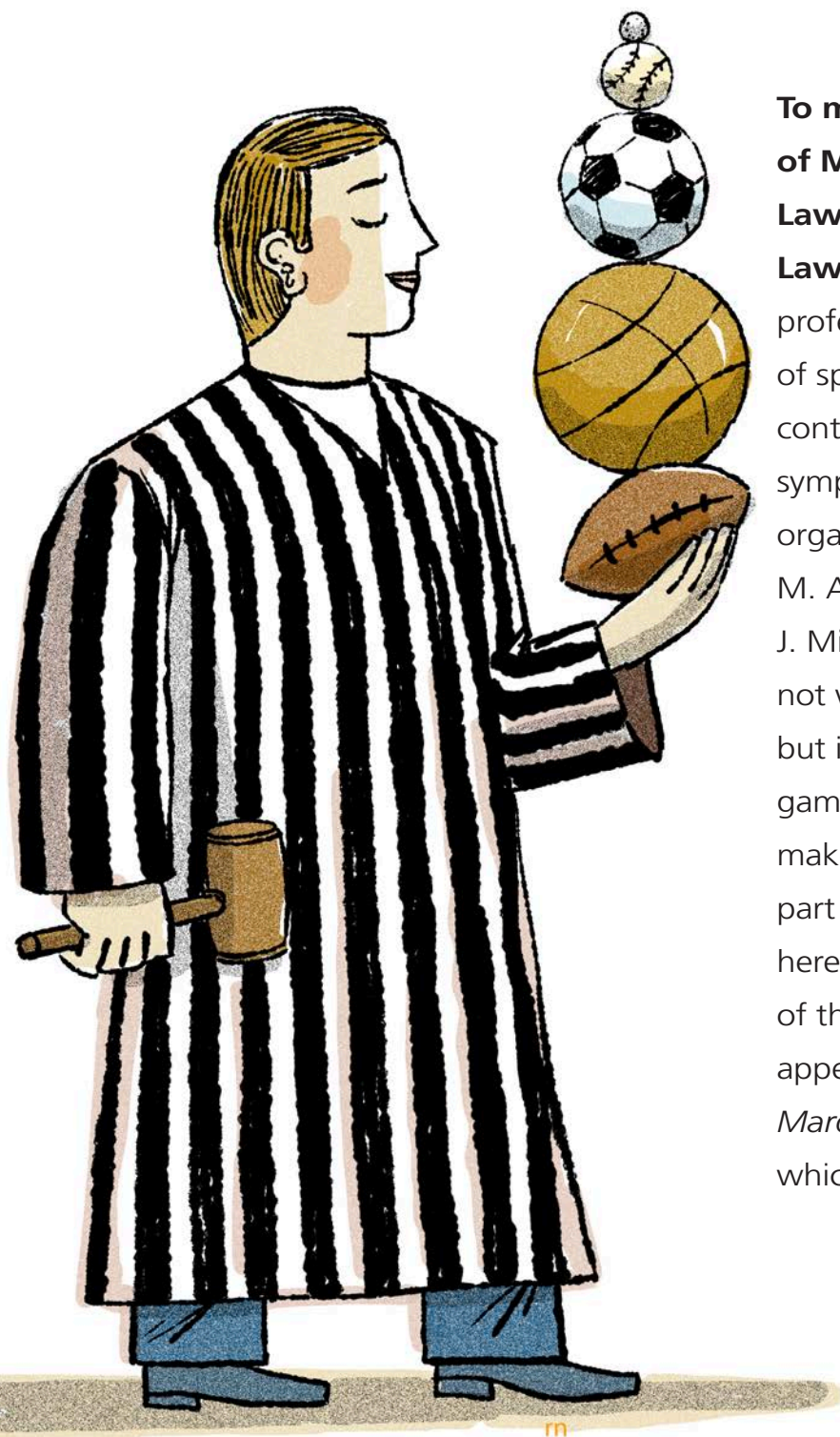
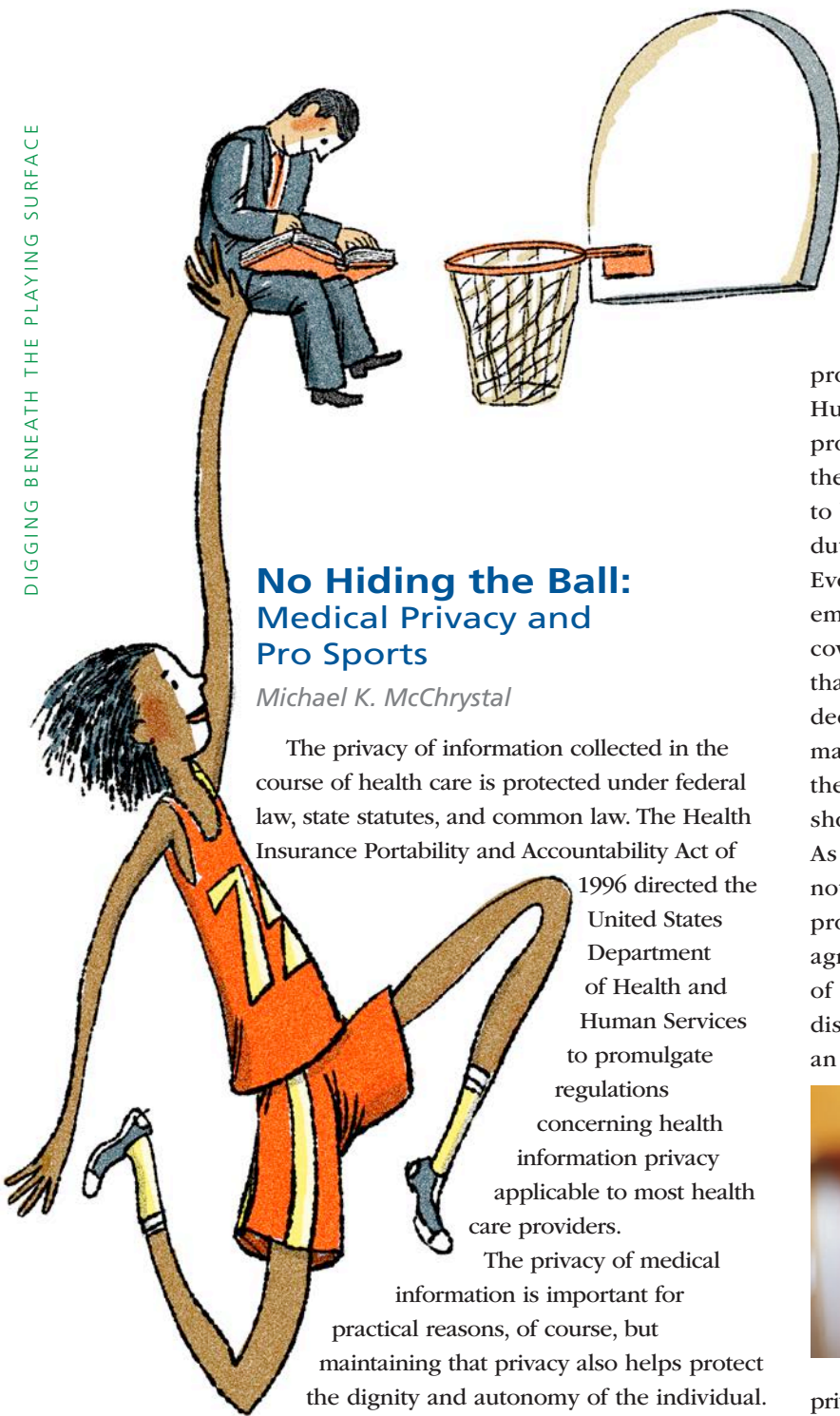


Digging Beneath the Playing Surface



To mark the 25th anniversary of Marquette University Law School's National Sports Law Institute, Marquette law professors with a wide range of specialties and interests contributed to a scholarly symposium on sports law, organized by Professors Paul M. Anderson and Matthew J. Mitten. The articles concern not what goes on during games but important aspects of the games and businesses that make sports such a high-profile part of our culture. We present here short excerpts from nine of the articles. The full articles appear in the current issue of the *Marquette Sports Law Review*, which is available online.



No Hiding the Ball: Medical Privacy and Pro Sports

Michael K. McChrystal

The privacy of information collected in the course of health care is protected under federal law, state statutes, and common law. The Health Insurance Portability and Accountability Act of

1996 directed the United States Department of Health and Human Services to promulgate regulations concerning health information privacy applicable to most health care providers.

The privacy of medical information is important for practical reasons, of course, but maintaining that privacy also helps protect the dignity and autonomy of the individual.

Among the most compelling practical reasons to guard privacy about health issues is the patient's pocketbook, particularly in cases where employment opportunities might be adversely affected by health concerns. This is certainly an issue of enormous importance to professional athletes.

Even beyond pocketbook concerns, health issues can strongly affect a person's self- and public image. Medical concerns are often associated with a physical deficiency, and professional athletes take particular pride in their physical accomplishments and the positive image they associate with those accomplishments.

So, on the one hand, medical privacy is taken seriously by many people and by the law. On the other hand, legal protection for medical privacy is generally subject to the significant limitation that privacy is lost when the patient consents to disclosure. With respect to the privacy interests of professional athletes, the Department of Health and Human Services, in responding to a comment on its proposed privacy rules—which are now final—said the following: “Professional sports teams are unlikely to be covered entities [i.e., entities that owe primary duties of confidentiality under the regulations]. Even if a sports team were to be a covered entity, employment records of a covered entity are not covered by this rule. If this comment is suggesting that the records of professional athletes should be deemed ‘employment records’ even when created or maintained by health care providers and health plans, the department disagrees. No class of individuals should be singled out for reduced privacy protections. As noted in the preamble to the December 2000 Rule, nothing in this Rule prevents an employer, such as a professional sports team, from making an employee’s agreement to disclose health records a condition of employment. A covered entity, therefore, could disclose this information to an employer pursuant to an authorization.”



The operating principle suggested by the department is that a player may be compelled to authorize the release of medical information to his team without violating federal health care

privacy regulations under HIPAA. Therefore, players can be compelled to consent to disclosure of information about their medical condition without violating privacy principles under federal law. The same is generally true under state law.

What Is the NBA?

Nadelle E. Grossman

While courts and commentators have given substantial treatment to the NBA's structure, those discussions have not focused on the NBA's structure for purposes of state organization law. As

I have argued, it is important to identify what organizational form applies to the NBA given the consequences that could flow from such structure. As I have also argued, the NBA may be a partnership, even though there is some basis to conclude it is a non-profit unincorporated association (NUA).

There are numerous consequences that would flow from the NBA's categorization as a partnership. Importantly, each member would owe a fiduciary duty to the other members. That means each member would have a duty to act with the requisite degree of care in making partnership decisions. Moreover, each



member would have a duty to act loyally, in the best interest of the NBA, and not in the member's own self-interest.

In the case of former Los Angeles

Clippers owner Donald Sterling, he would have breached his duty of care by carelessly making remarks that could injure the league's reputation and the NBA's collective brand. He would have also breached his duty of loyalty by uttering remarks opposed to the best interests of the NBA and its players, and their desire to maximize league revenues.

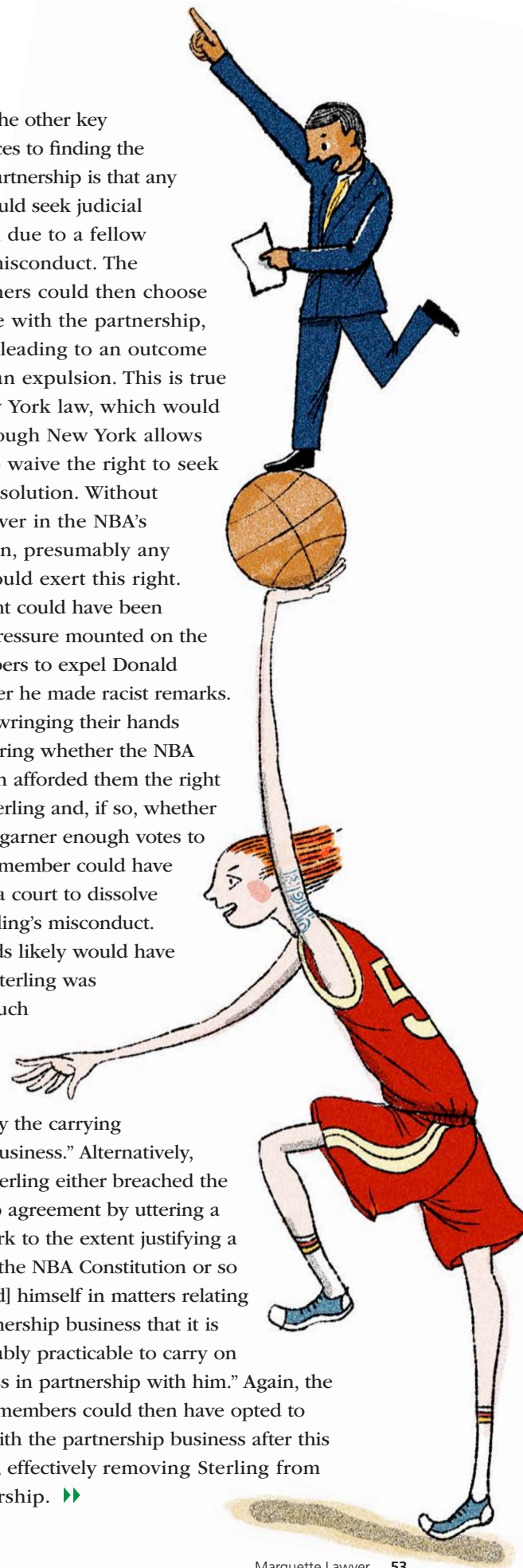
Here, the members have not eliminated these fiduciary duties in the NBA Constitution. While the NBA Constitution does address conflicts of interest, that provision does not state that it sets out the exclusive scope of fiduciary duties. Admittedly, the NBA Constitution does not contain such a provision because the NBA does not appear to view itself as a partnership. As such, no waiver is supposed to be necessary. However, as I argued elsewhere in this article, it is entirely plausible that the NBA is a partnership.

It is beyond the scope of this paper to analyze the intricacies of how these fiduciary duties would apply to the NBA's members. That analysis might be especially tricky given that the members also seek to maximize profits from their individually owned teams. On the other hand, courts in business organization law regularly resolve disputes among business owners who operate competing firms.

One of the other key consequences to finding the NBA is a partnership is that any member could seek judicial dissolution due to a fellow partner's misconduct. The other partners could then choose to continue with the partnership, effectively leading to an outcome similar to an expulsion. This is true under New York law, which would govern, though New York allows partners to waive the right to seek judicial dissolution. Without such a waiver in the NBA's Constitution, presumably any member could exert this right.

This right could have been useful as pressure mounted on the NBA members to expel Donald Sterling after he made racist remarks. Instead of wringing their hands and wondering whether the NBA Constitution afforded them the right to expel Sterling and, if so, whether they could garner enough votes to do so, any member could have petitioned a court to dissolve due to Sterling's misconduct. The grounds likely would have been that Sterling was "guilty of such

conduct as tends to affect prejudicially the carrying on of the business." Alternatively, arguably Sterling either breached the partnership agreement by uttering a racist remark to the extent justifying a fine under the NBA Constitution or so "conduct[ed] himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him." Again, the remaining members could then have opted to continue with the partnership business after this dissolution, effectively removing Sterling from the partnership. ▶▶



The Seventh Circuit and Wisconsin Sports Law

Matthew J. Mitten



The Seventh Circuit and Wisconsin courts have developed a significant body of high school sports law jurisprudence, most of which is consistent with other jurisdictions. There

are, however, some important, unresolved issues, as well as a few leading cases that, over time, may influence the development of the law governing high school athletics in states outside the Seventh Circuit.

To date, there has been no judicial determination whether the respective governing bodies for high school sports in Illinois, Indiana, or Wisconsin are a state actor, whose rules, decisions, and conduct are subject to the constraints of the U.S. Constitution pursuant to *Brentwood Academy v. Tennessee Secondary School Athletic Association* (2001). In *Brentwood Academy*, the U.S. Supreme Court held that the “nominally private character of the [Tennessee Secondary School Athletic Association (TSSAA)] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings.” The Court concluded the TSSAA is a state actor because the requisite entwinement with the State of Tennessee exists. Although the state did not create the TSSAA or fund its operations, public schools constituted 84 percent of its membership, state board of education members served ex officio on its board of control and legislative council, and its ministerial employees are eligible to participate in the state retirement system. The state board of education also permitted students to satisfy its physical education requirement by participating in athletics sponsored by the TSSAA.

Prior to the 2001 *Brentwood Academy* ruling, the Seventh Circuit held that the Illinois High School Association is a state actor because of the “overwhelming public character” of its member schools, 85 percent of which are public schools. In a case in which the panel majority did not address this issue, Judge Posner concluded that the Indiana High School Athletic Association, whose membership is “composed primarily of public schools,” is a state actor. A Wisconsin federal district court denied the motion of the Wisconsin Interscholastic

Athletic Association (WIAA) motion to dismiss a complaint alleging its violation of a student’s federal constitutional rights because the WIAA’s “direct influence upon the school’s athletic programs” makes it “clear that [WIAA is] functioning ‘under color of’ state law.”

After *Brentwood Academy*, in *Bukowski v. WIAA* (2006), the Wisconsin court of appeals ruled that the plaintiff did not prove the WIAA is a state actor because he offered no evidence of “extensive entwinement” between a state agency or public schools and WIAA. The court observed that the WIAA is not a state actor even if it received federal funds, that being insufficient alone to establish state action. However, this unpublished opinion has no precedential authority. Because virtually all Wisconsin public schools with interscholastic athletic programs are members of WIAA (and collectively constitute a majority of its members), and their principals and administrators probably are extensively involved in its rule-making and decision-making authority, WIAA is likely to be judicially found to be a state actor when record evidence of “extensive entwinement” with its member public schools is established.

Regulation of Sponsored Content in the New Sports Media Economy

Kali N. Murray

Sports advertising formats, like all other types of advertising strategy and campaigns, are becoming increasingly diverse. Sponsored content, in which advertising content is integrated specifically into editorial content, has become a new way to generate revenue in a media sport content economy. . . .

The regulation of sponsored content is bound by two key choices: what is the type of information that should



be regulated and who should regulate the relevant information. First, regulation of sponsored content falls within a broad category of regulated information that Michael Grynberg refers to as

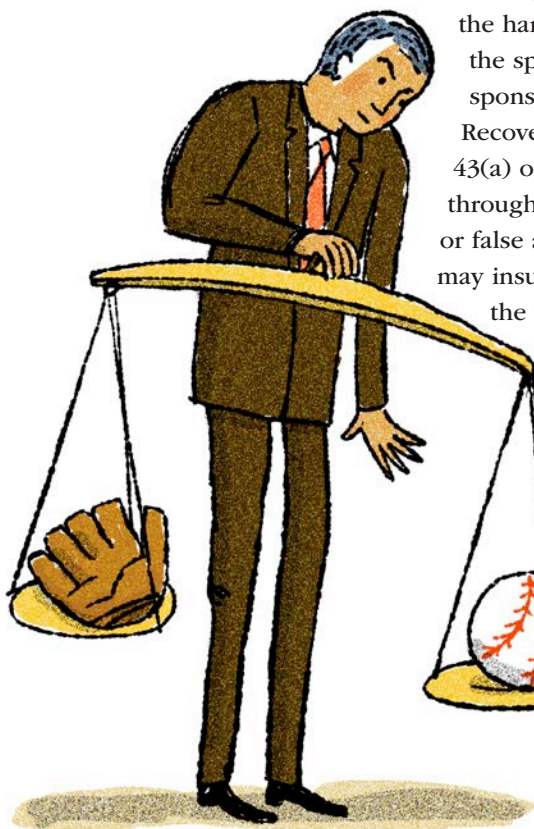
consumer information law, which regulates “the production and dissemination of information relevant to consumers in making purchasing decisions.” Categories of consumer information, according to Grynberg, can include trademark

law, false advertising law, state tort and contract law, and administrative regulation of unfair and deceptive advertising. Second, which entity should regulate sponsored content is an ongoing question. Consumer information regulation is a complex combination of public regulation, through entities such as the Federal Trade Commission or the state attorney general, and private regulation, through the intellectual property regulation of trademarks, false advertising, and false affiliation litigation within Section 43(a) of the Lanham Act. Thus, consumer information law is an area in which there is a “systematic deployment of private power in controlling what are regarded as public activities.”

To date, the primary deployment of regulation of sponsored content has been public. For instance, in December 2013, the Federal Trade Commission sponsored a workshop, “Blurred Lines: Advertising or Content? An FTC Workshop on Native Advertising,” to discuss the impact on consumers of false advertisement. The Federal Trade Commission identified that its preexisting regulatory structure would likely prove to be flexible in regulating sponsored content.

This article has contemplated what may be the best vehicle for private regulation of sports-related sponsored content by evaluating the ways in which harm could be experienced under the Lanham Act of 1946. My analysis concludes that private regulation within this arena might be insufficient, given the

difficulty of capturing the harms at risk within the spectrum of such sponsored content. Recovery under Section 43(a) of the Lanham Act through trademark law or false advertising law may insufficiently capture the ways in which the advertiser and the content generator may work together to create content. False advertising law may offer a way to regulate the content



of the ad itself but might be insufficient to capture the potentially complicated relationships that might need to be disclosed to consumers. The most potentially valid claim, false association, suffers from competing theories of recovery that are insufficiently theorized with each other, and thus may not be usable in everyday litigation. A serious question remains then: whether our regulatory model is sufficient for addressing the harms caused by sponsored content, an issue that is particularly compelling within the sports context.

Judges as Judges: Adjudication in Aesthetic Sports and Its Implications for Law

Chad M. Oldfather



Chief Justice Roberts was, of course, hardly the first to draw an analogy between umpire and judge, and he will certainly not be the last. The comparison is natural, for both roles require

their occupant to “make the call,” or, more formally, to serve as the presumptively final adjudicator of the rights of competing parties.

Yet while the judge as umpire seems to have naturally captured the imagination of judges, commentators, and laypersons alike, it has also come in for its share of critique, with critics pointing out the various ways in which the comparison is inapt. Perhaps the most frequently mentioned distinction is that umpires, unlike judges, play no role in creating or refining the rules they must apply. Thus, commentators have proposed substitute analogies, including the “justice as commissioner” and “justice as color commentator.” Along those lines, one of my goals in this essay is to suggest that there may be a better analogy—the somewhat less euphonious notion of the “judge as judge.” It may be, in other words, that the best sporting analogy to judges in law is not the umpire or referee but, rather, their namesakes in sport—the judges who provide the authoritative scoring in aesthetic sports, such as gymnastics and figure skating.

Judges in aesthetic sports, like their counterparts in law, derive a substantial portion of their authority and legitimacy from the expertise they bring to the position. ▶▶

Both, as we will see, play a significant role in shaping the content of the governing standards and draw, to a considerable degree, on their “tacit knowledge” in shaping and applying the rules. At the same time, however, their reliance on this sort of expertise—which necessarily entails the application of criteria unavailable or at least opaque to the lay observer or even the less-expert participant—creates an opening for skepticism. Observers will often be unable to determine for themselves whether the judges have accurately assessed the merits, and their efforts to do so will often lead them to assessments that differ from the judges’ assessments, likely because they have not accounted for all the factors that an expert judge considers. Because these observers cannot access all the factors driving the experts’ decisions and, thus, cannot fully understand them, they can easily conclude that the judges’ decisions are being driven by improper factors. Of course, judges in aesthetic sports have been accused, and occasionally found to be guilty, of corruption, as well as less pernicious forms of bias. The same is true of judges in law. Indeed, given the enormous cognitive demands associated with judging aesthetic sports, it is unsurprising that some extraneous factors influence officials’ determinations. That, too, can be said about judging in law.

Of course, metaphor and analogy have a tendency to obscure as well as to enlighten, so it is wise not to press the point too far. There are significant differences between the two contexts, as there will be for any sport-law comparison. Still, the comparison is worth developing, for the analogy goes deeper than the characteristics of the judicial role in the two contexts and includes features of the larger systems in which those two types of judges operate. Whatever the allure of analogizing judges to umpires and other officials in what philosophers of sport call *purposive* sports, the more realistic comparison may be to judges in *aesthetic* sports.

Addressing Abusive Conduct in Youth Sports

Judith G. McMullen

When we consider these goals of punishment of abusive conduct in the youth sport context in light of the research about causes and effects of abusive behavior by adolescents, some problems with the current approach become apparent. It is my contention that swift, automatic, and severe punishments are counterproductive to the preventive and educational goals of youth sports. In

particular, it is my contention that zero tolerance policies are harmful, and that referral of bullying and hazing incidents to outside law enforcement should be rare and not automatic. Since youth sports players are in a team environment—often one that is officially linked to a school—I believe that abusive behavior should be prevented through guidance and education where possible, and dealt with as a teachable moment where abuses occur. Although the desire to ban all behaviors remotely suggesting bullying or the desire to ban all perpetrators thereof from sports or school is understandable, automatic bans, either of specific behaviors or of particular people, are not a good solution to the underlying societal problems that lead to abusive behavior in sports.



Proponents of zero tolerance policies contend that harsh and certain punishment of specified offenses sends a clear message and will deter undesirable student or athlete behavior. However, when we consider

the zero tolerance approach in light of research about adolescent development discussed earlier in this article, it makes sense that the zero tolerance approach may fall short. As we have seen, adolescents tend to act impulsively and typically do not consider the repercussions of their behaviors prior to acting. Threats of Draconian punishment are unlikely to deter specific behaviors if the actors are acting on impulse or are motivated by adolescent concerns such as peer pressure, acceptance, or status.

A task force of the American Psychological Association (APA) recently examined research and data on zero tolerance and concluded that zero-tolerance policies have been problematic in school settings generally and may actually lead to worse behavioral outcomes for students. For one thing, suspension and expulsion, penalties associated with zero-tolerance policies, are associated with lots of negative outcomes, such as lower grades, lower standardized test scores, and higher dropout rates. The APA task force also found that schools with higher suspension and expulsion rates tend to have lower rates of school-wide academic achievement, even after controlling for lower socioeconomic status or other demographic factors. In the context of offenses such as bullying, the severity of the punishment may deter bystanders who observe the abusive behavior from reporting it. Moreover, as educators Christopher Boccanfuso and Megan Kuhfeld point out, since zero tolerance policies by their

nature do not consider context, “a student who is bullied may face the same suspension for retaliating in a physical altercation as the bully who initiated the confrontation.”

Just as exclusion from school can increase risks for the students left behind at school as well as for the students who are expelled or suspended, excluding players from their sports removes them from an important potential place to learn values, increase their physical fitness, and learn to be part of a team. This might accomplish a retribution objective, but it does not rehabilitate or educate players, and it does not reliably deter future abusive behavior since the original abusive conduct is most likely a product of immaturity, poor impulse control, and peer influences rather than a mature decision to engage in criminal behavior.

Crowdfunding and Sport: How Soon Until the Fans Own the Franchise?

Edward A. Fallone

Given the current legal environment for equity crowdfunding, is it realistic to expect the number of publicly owned professional sports teams to increase in the future? For teams in the four major leagues, the answer remains “No.” Valuations of major league football, basketball, hockey, and baseball teams run in the hundreds of millions and even in excess of \$1 billion. Crowdfunding has never been envisioned as a vehicle that could be used to raise sums at that level. At these stratospheric valuations, even conducting a stock sale intended to create a minority-owned block of shares becomes unlikely using small individual contribution limits. In addition, the private owners who have the resources to buy these teams

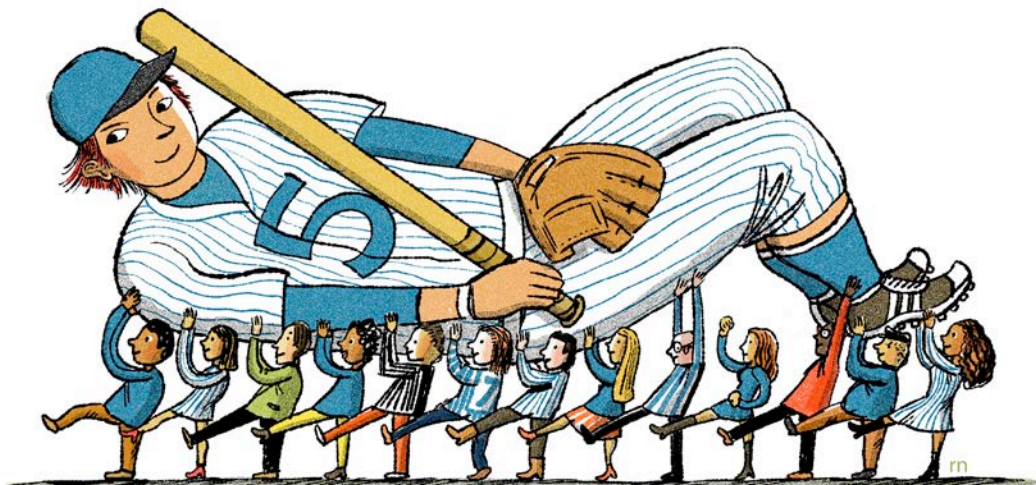
will be hesitant to share any future appreciation in the value of their investment with the public. The Green Bay Packers seem destined to remain the only publicly owned team in major league sports.



However, for minor league and expansion teams, the outlook is more promising. For example, valuations for minor league baseball teams range from the tens of millions of dollars for AAA teams

to less than \$10 million for a Class A team. In 2013, *Forbes Magazine* ranked the value of minor league AAA baseball teams from a high of \$38 million (the Sacramento River Cats) to a minimum of \$20 million. But valuations are even lower for Class A teams. Baseball legend Cal Ripken, Jr., owns the Class A Aberdeen Ironbirds minor league team, valued by *Forbes Magazine* at \$15 million. He also sold a Low A minor league franchise for \$7.5 million in December 2012. While the valuations for Class A teams have been on the rise in recent years, they are still at levels where crowdfunding might provide a means for a minority or even majority group of public shareholders to buy a share of the team.

The situation is even more promising for the minor leagues in sports other than baseball, and for expansion teams. For example, a new minor league hockey franchise in the Central Hockey League costs a minimum of \$500,000. This is well within the range of amounts successfully raised on crowdfunding portals. Valuations are especially affordable for less well-known professional sports leagues and for franchises in newly created leagues. The National Lacrosse League (NLL) is a professional ▶▶



indoor lacrosse league with nine teams, some of which draw in excess of 10,000 fans per game. The asking price for an expansion franchise in the NLL is \$3 million. And even though the A-11 Football League still exists only as a business plan and may never play a game, the promoters of the league are asking for a \$5 million franchise fee to buy a team in the fledgling professional football league.

At valuation levels below \$5 million, the strengths of crowdfunding as a means of raising capital seem particularly well-suited to professional sports teams. Sports teams are one of the primary beneficiaries of the way that the Internet increases interconnectivity between fans and content providers. More so than music fans or movie lovers, sports fans develop a passion for a team that is strong and often passed down through generations. If musicians and movie producers can successfully tap into fan loyalty via crowdfunding, sports teams can do so to an even greater extent.

After the Arbitration Award: Not Always Final and Binding

Jay E. Grenig

Although the Federal Arbitration Act provides that a court can vacate an award “[w]here there was evident partiality or corruption in the arbitrators,” it does not provide for pre-award removal of an arbitrator. A party may challenge any award ultimately rendered on the grounds of evident partiality. However, a party to arbitration who knows of an arbitrator’s alleged bias before rendition of the award and does not complain until after rendition of the award waives the impropriety.



In some circumstances, an award of damages may be so grossly excessive or inadequate as to indicate partiality. A court will not “set aside an award for mere inadequacy in [the]

amount [of damages], unless it is so great as to indicate corruption or partisan bias on the part of the arbitrators.”

In *National Football League Players Association v. National Football League*, a dispute over discipline imposed on players who tested positive for banned substances was heard by the NFL’s chief legal officer. The court rejected the Players Association’s contention that the decision—treated as an arbitration award—should be vacated because the “arbitrator” was partial.

The court pointed out that the Players Association had agreed with the NFL in the collective bargaining agreement that the commissioner or the commissioner’s designee could hear disciplinary appeals. The “arbitrator” in question was the NFL’s chief legal officer. Although the “arbitrator” had given the NFL legal advice regarding the matter that he heard, the court concluded that because the Players Association had not objected to the “arbitrator” before the award, it had waived any claim of bias.

Poston v. National Football League Players Association involved the Players Association and a licensed “contract advisor.” A licensed contract advisor “represent[ed] NFL players in various types of negotiations, including negotiations for employment contracts with particular teams and associated marketing opportunities.” Pursuant to their agreements with the Players Association, “the conduct of such advisors was governed by regulations established” by the Players Association. The Players Association, “through its Disciplinary Committee, ha[d] the power to discipline contract advisors for noncompliance with [these] regulations.”

One of the advisor’s employees improperly purchased airline tickets for four college players in order to attend a party at the advisor’s company. One player was suspended one game for impermissible benefits. The Players Association disciplined the contract advisor.

In accordance with established procedures, the Players Association Disciplinary Committee’s determination was appealed to arbitration. The Players Association selected an arbitrator to resolve the matter. The parties stipulated that the following two issues would be presented to the arbitrator: (1) whether the contract advisors engaged in or were engaging in prohibited conduct, as alleged; and (2) if so, whether the discipline imposed should be affirmed or modified. The arbitrator upheld the discipline.

The contract advisor filed a motion to vacate the arbitration award. The court rejected the advisor’s claim that the arbitrator was not impartial. The court noted that the contract advisor knew, or should have known, that the arbitrator used in the case was the one regularly used by the Players Association, and, therefore, should have raised any concerns regarding the arbitrator’s potential partiality before the arbitration proceeding. The court explained that “arbitration awards should not be vacated ‘where the arbitrator has disclosed any circumstance that would show bias,’ or ‘where an objecting party who is in fact aware of the relationship at the time of the arbitration remains silent.’”

Michael Sam and the NFL Locker Room: How Masculinities Theory Explains the Way We View Gay Athletes

By Lisa A. Mazzie



Sport has played a significant, if not leading, role in shaping masculinity; however, sport, too, is a social construct. Sports, as we now know them, emerged out of a

specific historical period, with the specific purpose of fostering masculinity in boys. By excluding women from organized sport—and by explaining this exclusion as due to the peculiarities of the female anatomy—men were able to build a solely male arena for the construction, performance, and reproduction of masculinity.

Present-day sport developed in the nineteenth century in Britain and the United States as a consequence of the Industrial Revolution. Prior to that point, most families had lived and worked together on family farms, where physical work was plentiful and fathers and sons were in close contact. With the Industrial Revolution, fathers headed out of the home to work often long hours, leaving their sons in the care of mothers and, increasingly, female teachers at school. The concern was that boys were becoming feminized by their lengthy contact with women.

Sports were consciously developed and introduced in public schools and in community organizations like the YMCA for boys to separate them from girls—making visible men’s purported physical superiority—and to allow them to learn “masculine” values, as Michael A. Messner has explained. Through sports, boys could use their bodies in socially acceptable, physical, sometimes violent, ways and learn traits such as competitiveness and dominance (emphasis on winning) that allowed them to distinguish themselves from girls and maintain hegemonic masculinity. Team sports, in particular, were valued, as they emphasized loyalty to the team (e.g., other males) and obedience to authority (e.g., a coach). Such lessons in physical and mental toughness, loyalty, and obedience were perceived to ready boys for military duty or leadership positions.

Modern sport, then, was constructed specifically as “a gendered institution,” constructed by men “largely as a response to a crisis of gender relations in the late nineteenth and early twentieth centuries. The dominant structures and values of sport came to reflect the fears and needs of a threatened masculinity.” As such, sport “has served as an important site in the construction of male solidarity.” Boys who participate in sports—and they learn early on that they “should”—are learning not just how that particular sport is played, but they are learning, often in all-male environments, the “culturally dominant conception of being a man.”

Learning to be a man in an all-male environment, though, can produce a “hypermasculine ethos,” a kind of masculinity that is “marked by misogyny, belief in male superiority, and homophobia,” in the characterization of Deborah L. Brake. Many elite sports teams tend to be all male; as such, traits that correspond to a hypermasculine ethos—traits such as physical strength, discipline, aggression, loyalty to other men, and heterosexuality—are particularly valued. Different sports emphasize such a hypermasculine ethos to differing degrees. The hypermasculinity a boy learns by participating in tennis or baseball is different from the hypermasculinity he learns by participating in football or ice hockey.

This differing ethos results because, just as not all masculinities are equally valued, neither are all sports. Academic and former Olympian Bruce Kidd noted that “[t]he preferences we express for different sports . . . are in part statements about what we value ‘in a man’ and what sort of relations we want to encourage between men.” The more aggressive and violent the sport, the more masculine it is considered to be; football is among the three most violent, thus among the most masculine. It is also a particular American institution. As former NFL running back Dave Kopay said, “Of all the team sports, football would also seem to be one of the most representative of the American character.” ■

