaheim Ducks, the Los Angeles Kings, or the San Jose Sharks—would pay a top marginal tax rate of 13.3%²²¹ and an effective tax rate of roughly 10.6%.²²² When these figures are contrasted to states like Florida, Nevada, and Texas—all of which have NHL teams that have no state income tax—it is calculated that playing in a low or no-tax state can effectively save players that play in those states up to \$90,000 per year. The actual computation of an athlete's tax return is much more convoluted than this brief example as athletes must generally file taxes in each state in which they work throughout the year.²²³ Nevertheless, the amount an athlete saves in taxes from playing a majority of their games in a low state-tax state is far from negligible and certainly comes into play when veteran free agents consider signing subsequent contracts with teams.²²⁴ Under the proposal that this Article proffers, a player who was selected to play for a team in a state with a higher tax rate would be able to factor that into his—and his agent's—negotiations with a team so that the player was not at a disadvantage relative to his peers in lower-rate states.

Simply put, the proposal that rookie or entry-level contracts should not have an artificially imposed maximum on them forces the team owners to be businessmen and make good business deals. With some, if not most, NFL and NHL owners' net worth being measured in billions as opposed to millions, making good business deals is not out of the question for them. Allowing players the opportunity to earn more than a prescribed maximum does not mean that owners will be forced to empty their bank accounts for unproven rookies each and every time, it merely affords the players who are worth more to earn their fair

²²¹ See Katherin Loughhead, *State Individual Income Tax Rates and Brackets for 2021* at 6, TAX FOUND. (Feb. 2021), <http://files.taxfoundation.org/20210217114725/State-Individual-Income-Tax-Rates-and-Brackets-for-2021.pdf> [<http://perma.cc/HP7Z-MKG5>].

²²² See, e.g., *California Income Tax Calculator*, SMARTASSET, <http://smartasset.com/taxes/california-tax-calculator> [<http://perma.cc/P4FN-A872>] (last visited May 6, 2020).

²²³ See generally John Calvin, *Itching for the Jock Tax*, AM. SPECTATOR (June 1, 2016, 12:00 AM), <http://spectator.org/itching-for-the-jock-tax/> [<http://perma.cc/N2PT-J64G>]. This brief tax calculation does not take into account any standard or itemized deductions that might be available to the athlete or if they file jointly with a spouse.

²²⁴ See generally Bowes, *supra* note 220; Ryan Lake, *Mark Stone Hit The Tax Jackpot With Trade To Vegas Golden Knights*, FORBES (Mar. 7, 2019, 9:00 AM), <http://www.forbes.com/sites/ryanlake/2019/03/07/mark-stone-hits-the-tax-jackpot-in-vegas/#6842267c748c> [<http://perma.cc/DS4G-NUKA>].

share faster. In turn, this leads to increased player satisfaction and loyalty, increased productivity on the field of play, and a better feel for fans of the team who do not have to witness their favorite player sitting out. Allowing young players their shot to earn a fair salary ultimately benefits all interested parties.

V. CONCLUSION

Professional athletes have a finite amount of time to cash in on the earning potential that they spent their entire lifetime building. With the developments of modern medicine giving us a glimpse into just how much damage these young men do to their bodies, it is more important than ever that athletes utilize the very limited time they have to the fullest. Rookie or entry-level players that are forced to take less than fair-market value for their services while they earn their places in the league is a disservice to the blood, sweat, and tears that professional athletes put into their careers. The barriers to entry to a career in professional sports are some of the highest in North America on their own, and these barriers should not be made artificially higher due to players' associations negotiating in bad faith and not fairly representing a certain class of members in their unions.

Although recent holdouts have been met with mixed results from critics,²²⁵ it is clear that the players who make the calculated risk to sit out for days, weeks, or months at a time are doing so with the notion that the value of services they provide to their respective teams is vastly underappreciated by ownership. Simply put, these players deserve better. They deserve better from team owners and they especially deserve better from their players' associations—the very people that are supposed to be in their corner, fighting for their best interests.

²²⁵ Compare Jesse Washington, *Le'Veon Bell is smarter than you think*, UNDEFEATED (Nov. 14, 2018), <http://theundefeated.com/features/leveon-bell-pittsburgh-steelers-is-smarter-than-you-think/> [<http://perma.cc/9V7W-KZHE>], with Mike Tanier, *Le'Veon Bell's Holdout Has Become a Historic Disaster...for Le'Veon Bell*, BLEACHER REP. (Nov. 6, 2018), <http://bleacherreport.com/articles/2804597-leveon-bells-holdout-has-become-a-historic-disasterfor-leveon-bell> [<http://perma.cc/8PUQ-8SWH>].

Appendix A

Salary Inequality and Parity Comparison in Major Professional Sports²²⁶

League	“Fairness Metric” Rank	“Fairness Metric” Raw Ratio
NFL ²²⁷	5 of 18	1.38:1
NBA ²²⁸	6 of 18	1.98:1
NHL ²²⁹	7 of 18	2.30:1
MLB ²³⁰	9 of 18	3.53:1
Premier League (England) ²³¹	12 of 18	6.82:1
Serie A (Italy) ²³²	13 of 18	16:1
La Liga (Spain) ²³³	15 of 18	19:1
Bundesliga (Germany) ²³⁴	16 of 18	20.5:1
Ligue 1 (France) ²³⁵	18 of 18	26.6:1

²²⁶ See generally *Global Sports Salaries Survey 2018*, *supra* note 51.

²²⁷ *Id.* at 58.

²²⁸ *Id.* at 42.

²²⁹ *Id.* at 66.

²³⁰ *Id.* at 50.

²³¹ *Id.* at 54.

²³² *Id.* at 70.

²³³ *Id.* at 62.

²³⁴ *Id.* at 74.

²³⁵ *Id.* at 78.

Appendix B**1995 NHL CBA Entry-Level Compensation by Draft Year²³⁶**

Draft Year	NHL Compensation
1995	US\$ 850,000
1996	US\$ 875,000
1997	US\$ 925,000
1998	US\$ 975,000
1999	US\$ 1,025,000
2000	US\$ 1,075,000
2001	US\$ 1,130,000
2002	US\$ 1,185,000
2003	US\$ 1,240,000
2004	US\$ 1,295,000

Appendix C**2005 NHL CBA Entry-Level Compensation by Draft Year²³⁷**

Draft Year	NHL Compensation
2005	US\$ 850,000
2006	US\$ 850,000
2007	US\$ 875,000
2008	US\$ 875,000
2009	US\$ 900,000
2010	US\$ 900,000
2011	US\$ 925,000
2012 ²³⁸	US\$ 925,000

²³⁶ Nat'l Hockey League, *supra* note 85, at art. 9.3(a).

²³⁷ Nat'l Hockey League, *supra* note 94, at art. 9.3(a).

²³⁸ *Id.* ("If the NHLPA exercises its right to extend this Agreement until 2012, the maximum annual aggregate Paragraph 1 NHL Salary . . . shall be U.S. \$925,000.").

Appendix D²³⁹

NFLPA Player Representatives

Team	Player Representative	Years in League ²⁴⁰
Arizona Cardinals	Corey Peters	10 years
Atlanta Falcons	Josh Harris	8 years
Baltimore Ravens	Ronnie Stanley	4 years
Buffalo Bills	Patrick DiMarco	8 years
Carolina Panthers	Greg Van Roten	8 years
Chicago Bears	Chase Daniel	10 years
Cincinnati Bengals	Geno Atkins	10 years
Cleveland Browns	Jarvis Landry	6 years
Dallas Cowboys	Byron Jones	5 years
Denver Broncos	Brandon McManus	6 years
Detroit Lions	Devon Kennard	6 years
Green Bay Packers	Aaron Rodgers	15 years
Houston Texans	Brennan Scarlett	4 years
Indianapolis Colts	Clayton Geathers	5 years
Jacksonville Jaguars	Calais Campbell ²⁴¹	12 years
Kansas City Chiefs	Dustin Colquitt	15 years
Las Vegas Raiders	Rodney Hudson	9 years
Los Angeles Chargers	Mike Pouncey	9 years
Los Angeles Rams	Todd Gurley ²⁴²	5 years
Miami Dolphins	Christian Wilkins	1 year
Minnesota Vikings	Adam Thielen	6 years
New England Patriots	Matt Slater	12 years
New Orleans Saints	Craig Robertson	8 years
New York Giants	Nate Solder	9 years
New York Jets	Quincy Enunwa	6 years
Philadelphia Eagles	Malcolm Jenkins	11 years

²³⁹ Board of Player Representatives, *supra* note 173.

²⁴⁰ See, e.g., 2020 NFL Players, FOX SPORTS (last visited May 16, 2020), <http://www.foxsports.com/nfl/players> [<http://perma.cc/P9NJ-XB46>] (showing experience calculations conducted by the author accurate as of the conclusion of the 2019 NFL season).

²⁴¹ See Nick Shook, *Jaguars to trade DE Calais Campbell to Ravens*, NFL (Mar. 15, 2020, 2:38 AM), <http://www.nfl.com/news/jaguars-to-trade-de-calais-campbell-to-ravens-0ap3000001106265> [<http://perma.cc/ETF7-SNFZ>].

²⁴² See Kevin Patra, *Rams release former OPOY, standout Todd Gurley*, NFL (Mar. 19, 2020, 5:48 AM), <http://www.nfl.com/news/rams-release-former-opoy-standout-todd-gurley-0ap3000001107050> [<http://perma.cc/9MH4-XDV5>].

Pittsburgh Steelers	Ramon Foster	11 years
San Francisco 49ers	Richard Sherman	9 years
Seattle Seahawks	K.J. Wright	9 years
Tampa Bay Buccaneers	Ali Marpet	5 years
Tennessee Titans	Wesley Woodyard	12 years
Washington Redskins	Nick Sundberg	10 years

Appendix E²⁴³
NHLPA Player Representatives

Team	Player Representative	Years in League²⁴⁴
Anaheim Ducks	Josh Manson	6 years
Arizona Coyotes	Derek Stepan	10 years
Boston Bruins	Brandon Carlo	4 years
Buffalo Sabres	Jake McCabe	7 years
Calgary Flames	Mikael Backlund	11 years
Carolina Hurricanes	Jordan Martinook	8 years
Chicago Blackhawks	Jonathan Toews	13 years
Colorado Avalanche	Ian Cole	10 years
Columbus Blue Jackets	David Savard	10 years
Dallas Stars	Jason Dickinson	5 years
Detroit Red Wings	Luke Glendening	7 years
Edmonton Oilers	Darnell Nurse	5 years
Florida Panthers	Michael Matheson	5 years
Los Angeles Kings	Matt Roy	3 years
Minnesota Wild	Devan Dubnyk	11 years
Montreal Canadiens	Paul Byron	11 years
Nashville Predators	Yannick Weber	12 years
New Jersey Devils	Kyle Palmieri	10 years
New York Islanders	Anders Lee	8 years
New York Rangers	Jacob Trouba	7 years
Ottawa Senators	Brady Tkachuk	2 years
Philadelphia Flyers	James Van Riemsdyk	11 years
Pittsburgh Penguins	Kristopher Letang	13 years
San Jose Sharks	Logan Couture	11 years
St. Louis Blues	Colton Parayko	5 years
Tampa Bay Lightning	Alexander Killorn	8 years
Toronto Maple Leafs	Zach Hyman	5 years
Vancouver Canucks	Bo Horvat	6 years
Vegas Golden Knights	Nate Schmidt	8 years
Washington Capitals	Thomas Wilson	7 years
Winnipeg Jets	Adam Lowry	7 years

²⁴³ *Executive Board*, *supra* note 173.

²⁴⁴ CAPFRIENDLY, <http://www.capfriendly.com> [<http://perma.cc/W5VA-CBNT>] (last visited Apr. 1, 2020). At the time of this writing, the 2019–20 NHL season was on hiatus due to the COVID-19 pandemic. Years of experience data accurate counting the 2019–20 season as a full year.