

Barry University School of Law

Digital Commons @ Barry Law

Faculty Scholarship

2018

When Popular Culture and the NFL Collide: Fan Responsibility in Ending the Concussion Crisis

Taylor Simpson-Wood

Follow this and additional works at: <https://lawpublications.barry.edu/facultyscholarship>



Part of the [Entertainment, Arts, and Sports Law Commons](#), [Health Law and Policy Commons](#), [Labor and Employment Law Commons](#), and the [Law and Society Commons](#)

ARTICLES

WHEN POPULAR CULTURE AND THE NFL COLLIDE: FAN RESPONSIBILITY IN ENDING THE CONCUSSION CRISIS

TAYLOR SIMPSON-WOOD* & ROBERT H. WOOD**

I. PART I

A. Introduction: The Kickoff

For the past fifty years, football has been the number one spectator sport in America.¹ A 2018 Gallup Poll shows that the popularity of professional football has only suffered a small decline since 2007.² This continuing popularity is perplexing given the unsettling facts about the toll the game clearly takes upon both the bodies and minds of its players. The concerns over brain injuries and

* Taylor Simpson-Wood is a Professor of Law at Barry University School of Law, Orlando, Florida. She received her J.D. (*magna cum laude*) and LL.M. in Admiralty (*with distinction*) from Tulane Law School. She currently teaches in the areas of Civil Procedure, Conflict of Laws, Federal Jurisdiction, Admiralty & Maritime Law, and Popular Culture & the Law. She would like to express her gratitude to Dean Leticia M. Diaz for her continuing support of faculty scholarship and the research grant that assisted in the writing of this article. Prior to beginning her legal studies, Professor Simpson-Wood was a professional actress for a number of years. She is a long-time member of the Actors' Equity Association and Screen Actors Guild & the American Federation of Radio and Television Artists. Full disclosure: Professor Simpson-Wood is a die-hard New Orleans Saints fan.

** Robert H. Wood is an Associate Professor of Legal Studies at the University of Central Florida (UCF). He received his J.D. from Georgia State University College of Law and his LL.M. in Admiralty (*with distinction*) from Tulane Law School. At UCF, he teaches in the areas of Sports Law, Entertainment Law, World Legal Systems, Admiralty Law, and Administrative Law. Professor Wood also has taught as an adjunct at Barry University School of Law in the areas of Administrative Law, and Popular Culture and the Law. He would like to thank his wife, Professor Taylor Simpson-Wood, for her love and support of over twenty-five years of marriage. Full disclosure: He is a life-long Washington Redskins fan.

1. Jim Norman, *Football Still Americans' Favorite Sport to Watch*, GALLUP (Jan. 4, 2018), <https://news.gallup.com/poll/224864/football-americans-favorite-sport-watch.aspx>.

2. *Id.* Football's "[p]opularity has slipped since peaking at 43% in 2006 and 2007. In 2008, it dipped slightly to 41% and dropped again to 39% in 2013—the last time the question was asked before the December 2017 poll and its 37% reading." *Id.*

death from chronic traumatic encephalopathy (CTE) resulted in the 2017 class action settlement between the NFL and retired players, which created “a 65-year, uncapped fund for players with qualifying diagnoses, such as CTE, ALS, Alzheimer’s disease, Parkinson’s and other neurocognitive impairments.”³ As of April 16, 2018, there are 20,480 registered settlement class members.⁴ In response to what it sees as a manipulation of the settlement process, in March 2018, former players who are members of the settlement class filed a complaint alleging that the agreement “‘is failing to provide a fraction of what the NFL promised” and that the NFL is arguing “‘virtually anything to evade payments.”⁵ According to the attorney who authored the motion, the NFL has historically “always engaged in scorch-earth litigation, and that is what the league is doing here, making it a settlement in name only.”⁶ The league replied in April 2018, by filing a motion in the United States District Court for the Eastern Pennsylvania, requesting that a special investigator be appointed “to probe what it described as widespread fraud that has resulted in hundreds of millions of dollars in false claims to a fund meant to compensate former players for head injuries.”⁷

Even more disconcerting than football’s continuing popularity and apparent stonewalling by the NFL in paying legitimate claims under the settlement agreement, is the league’s failure to effectively change the violent nature of the game. At first blush, it might appear there has been some progress made. For example, in 2016, the NFL added specific penalties for failing to follow the guidelines for concussions.⁸ Previously, a team was not fined if it violated the NFL Concussion Protocols.⁹ Under the 2016 revisions, a first violation can

3. Andrew Beaton, *NFL Alleges ‘Deep and Widespread’ Fraud in Concussion Settlement*, WALL ST. J., Apr. 13, 2018, <https://www.wsj.com/articles/nfl-alleges-deep-and-widespread-fraud-in-concussion-settlement-1523641002>.

4. *Official NFL Concussion Settlement*, NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com> (last visited Dec. 13, 2018) (“The In re: National Football League Players’ Concussion Injury Litigation class action settlement became final and effective on January 7, 2017, which is the ‘Effective Date’ of the Settlement Program.”).

5. Rick Maese, *Dementia Claims in NFL Concussion Settlement Are Going Unpaid, Lawyers Say*, WASH. POST, Mar. 20, 2018, https://www.washingtonpost.com/sports/redskins/dementia-claims-in-nfl-concussion-settlement-are-going-unpaid-lawyers-say/2018/03/20/00e635bc-2c7f-11e8-8ad6-fbc50284fce8_story.html?noredirect=on&utm_term=.e25dbbb3cb2f.

6. *Id.*

7. Beaton, *supra* note 3.

8. Lauren Theisen, *Seahawks Become First-Ever Team Fined for Violating Concussion Protocol*, DEADSPIN (Dec. 21, 2017), <https://deadspin.com/seahawks-become-first-ever-team-fined-for-violating-conc-1821508672>.

9. Ken Belson, *N.F.L. Introduces New Rules to Back Its Concussion Protocol*, N.Y. TIMES, July 25, 2016, <https://www.nytimes.com/2016/07/26/sports/football/nfl-concussion-protocol-new-rules.html>.

result in a team facing a maximum fine of \$150,000.¹⁰ If a team skirts the rules a second time, it will face a minimum fine of \$100,000.¹¹ In addition, if a team is found to have breached protocol “for competitive reasons,” such as “keeping a concussed player in the game,” the team can be penalized by having to forfeit draft picks.¹² Team medical and coaching staff members can also be required to attend additional protocol training.¹³ However, when the league released its numbers about concussions, the report showed that diagnosed “[c]oncussions increased by 13.5 percent (243 to 281) over the preseason and regular season from 2016 to 2017.”¹⁴

In December 2017, the Seattle Seahawks had the dubious honor of becoming the first team to be fined for contravening the protocols.¹⁵ The team was fined \$100,000 and members of the medical and coaching staff were required to undergo “remedial training regarding the protocol.”¹⁶ Comparatively, however, the consequences of the infraction were very mild. There were “no lost draft picks, no suspensions for the coaching or medical staff, and a fine that [was] not even a rounding error in the checkbook of Seahawks owner Paul Allen.”¹⁷ A week or so later, it was determined that the Houston Texans had not run afoul of the protocols.¹⁸ However, the result of implementing the protocol even properly was “unacceptable” when quarterback Tom Savage was allowed to continue playing and not removed from the game.¹⁹

10. *Id.*

11. *Id.*

12. *Id.*

13. Kevin Patra, *Seahawks Fined for Not Following Concussion Protocol*, NFL (Dec. 21, 2017), <http://www.nfl.com/news/story/0ap3000000896202/printable/seahawks-fined-for-not-following-concussion-protocol>. Accepting the joint findings of the NFL and the NFL Players Association, the Seahawks responded that they had “[n]ot knowingly disregard[ed] the Concussion Protocol” and that “[a]ny misstep was unintentional and the result of confusion on the sideline.” Seahawks PR, @seahawksPR, TWITTER (Dec. 21, 2017, 11:49 AM), <https://twitter.com/seahawksPR/status/943931425186766848>.

14. Jerry Barca, *The NFL’s New Targeting Rule Will Save Football*, FORBES (Mar. 31, 2018), <https://www.forbes.com/sites/jerrybarca/2018/03/31/the-nfls-new-targeting-rule-will-save-football/#3e3f37707d57>. See Danny Heifetz, *How the NFL’s Rules Changes Will Affect the League*, RINGER (Mar. 27, 2018), <https://www.theringer.com/nfl/2018/3/27/17170560/nfl-rule-changes-roundup> (noting that “[o]fficials said that increased self-reporting rates have partially driven the increase.”).

15. *Seahawks Fined \$100,000 for Violating Concussion Protocol*, REUTERS (Dec. 21, 2017), <https://www.reuters.com/article/us-football-nfl-sea/seahawks-fined-100000-for-violating-concussion-protocol-idUSKBN1EF2RJ>.

16. Patra, *supra* note 13.

17. Theisen, *supra* note 8.

18. Mark Maske, *Texans Not Punished for Tom Savage Concussion, But NFL, NFLPA Call Outcome ‘Unacceptable’*, WASH. POST (Dec. 29, 2017), https://www.washingtonpost.com/news/sports/wp/2017/12/29/texans-not-punished-for-tom-savage-concussion-but-nfl-nflpa-call-outcome-unacceptable/?utm_term=.043be8d3883c.

19. *Id.*

Arguably, it was a shock to anyone watching the game that Savage was allowed to return to play after the brutal hit he took. Not only was he slow to get up, he experienced motor coordination problems and exhibited the “fencing response”²⁰ right after the hit.²¹ How any competent member of the medical staff or the independent neurotrauma consultant missed these signs when reviewing the video of the play is simply a mystery. The NFL basically looked at the error as a learning experience, and once again modified the Concussion Protocol in December 2017. These modifications included implementing a pilot program requiring the addition of another Unaffiliated Neurotrauma Consultant (“UNC”) to watch the broadcast feeds of all games from a central location who has to alert the sideline medical teams of “any signs or symptoms warranting further evaluation” and that any player displaying seizure or fencing responses “at any time shall be removed from play and may not return to the game.”²²

In March of 2018, while the league made some substantial changes to its bylaws and rules, there was one rather glaring omission from the safety updates- no additions to the Concussion Protocol even though a number of quarterbacks had joined Tom Savage in returning to play after it appeared they had sustained a concussion.²³ The major change garnering attention is a new “head targeting rule.” Under this new rule, it is now a penalty for a player to employ the technique of lowering his head in order to utilize his helmet when

20. Gary Wickman, *The Fencing Response*, HEALTHGUIDANCE (Nov. 4, 2010), <http://www.healthguidance.org/entry/14309/1/The-Fencing-Response.html>.

The fencing response is an unusual and unnatural looking position of the arms adopted by individuals when suffering a concussion. Here, immediately following moderate forces affecting the brain stem of the individual, the forearms are held awkwardly, with one in a flexed position, and the other extended up into the air lasting a few seconds following the impact. This often occurs in sports such as football, hockey, boxing, rugby, martial arts and others, and is used as an indicator of an injury force magnitude and midbrain localization which can aid in injury identification for medical professionals in sports activities and possibly other scenarios.

Id.

21. Steven Ruiz, *Tom Savage Re-enters a Game Minutes After Suffering Clear Concussion*, USA TODAY: FOR THE WIN, Dec. 10, 2017, <https://ftw.usatoday.com/2017/12/nfl-49ers-texans-tom-savage-concussion-protocol-video>.

22. National Football League, *NFL, NFLPA Complete Tom Savage Concussion Investigation*, NFL (Dec. 29, 2017), <http://www.nfl.com/news/story/0ap3000000899838/article/nfl-nflpa-complete-tom-savage-concussion-investigation>. See Kevin Armstrong, *How Texans QB Tom Savage's Injury Changed NFL's Concussion Protocol*, N.Y. DAILY NEWS, Dec. 29, 2017, <http://beta.nydailynews.com/sports/football/texans-qb-savage-injury-changed-nfl-concussion-protocol-article-1.3725869>.

23. Heifetz, *supra* note 14 (discussing additional concussed quarterbacks include Russell Wilson, Jacoby Brissett, and Cam Newton).

initiating contact with an opponent.²⁴ If this occurs, it is an automatic 15-yard penalty and the offending player may be ejected from the game.²⁵

Initially, this rule would seem to be an advancement in the effort to prevent brain injuries. However, it has been met with some criticism, particularly by the players.²⁶ In response to the new rule, Buffalo Bills linebacker Lorenzo Alexander, a co-vice president on the NFL Players Association's executive committee and a twelve-year veteran, commented that the new rule:

[C]ontinues to put [players] in a predicament In our mind, it makes it hard to play defense in this league. In my mind, there needs to be more of a common-sense approach to it It is football at the end of the day. There are going to be injuries that you can't avoid. You can't legislate everything out.²⁷

He added that the league:

[N]eed[s] to be a little more creative or and strategic rather than throw something out there that sounds good or looks good from player safety Because of (the degenerative brain disease Chronic Traumatic Encephalopathy), they feel like they have to do something to show the fans they're trying to change it. End of the day, it's football, and if you change the game so much, we'll eventually have to play something else.²⁸

There is also concern that the new rule will be difficult to effectively and consistently enforce.²⁹ During a phone interview, Josh Norman, cornerback for the Washington Redskins, lamented that he did not know how the players would be able to play the game. "If your helmet comes in contact? How are you going to avoid that if you're in the trenches and hit a running back, facemask to facemask and accidentally gaze the helmet? It's obviously going to happen. So, I don't even know what the definition looks like."³⁰ Richard Sherman, the 49ers' cornerback, thinks that the new rule will not make the game safer. It will simply create different injuries. "It's ridiculous. Like telling a driver if you

24. Mark Maske, *NFL's New Targeting-Like Rule Will Penalize Players for Lowering Helmet Before Hit*, WASH. POST, Mar. 27, 2018, https://www.washingtonpost.com/news/sports/wp/2018/03/27/nfls-new-targeting-rule-will-penalize-players-for-lowering-helmet-before-hit/?utm_term=.7a65643d145d.

25. *Id.*

26. Mike Jones, *NFL's Targeting Rule Has Defensive Worried About Penalties*, USA TODAY, Mar. 27, 2018, <https://www.usatoday.com/story/sports/nfl/2018/03/27/nfl-targeting-rule-penalty-josh-norman-richard-sherman-lorenzo-alexander/464275002/>.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

touch the lane lines, you're getting a ticket. (It's) gonna lead to more lower-extremity injuries.”³¹

The players are also concerned that “[e]ven if portions of practice time [are] devoted to refining techniques,” it is highly improbable “that players will be able to alter their tackling approach[]” in order to comply with the rule.³² As Josh Norman further observed:

It's not going to do anything. I don't know any other way to play . . . I understand trying to be safer, I get it. We saw what happened to (Pittsburgh Steelers linebacker) Ryan Shazier [who took a hit that resulted in a serious spine injury], and I get it and understand that, but at the same time, it's football. I don't know what other way to say it but it's football . . . I pray for the game and hope it'll still be what it is, but it seems in our day and age, the game as we know it is coming to an end. But really, we're all playing the game the way it's supposed to be played.³³

In light of a recent 2018 study, even with changes like the new ban on head targeting with the helmet, football continues to be played in a way which still does not prevent or even lessen the threat to the minds of the players. It has been shown that it is not only hits which result in concussions that can cause CTE, but sub-concussive head hits can result in chronic brain damage, thereby destroying the lives of the players.³⁴ A positive correlation is being found by researchers between “[t]he amount of time spent playing sports with long-term exposure to sub-clinical head trauma” and CTE.³⁵ A January 2018 Boston University “[s]tudy published . . . in *Brain*, a journal of neurology, present[ed] the strongest case yet that repetitive hits to the head that don't lead to concussions – meaning no loss of consciousness or other symptoms that can include headaches, dizziness, vision problems or confusion – cause CTE.”³⁶ According to associate professor of psychiatry at Boston University, Dr. Lee Goldstein, researchers previously “[h]ad an inkling that subconcussive hits,” that do not evidence “neurological signs and symptoms” were likely “associated

31. *Id.*

32. *Id.*

33. *Id.*

34. Emily Boerger, *The Sub-Concussive Impact*, B.U. NEWS SERV. (Feb. 23, 2017), <http://bunewsservice.com/sub-concussions-a-threat-to-brain-health/>.

35. *Id.*

36. Tom Goldman, *CTE in Athletes Linked to Hits to the Head, Even Without Concussions*, NPR (Jan. 18, 2018), <https://www.npr.org/sections/health-shots/2018/01/18/578355877/repeated-head-hits-not-concussions-may-be-behind-a-type-of-chronic-brain-damage>.

with CTE.”³⁷ As a result of the study, however, there is now “[s]olid scientific evidence” establishing the correlation.³⁸ In fact, “about 20 percent of the known cases of CTE have no record or report of concussion.”³⁹ The “real-life application” of the study was encapsulated by the head of the Concussion Legacy Foundation, Chris Nowinski, in a rather disturbing statement made to NPR:

We see hard hits all the time, where a guy pops up and smiles and [signals] a first down, and [we think], ‘OK, that hit was fine.’ But what this study says is: No, that hit probably wasn’t fine, and that poor guy can’t feel the damage that’s happening in his brain right now.⁴⁰

The seriousness of such hits for professional players is demonstrated by the first case of CTE discovered by Dr. Omalu, that of the late Mike Webster, who played center for the Pittsburgh Steelers for “27 years and never had a known or diagnosed concussion.”⁴¹ A number of studies have also shown the risks sub-concussive hits can pose for younger athletes, from youth football (ages eight – thirteen), high school, and at the college level. These players can sustain anywhere from several hundred to over a thousand impacts during a single season of football.⁴²

The realization of the threat posed by sub-concussive head hits in conjunction with the cutoff dates regarding CTE in the settlement agreement is also troubling. Under the terms of the settlement agreement, “NFL retirees may receive awards up to \$4 million for ‘Death with CTE’ but only if they died between January 1, 2006 and July 7, 2014.”⁴³ This means that players who retired after the 2014 date and the players currently being bashed on the playing field are not covered for CTE. In other words, “every single NFL retiree going forward [after July 7, 2014] – and there’s about 20,000 of these guys – if they’re still alive to hear this right now, and they die and they have CTE and they suffer,

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* Mr. Nowinski “[i]s a former high school and college player who says that even now, at 39, he deals with symptoms of acute post-concussion syndrome, including lingering headaches, sleepwalking and nausea during exercise.” *Id.*

41. *Id.*

42. Boerger, *supra* note 34.

43. Patrick Hruby, *Cutting Them Short*, INDEP. FOOTBALL VETERANS (July 19, 2014), <http://www.footballvets.org/blog/2014/07/patrick-hruby-cutting-them-short/>.

and their families suffer, they're gonna get nothing for that."⁴⁴ While the agreement does allow for it to be revisited every ten years, there is no "legal guarantee" that CTE will ever be "included [in the settlement] as a [re-compensable] recogniz[ed] condition"⁴⁵

Perhaps the greatest irony of the settlement terms, however, is that the ramifications of the 2006 cut-off date will be to exclude a large number of former players from recovering under the settlement, "including those whose deaths sparked the outrage over the NFL's actions."⁴⁶ This means that the families of players "[w]ho died or killed themselves for reasons related to brain trauma, may not collect a thing."⁴⁷ For example, while the families of Dave Duerson and Junior Seau, both of whom committed suicide and were later diagnosed with CTE, would qualify for coverage under the settlement, the family of the man whose diagnoses started the awareness of the CTE problem, Mike Webster, is unable to receive a dime.⁴⁸ It also leaves players currently suffering from certain symptoms of CTE without a remedy.

A case on point is that of former defensive lineman, Joe DeLamielleure, who is currently sixty-seven years old and played in the NFL for thirteen seasons from 1973 to 1985, for both the Buffalo Bills and the Cleveland

44. Patrick Hruby, *Concerns Mount Over NFL Concussion Deal*, WBUR 90.9 (July 26, 2014), <http://www.wbur.org/onlyagame/2014/07/26/hruby-concussion-nfl-cte> (Bill Littlefield speaking with Patrick Hruby).

45. Michael McCann, *Will New CTE Findings Doom NFL Concussion Settlement?*, SPORTS ILLUSTRATED, Aug. 15, 2017, <https://www.si.com/nfl/2017/08/15/new-cte-study-effect-nfl-concussion-settlement>.

46. Barry Petchesky, *The NFL's Concussion Settlement Is a Disaster*, DEADSPIN (Sept. 20, 2013), <https://deadspin.com/the-nfls-concussion-settlement-is-a-disaster-1356127608>. CTE coverage could be added to the settlement at a later date, perhaps as soon as the mid 2020s. See Class Action Settlement Agreement (As Amended), *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa. Feb. 13, 2015). The settlement calls for retired players and the NFL to meet every ten years. *Id.* In those meetings, the two sides are expected to evaluate whether the settlement has been effective and whether changes are warranted. *Id.* The science of CTE diagnosis could advance over the next several years. If as credible method of testing for CTE in living subjects were created, the players would have a compelling argument that CTE should be added to the settlement as a recognized condition. Then again, the NFL is not obligated to add CTE as a recognizable condition at a later date. The inclusion of CTE testing and benefits would have to be negotiated with the NFL. The possibility for CTE to later be included as a recognizable condition is not a legal guarantee. See McCann, *supra* note 45.

47. *Id.* The settlement agreement does have a loophole for players who died before 2006. Ken Belson, *He Helped Ex-Players Get Benefits. His Family Is Still Waiting*, N.Y. TIMES, Jan. 13, 2018, <https://www.nytimes.com/2018/01/13/sports/football/nfl-cte-mike-webster.html>. While not eligible for payouts under the agreement, they can seek to sue the NFL if the local statute of limitations, which varies by state, has not run. *Id.*

48. Jacob Tierney, *Family of Former Steeler Mike Webster Get Nothing from \$1 Billion Brain-Damage Settlement*, TRIBLIVE (Jan. 13, 2018), <http://triblive.com/sports/nfl/13178006-74/family-of-former-steeler-mike-webster-get-nothing-from-1-billion-brain-damage>; Belson, *supra* note 47.

Browns.⁴⁹ Three years ago, his wife, Gerri, shared that her husband was “[a]lready starting to show some of the behavioral symptoms that are associated with CTE, but was excluded from the settlement.”⁵⁰ There are a number of symptoms attendant to CTE, including “memory loss, depression, and mood swings.”⁵¹ The federal judge, Anita Brody, who approved the agreement, allowed the exclusion of future cases of CTE “because neurocognitive ailment associated with the disease are eligible for awards.”⁵² Arguably, players who are still living suffering from CTE should be entitled to damages as long as their symptoms fall into a covered condition.⁵³ The problem with this conclusion by the judge is that many CTE victims do not experience such symptoms.⁵⁴ Instead, they may suffer from mood swings and depression.⁵⁵ This is DeLamielleure’s situation. One minute, he is fine; then he’ll have a “flare[] of temper” for no apparent reason.⁵⁶ To quote his wife, “He’ll turn on a dime.”⁵⁷ Unfortunately, Judge “Brody specifically excluded [from coverage under the agreement] symptoms of CTE, such as irritability, aggression, depression and suicidal tendencies”⁵⁸ Consequently, after the cutoff date, “families of players diagnosed with CTE after death are ineligible for an award”⁵⁹ The Judge’s concern was that to have permitted benefits going forward might “incentivize suicide” because the disease can (at present) only be diagnosed posthumously.⁶⁰

To coin a phrase from Laurel and Hardy, it appears that football and those of us who love the game, are “in another fine mess.”⁶¹ This Article examines

49. Sean Gregory, *NFL Concussion Settlement: Ex-Players Angered Over CTE Exclusion*, TIME, Apr. 27, 2015, <http://time.com/3836097/nfl-concussion-settlement-former-players/>. Joe DeLamielleure participated in a PET scan developed by researchers at UCLA which may be able to detect CTE in living players. *Id.* It was found that DeLamielleure’s brain, along with those of a dozen or so other former players whom had suffered at least one concussion, including “fellow NFL Hall of Famer Tony Dorsett” and “[f]ormer All-Pro Leonard Marshall,” all suffered from signs of CTE. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* (“Robert Stern, a leading CTE researcher from Boston University, has said that many of the CTE victims he has studied did not suffer from [memory loss or other neurocognitive impairments] - and thus wouldn’t have been eligible for this award under the settlement.”).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. ANOTHER FINE MESS (Hal Roach, MGM 1930).

the forces that have resulted in this “fine mess” where football fans essentially paying week after week to destroy the thing they love. In particular, it delves into the role played by popular culture in creating this modern American tragedy. Part I of this Article provides an overview of key medical information surrounding CTE and brain damage from sub-concussive hits, examines the litigation which resulted in the settlement agreement between affected players and the NFL, and evaluates the effectiveness of past and present concussion protocols. It also focuses on two key films that helped bring the CTE crisis into mainstream consciousness and explains why football and television are a match made in heaven.

While issues of popular culture are touched upon in Part I, the second part of the Article is devoted almost exclusively to the role of popular culture in helping to create the concussion crisis. It discusses the influence the concepts of cultivation, heuristic reasoning and resonance have on a fan perception, and considers key lessons fans have learned from films and how this education has created a fan mentality that condones the current level of violence in football. Finally, the paper scrutinizes suggestions about how to modify the way the sport is played in order to allow the game of football to have a viable, and healthy, future not only economically, but for the players and their fans.

B. Medical Evidence

Scenes from Concussion⁶²:

69

INT. ELEVATOR – PRESBYTERIAN UNIVERSITY
HOSPITAL – DAY

Bennet cradles the box.

70

INT. HALLWAY – PRESBYTERIAN UNIVERSITY
HOSPITAL

*Bennet walks an endless hallway with a hundred doors,
where—*

DR. RON HAMILTON *[Bennet’s former professor during
his two-year fellowship training watches Bennet approach.
The sign on Dr. Hamilton’s door reads “Chairman,*

62. Peter Landesman, *Concussion Movie Script*, SCRIPTS, https://www.scripts.com/script/concussion_304 (last visited Dec. 13, 2018) (focusing on scenes 69-73). See *Concussion (2015) Movie Script*, SPRINGFIELD! SPRINGFIELD!, https://www.springfieldspringfield.co.uk/movie_script.php?movie=concussion (last visited Dec. 13, 2018).

Neuropathology Program, Univ. of Pittsburg Medical School”–]

HAMILTON:

What did you bring me?

BENNET:

I need you to look at this cold.

(as they go into--)

71

INT. NEUROPATHOLOGY LAB – PRESBYTERIAN
UNIVERSITY HOSPITAL

[Dr. Hamilton] leads Bennet into his office, digging out the slides. Bennet steps to the window, looks down on massive Heinz Field [the home of the Pittsburgh Steelers].

HAMILTON:

Bennet. Relax. I can hear you breathing (another look, then--) Hamilton slowly lifts his head. Pause.

HAMILTON (CONT'D)

This is a really really terrible brain.

72

INT. HALLWAY – PRESBYTERIAN UNIVERSITY
HOSPITAL

Office of “Dr. Steven DeKosky, Chairman, Dept of Neurology.” Out strides DEKOSKY, a fit 55. Pissed-off to be interrupted. And back to–

73

INT. HAMILTON’S OFFICE – PRESBYTERIAN
UNIVERSITY HOSPITAL –
PITTSBURGH – DAY

HAMILTON:

Ever met the great man before? *(Bennet shakes, No)*
Tough. One of the top brain guys in the world. Expect
two minutes tops. *DeKosky blows in. Gives Hamilton*
a “this better be good” look.

DEKOSKY:

That him? *(Hamilton nods)* So you’re our prize
graduate. And crosses straight to the microscope.
Great focus, long moment of this. *Then–*

It's very obvious. And he faces them. In the presence of something monumental and knows it.

HAMILTON:

Tell him.

BENNET:

That is Mike Webster. The Pittsburgh Steeler—

DEKOSKY:

(get to the point) I know who Mike Webster is.

HAMILTON:

Steve. He was fifty. *(and that's the point and—)* DeKosky looks to the window, mentally shuffling through his decades of study, toil, research. The tens of thousands of hours. Then reaches for the phone—

DEKOSKY:

(into phone) Cancel the rest of my morning— *(hangs up; then)* You have my attention. Hamilton nods, Go.

BENNET:

Diving birds hit the sea at 200 MPH, generating 1,000 g-force at impact. Each peck of a woodpeckers produces a g-force of a thousand. 12,000 pecks a day, 85-million times over their lifetimes. Big-horned sheep—

(DeKosky gives Hamilton an impatient look)

HAMILTON:

Bennet—

BENNET:

All these animals have shock absorbers built into their bodies. The woodpecker's tongue comes out the back of the mouth through the nostril and goes around the top of its head. Basically, it's one big safety belt for the brain. *(then)* Humans? Not one piece of anatomy protects us from those kinds of collisions. A human being will get concussed at 80 g's. The average head-to-head contact on a football field? 120 g's. God did not intend for us to play football.

HAMILTON:

Let's keep God out of this.

And Bennet goes to a white board and draws the S's/O's coach's diagram of football squads. Offense. Defense. The backs. The quarterback. And circles the center--

*HAMILTON (CONT'D) BENNET **

What's the 'S'? The Steelers. *

HAMILTON DEKOSKY *

The 'O's--? The 'others'. Obviously. *

BENNET:

The others, yes.

DEKOSKY:

Do you even watch football?

BENNET:

Not at all— (*back to the board*) But I studied Mike Webster's position. The one in the middle. The most violent on the field. The slaps and the choking, the head as a weapon on every play of the game, of every practice. From the time he was a boy, then a college man, through a professional career. The time he was a boy, then a college man, through a professional career. The thousands and thousands of hits that weren't concussions.

Now circles the wide-outs, running backs and safeties—

BENNET (CONT'D)

But these? They are the fastest.

BENNET (CONT'D)

Their speed multiplied by the speed of the men who hit them, and the trajectories at which they hit them, the g-force created – the same as getting hit on the head with a sledgehammer –

HAMILTON:

Slow down. The brain. Get to the brain part—

BENNET:

(distinctly not slowing)

Mike Webster played eighteen years of professional football. 90 thousand blows to the head during just his professional career, by my calculation. (*and now --*) All this triggered a cascading series of neurological

events that unleashed killer protein upon Mike Webster's brain. The tangles invading and then strangling his mind from the inside out. Leaving him unrecognizable, even to himself.

**

BENNET:

I don't know the game. I have never played the game. But I am convinced playing football killed him. (*and*) And there have to be others.

DEKOSKY:

How can you know that?

BENNET:

Common sense. But they're dead. Or lost. Like Mike Webster was lost.

DEKOSKY:

I'm not interested in common sense. The only thing that interests me is science, and science is knowing.

BENNET:

I know from these men's records their doctors think they have early Alzheimer's. Which is statistically impossible. Because it isn't Alzheimer's. It's this.

Dekosky sits.

**

HAMILTON:

Steve. It's a billion-dollar finding.

DEKOSKY:

I don't like it. Actually, I hate it. But as a scientist I can't deny it.

BENNET:

We need to tell them. Now.

**

HAMILTON:

And name this. You're going to have to give this a name.⁶³

63. Landesman, *supra* note 62 (emphasis added).

CTE is a progressive tauopathy⁶⁴ that occurs as a result of repetitive mild traumatic brain injury (TBI).⁶⁵ CTE was first identified in 1928 by a New Jersey pathologist who observed the progressive neurological deterioration of boxers who became “punch drunk” after sustaining repetitive brain trauma. This condition was initially called “dementia pugilistica,” but was changed to “progressive traumatic encephalopathy” (and later to CTE) after scientists observed the same condition occurring as a result of other physical activities.⁶⁶

The early clinical symptoms of CTE include irritability, impulsivity, aggression, depression, short-term memory loss and a heightened tendency towards suicide. These symptoms typically begin between eight and ten years after exposure to TBI. As the disease advances, more severe neurological deterioration is exhibited, including dementia, gait and speech abnormalities and parkinsonism. Advanced CTE can be mistaken for Alzheimer’s disease, frontotemporal dementia or motor neuron disease. The neuropathological changes of CTE include the atrophy of parts of the brain including the cerebral cortex and medial temporal lobe, as well as other extensive changes to healthy tissue.⁶⁷

While CTE was long known to occur in boxers, the first study to connect the condition to football players was authored by Dr. Bennet Omalu in 2005.⁶⁸ His study noted that the NFL had formed a Committee on Mild Traumatic Brain Injury in 1994 to study the trend of football players taking premature retirement

64. *Tauopathies*, U.C.S.F. INST. NEURODEGENERATIVE DISEASES, <http://ind.ucsf.edu/research/tauopathies> (last visited Dec. 13, 2018).

The tauopathies are a class of diseases caused by misfolding of the tau protein. Tau prions begin replicating spontaneously in the frontal lobes. Tau prions are observed in frontotemporal dementia (FTD), posttraumatic stress disorders (PTSD), dementia pugilistica, and chronic traumatic encephalopathy (CTE), which has been seen in boxers, football and hockey players, and soldiers after episodes of traumatic brain injury (TBI).

Id.

65. Ann C. McKee et al., *The Spectrum of Disease in Chronic Traumatic Encephalopathy*, 136 *BRAIN* 43 (2012).

66. *Id.* at 44.

67. *Id.* These include:

cavum septum pellucidum, often with fenestrations; extensive p-tau-immunoreactive neurofibrillary tangles and astrocytic tangles in the frontal and temporal cortices, particularly around small cerebral vessels and at the depths of cerebral sulci; extensive p-tau-immunoreactive neurofibrillary tangles in limbic regions, diencephalon and brainstem nuclei; extensive degeneration of axons and white matter fibre bundles; TAR DNA-binding protein 43 (TDP-43) immunoreactive intraneuronal and intragial inclusions and neurites in most cases and a relative absence of amyloid- β peptide deposits.

Id.

68. Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 *NEUROSURGERY* 128 (2005).

due to “postconcussion syndrome,” which was later renamed “mild traumatic brain injury.”⁶⁹ Despite the recommendation of that committee to fund independent scientific studies of that condition, little was actually done during the intervening years. A pathologist, Dr. Omalu, conducted an autopsy on a retired fifty-year-old NFL Hall of Fame football player, Mike Webster, and found clear evidence of CTE, the first confirmed finding of the disease in a professional football player.⁷⁰

In 2012, a more extensive study of CTE occurred at the Center for the Study of Traumatic Encephalopathy (CTSE) at the Boston University School of Medicine. In 2008, the CTSE had established a brain bank at the Bedford VA Hospital to conduct a post-mortem study of the brains and spinal cords of athletes, military veterans and civilians who had suffered repetitive mild traumatic brain injury while alive. Eighty-five TBI brains were studied and compared to eighteen brains with no history of TBI. Of the eighty-five brain donors, fifty-eight had played American football as their primary sport at the high school or higher level.⁷¹

The study was conducted on two levels. First, a neuropsychologist conducted “post-mortem interviews with the next of kin” of the brain donor to obtain information on brain injury history, cognitive and behavioral changes, and clinical status prior to death.⁷² The neuropsychologist was unaware of the neuropathological results at the time of the interviews.⁷³ Second, a neuropathological study of the brains was conducted and the diagnoses were made without any knowledge of the clinical histories of the donors.⁷⁴

The researchers divided the subjects with CTE into four progressive stages of disease. Stage I CTE was the mildest with symptoms including headache, loss of attention and concentration, difficulty with short-term memory, aggression, depression, executive dysfunction and explosivity.⁷⁵ Stage II CTE clinical symptoms included those from Stage I as well as some subjects identified as having motor neuron disease. At this stage there were reports of “executive dysfunction, impulsivity, suicidality, and language difficulties.”⁷⁶ The Stage III clinical symptoms commonly include “memory loss, executive

69. *Id.*

70. *Id.* This study was the subject of the film *Concussion*, starring Will Smith as Dr. Omalu.

71. McKee et al., *supra* note 65, at 45.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 52.

76. *Id.* at 55.

dysfunction, . . . and attention and concentration difficulties.”⁷⁷ Other issues found were “depression or mood swings, visuospatial problems, and aggression.”⁷⁸ “Seventy-five [percent] of [these] subjects were considered cognitively impaired.”⁷⁹ Lastly, Stage IV subjects exhibited “severe memory loss with dementia,” as well as “profound loss of attention and concentration, executive dysfunction, language difficulty, explosivity, aggression . . . , paranoia, depression, gait and visuospatial difficulties.”⁸⁰ Thirty-one percent of Stage IV subjects were suicidal at some stage in the course of the disease.⁸¹

Of the fifty-eight subjects identified as having played football, thirty-five were professional football players. Of those, only one showed no disease, while the remainder showed CTE of varying stages of severity or CTE plus another disease diagnosis such as Alzheimer’s.⁸² Importantly, the “pathological stage correlated with duration of exposure to American football, survival after football and age at death in those who played football.”⁸³

The study concluded that although much more research was required, CTE was a condition clearly associated with repetitive mild traumatic brain injury.⁸⁴ Therefore, both athletes and military personnel could be subjected to “severe and devastating long-term consequences of repetitive brain trauma that has traditionally been considered only mild.”⁸⁵

By 2017, the VA-BU-CLF Brain Bank in Boston had swelled to 202 donations by deceased football players and their next of kin.⁸⁶ This gave the researchers in Boston a much larger sample for study than was available in 2012. The results were startling: of the 202 football players, 177 were diagnosed with CTE (87%). Further, the severity of the disease corresponded with the level and duration of playing football. All those who had played football on the high school level demonstrated mild levels of CTE, while the majority of college and professional players displayed the severest level of the disease. Further, behavior, mood and cognitive symptoms were common among both mild and severe cases, while dementia was commonly exhibited by the severe cases. Of

77. *Id.* at 56.

78. *Id.*

79. *Id.*

80. *Id.* at 59.

81. *Id.*

82. *Id.*

83. *Id.* at 60.

84. *Id.* at 43-44.

85. *Id.* at 62.

86. Jesse Mez et al., *Clinicopathological Evaluation of Chronic Traumatic Encephalopathy in Players of American Football*, 318 JAMA 360 (2017).

the professional football players, 99% had CTE. The study concluded that “CTE may be related to prior participation in football.”⁸⁷

Although much of the prior discussions had focused on the effect of concussive impacts, recent research suggests that even non-concussive brain trauma may result in CTE.⁸⁸ This recent study concluded that “closed-head impact injuries, independent of concussive signs, can induce traumatic brain injury as well as early pathologies and functional sequelae associated with chronic traumatic encephalopathy.”⁸⁹

Although the previous research relied on post-mortem examination of the brain, recent research results indicate that there may be a way to diagnose CTE while the patient is alive. For example, Dr. Ann McKee of Boston University, and her team of researchers, discovered a key biomarker in the brains of twenty-three former football players diagnosed with CTE post-mortem.⁹⁰ The research team found that the CTE brains had a significantly elevated level of a protein called CCL11, which was not present in the brains of non-athletes or those with Alzheimer’s disease.⁹¹ The identification of this unique protein might lead to the ability to diagnose the disease in living patients.⁹²

Dr. Bennet Omalu diagnosed CTE in a living patient for the first time in 2015 when he examined a fifty-nine-year-old retired football player, Fred McNeill, who had played linebacker for the Minnesota Vikings for twelve years.⁹³ Omalu conducted positron emission tomography (PET) imaging using a FDDNP tracer, which was able to identify the distinctive brain tau pathology of chronic traumatic encephalopathy.⁹⁴ When McNeill died two years later, the autopsy confirmed the presence of CTE.⁹⁵

In addition to sub-concussive head impacts eventually leading to CTE, recent research shows that those impacts can also contribute to mood and behavior issues in younger children who play contact football. Dr. Robert Stern,

87. *Id.*

88. Chad A. Tagge et al., *Concussion, Microvascular Injury, and Early Tauopathy in Young Athletes After Impact Head Injury and an Impact Concussion Mouse Model*, 141 *BRAIN* 422 (2018).

89. *Id.* at 423.

90. Rick Maese, *Breakthrough May Lead to Ability to Diagnose CTE in Living Football Players*, WASH. POST, Sept. 26, 2017, https://www.washingtonpost.com/sports/breakthrough-may-lead-to-ability-to-diagnose-cte-in-living-football-players/2017/09/26/a6e1e8c4-a2bb-11e7-ade1-76d061d56efa_story.html?utm_term=.43db3e261e38.

91. *Id.*

92. *Id.*

93. Pauline Anderson, *Brain Imaging Identifies CTE in a Living Person*, MEDSCAPE (Nov. 17, 2017), <https://www.medscape.com/viewarticle/888817>.

94. *Id.*

95. *Id.*

of Boston University's Chronic Traumatic Encephalopathy Center, found that "those who participated in football before age 12 [during which time the human brain undergoes significant development] [are] twice as likely to have problems with behavior regulation, apathy and executive functioning" when they became older.⁹⁶ Further, they "were three times more likely . . . to experience symptoms of depression" as peers who took up the sport after twelve.⁹⁷ Importantly, these findings were not affected by the number of concussions the player had suffered, but appeared to be the result of an accumulation of sub-concussive injuries.⁹⁸

In an unrelated study, researchers at Wake Forest School of Medicine tracked a group of twenty-five football players between the ages of eight and thirteen for one year, measuring the frequency and severity of head impacts. A comparison of MRI exams done before and after the football season revealed significant changes in the brain's white matter. Further, while none of the players had sustained a concussion during the season, those who suffered the most hits demonstrated the most significant changes to the brain.⁹⁹

The newest study by CTE researchers, including noted expert Dr. Ann McKee, indicates "a strong correlation between the age at which some athletes begin playing tackle football and the onset of behavioral and cognitive problems later in life, findings that become significantly more pronounced for those who take up the sport before age 12."¹⁰⁰ After examining the brains of 246 former football players and their social histories, researchers concluded that for every year earlier that a player began playing tackle football in their youth, the symptoms associated with CTE began showing two and a half years earlier during adulthood.¹⁰¹ And for those who played tackle football before twelve, the symptoms could arise more than thirteen years earlier.¹⁰² Essentially, "[y]outh exposure to repetitive head impacts in tackle football may reduce one's resiliency to brain diseases later in life, including, but not limited to CTE."¹⁰³ Therefore, the authors of the study concluded that the rapidly developing brains

96. Rick Maese, *Study Shows Playing Football Before Age 12 Can Lead to Mood and Behavior Issues*, WASH. POST, Sept. 19 2017, https://www.washingtonpost.com/sports/study-shows-playing-football-before-age-12-can-lead-to-mood-and-behavior-issues/2017/09/18/1b3ebc1c-9cac-11e7-8ea1-ed975285475e_story.html?utm_term=.e2fdb0c43a31.

97. *Id.*

98. *Id.*

99. *Id.*

100. Rick Maese, *Tackle Football Before Age 12 Could Result in Earlier CTE Symptoms, New Study Finds*, WASH. POST, Apr. 30 2018, https://www.washingtonpost.com/news/sports/wp/2018/04/30/new-study-tackle-football-before-age-12-could-result-in-earlier-cte-symptoms/?noredirect=on&utm_term=.1621cf228f08.

101. *Id.*

102. *Id.*

103. *Id.*

of youths should not be exposed to the head impacts associated with tackle football.¹⁰⁴

The above medical studies support the premise that the head trauma inherent in the sport of football can cause lasting and life-threatening damage to the human brain. Further, the earlier a person plays football and the longer one plays it, the more severe the injury and possibility of brain trauma. The thread that runs through all of these studies is that more research needs to be done to explore possible diagnoses and treatments, and that requires major funding. Further, until science catches up to society, precautions should be taken to shield the nation's youth from potential brain damage.

C. *Litigation and Settlement*

1. Timeline of Events

Before the concussion litigation and settlement is addressed, it would be useful to outline the sequence of events leading up to it so one can appreciate the claims and defenses asserted by the parties. The following demonstrates that the NFL either ignored or, worse, actively tried to minimize the health effects of concussions from at least 1994, when the National Collegiate Athletic Association (NCAA) adopted the first official return-to-play guidelines for a concussion.¹⁰⁵ Despite mounting evidence that football players were having severe health effects tied to their playing careers, as legendary players suffered publicly from dementia, Alzheimer's, Parkinson's, depression, and suicide, the NFL was truly a League of Denial.¹⁰⁶ Timeline of Major Events:

- March 1994: NFL creates Mild Traumatic Brain Injury (MTBI) committee chaired by New York Jets team physician Dr. Elliot Pellman, who has no experience in brain science. When interviewed about the committee's work, he characterized concussions as "part of the profession, an occupational risk" that was not as important as knee injuries, drugs, steroids and drinking.¹⁰⁷

104. *Id.*

105. See *Concussion Timeline*, NCAA, <http://www.ncaa.org/sport-science-institute/concussion-timeline> (last visited Dec. 13, 2018).

106. See MARK FAINARU-WADA & STEVE FAINARU, *LEAGUE OF DENIAL: THE NFL, CONCUSSIONS AND THE BATTLE FOR THE TRUTH* (Crown Archetype 2013). This Pulitzer Prize winning bestseller is an exhaustive study of the scientific research on concussions and the NFL's response to it.

107. Lauren Ezell, *Timeline: The NFL's Concussion Crisis*, PBS: FRONTLINE (Oct. 8, 2013), <https://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/timeline-the-nfls-concussion-crisis/>.

- December 1994: “NFL Commissioner Paul Tagliabue [calls] concussions a “pack journalism issue,” stating that “the number [of concussions] is relatively small” and blaming the exaggeration on journalists.¹⁰⁸
- February 1995: NFL agent Leigh Steinberg “holds a seminar [for his clients] on the effects of concussions” employing a panel of medical experts.¹⁰⁹
- March 1997: The American Academy of Neurology issues guidelines for concussed players returning to play. Their report recognizes that multiple “concussions can cause brain damage and suggest[s] that players be removed” from play following loss of consciousness or if any symptoms are displayed fifteen minutes post-concussion.¹¹⁰
- April 1999: Mike Webster, Hall of Fame linebacker for the Chicago Bears, files a disability application with the NFL asserting that his football career caused dementia.¹¹¹
- October 1999: “The NFL Retirement Board rules that Mike Webster . . . is ‘totally and permanently’ disabled as [a] ‘result of head injuries’” sustained during his NFL career.¹¹²
- December 1999: Dr. Pellman, New York Jets team physician and head of the NFL MTBI committee, states that the committee’s studies show that the incidence of brain injuries in football are relatively uncommon and are usually minor in nature.¹¹³
- May 2000: The NFL rejects the guidelines from the American Academy of Neurology citing a lack of research to support those conclusions.¹¹⁴
- May 2000: Based on survey data two neurologists report to the American Academy of Neurology, players with one or more concussions report a significant number of neurological

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

problems compared to those who had not suffered concussions.¹¹⁵

- September 2002: Pathologist Bennet Omalu conducts a post-mortem examination of Hall of Famer Mike Webster's brain and finds CTE.¹¹⁶
- October 2003: Dr. Elliot Pellman and the NFL MTBI Committee publish the first of sixteen scientific papers in the journal *Neurosurgery* downplaying the risks of head trauma in football.¹¹⁷
- January 2004: NFL MTBI Committee publishes another paper in *Neurosurgery* stating that the risk of serious head injury in football is relatively mild: "A total of 92% of concussed players returned to practice in less than seven days . . . More than one-half of the players returned within one day, and symptoms resolved in a short time in the vast majority of cases."¹¹⁸
- November 2003: Researchers at the University of North Carolina (UNC) find that football players with a history of prior concussions were more likely to sustain repeat concussions and have slower recovery time.¹¹⁹
- October 2004: NFL MTBI pushes back and publishes a paper in *Neurosurgery* disputing the results of the UNC study and asserting that while brain disease has been noted in boxers, there was no sign of the disease in football players.¹²⁰
- November 2004: NFL MTBI committee publishes its fifth article in *Neurosurgery* suggesting that professional football players "are probably less susceptible to MTBI and prolonged post-concussion syndrome than the general population"

115. *Id.*

116. *Id.*

117. *Id.* In 2016, the New York Times revealed that the database that served as the underlying research for the papers was deeply flawed. Alan Schwartz et al., *N.F.L.'s Flawed Concussion Research and Ties to Tobacco Industry*, N.Y. TIMES, Mar. 24, 2016, <https://www.nytimes.com/2016/03/25/sports/football/nfl-concussion-research-tobacco.html>. The study purported to include all concussions sustained over the course of six seasons by all NFL teams. *Id.* However, the Times analysis revealed that at least 100 concussions, approximately 10%, were unreported in the database. *Id.* For example, the Dallas Cowboys did not report a single concussion for those six seasons, including the notorious injuries to quarterback Troy Aikman. *Id.* The result was that the study made concussions "appear less frequent than they actually were." *Id.*

118. Ezell, *supra* note 107.

119. *Id.* See Kevin M. Guskiewicz et al., *Cumulative Effects Associated with Recurrent Concussion in Collegiate Football Players: The NCAA Concussion Study*, 290 JAMA 2549 (2003).

120. Ezell, *supra* note 107.

because the MTBI prone players have been winnowed out during high school and college athletics.¹²¹

- January 2005: NFL MTBI committee continues its assault on concussion injuries in football by suggesting in *Neurosurgery* that return to play after a concussion does not increase the risk of injury either in the same game or during the season.¹²²
- July 2005: Dr. Bennet Omalu publishes his research findings from the Mike Webster autopsy in *Neurosurgery*, the first confirmed finding of CTE in a professional football player.¹²³
- October 2005: Dr. Julian Bailes and Dr. Kevin Guskiewicz publish a study in *Neurosurgery* concluding that concussions suffered by professional football players could result in dementia syndromes.¹²⁴
- January 2006: Dr. Joseph Maroon, team doctor for the Pittsburgh Steelers, says that Dr. Omalu's conclusion relating football head injuries to Terry Long's depression and suicide rests on "fallacious reasoning" and is "purely speculative."¹²⁵
- May 2006: Dr. Elliot Pellman and the NFL MTBI committee demand that *Neurosurgery* retract Dr. Omalu's paper on CTE saying it is "completely wrong" and not supported by the required medical history indicating a long-standing illness.¹²⁶
- November 2006: Dr. Omalu publishes his second paper in *Neurosurgery* after finding CTE in former Steelers player Terry Long, observing that both Long and Webster had lengthy careers, sustained multiple concussions, and had Major Depressive Disorder until they died.¹²⁷
- February 2007: Dr. Elliot Pellman resigns as head of the NFL MTBI committee. After new co-chairs are appointed, the committee is renamed the "Head, Neck and Spine" committee.¹²⁸

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

- May 2007: Dr. Julian Bailes and Dr. Kevin Guskiewicz publish a paper on the risks of depression in former NFL players, concluding that “[f]ootball players with a history of three or more concussions are at a significantly greater risk for having depressive episodes later in life compared with those players with no history of concussion.” This research was based on a survey of more than 2,500 former players.¹²⁹
- May 2007: Members of the NFL MTBI committee criticize the Bailes and Guskiewicz paper on the grounds that “[s]urveys . . . are the weakest type of research” and “virtually worthless.”¹³⁰
- May 2007: NFL MTBI committee chair Dr. Ira Casson steadfastly denies any link between head trauma and long-term brain damage. His repeated denials during a media interview earn him the nickname “Dr. No.”¹³¹
- June 2007: The NFL hosts a “Concussion Summit” where outside researchers are invited to present their findings. Commissioner Goodell tells the media that the MTBI committee is an example of the longstanding concern the league has had regarding the issue. MTBI chair Ira Casson states that CTE has only been found “in boxers and in some [s]teepchase jockeys” and has not been scientifically documented in other athletes.¹³²
- September 2007: The NFL issues a pamphlet on concussions stating that the research is inconclusive and that having more than one or two concussions does not lead to permanent injury if “managed properly.”¹³³
- January 2009: Doctors from the new Center for the Study of Traumatic Encephalopathy in Boston, including researcher Dr. Ann McKee, hold a press conference during the Super Bowl in Tampa to announce the discovery of several new cases of CTE in former football players.¹³⁴
- May 2009: Dr. Ann McKee addresses the NFL MTBI committee at NFL headquarters in New York City to present

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

her findings on CTE. She feels the panel was dismissive of her and her research. One committee member indicated that Dr. McKee's research was flawed because there was no evidence of cause and effect, it was only based on individual case studies and there were most likely thousands of players who were unaffected.¹³⁵

- September 2009: A study of players funded by the NFL showed that former players were "nineteen times more likely than the general population to [suffer from] dementia, Alzheimer's or other memory-related diseases."¹³⁶
- September 2009: The NFL criticized its own funded study stating that it relied on telephone surveys, which were inadequate, and that there were "thousands of retired players who did not have memory problems."¹³⁷
- October 2009: Congress holds a hearing on the concussion crisis. Dr. Ann McKee testifies that the NFL is behaving like the tobacco industry during the 1990s when confronted by the link between smoking and health problems. Commissioner Goodell is asked if there is a link between football and brain damage. He responds that they are still studying the issue, but the league is committed to player safety.¹³⁸
- November 2009: Dr. Ira Casson and another member resign from the NFL MTBI committee at the request of Commissioner Goodell.¹³⁹
- December 2009: An NFL spokesman acknowledges for the first time that concussions could have long-term effects on the health of players.¹⁴⁰
- December 2009: The NFL announces new return to play guidelines that prohibit players with symptoms of a concussion from returning to play the same day.¹⁴¹

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

- January 2010: The NFL donates \$1 million to the Center for the Study of Traumatic Encephalopathy for future research and names it the “preferred brain bank of the NFL.”¹⁴²
- July 2010: The NFL provides a locker room poster warning of the dangers of concussions, which “may lead to problems with memory and communication, personality changes, as well as depression and the early onset of dementia.”¹⁴³
- September 2010: Dr. Ann McKee reports the first case of CTE in a college football player, a twenty-one-year-old who had never been diagnosed with a concussion. This raised the prospect that CTE could be caused by sub-concussive brain trauma.¹⁴⁴
- September 2010: The NFL donates “\$30 million . . . to the National Institutes of Health for research into brain trauma.”¹⁴⁵
- March 2011: The NFL changes its kickoff rule to reduce high speed collisions. Kick-offs are moved up five yards to the thirty-five-yard line.¹⁴⁶
- August 2011: The first federal concussion litigation is filed by former Atlanta Falcons safety Ray Easterling “who claim[s] that the [NFL] engaged in a ‘concerted effort of deception and denial’” regarding concussions and brain trauma. Eventually, 4,500 players join the litigation.¹⁴⁷
- October 2011: Dr. Ann McKee appears before Congress to testify regarding the Owen Thomas case. Dr. McKee “warns of the dangers of sub-concussive hits,” and observes that “[w]e really have to address the way sports are played.”¹⁴⁸
- 2012: Despite rule changes intended to reduce the number of concussions, the 2012 football season showed an increase of 14% over the prior season.¹⁴⁹

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

- August 2012: The NFL funds a new USA Football program called Heads Up Football, designed to promote concussion and injury awareness in youth football.¹⁵⁰
- November 2012: Dr. Ann McKee presents her CTE research at the Conference of Concussion in Sport hosted by the international soccer federation in Zurich. Despite finding CTE in thirty-three out of thirty-four brains of deceased football players, she is sharply questioned by attendees over the causal relationship between CTE and football.¹⁵¹
- November 2012: Commissioner Goodell speaks about player safety at the Harvard School of Public Health and observes “that there are still unanswered questions when it comes to the long-term impact of concussions,” but the league is focused on making the game safer for players.¹⁵²
- January 2013: NFL Players Association funds a \$100 million research project at Harvard Medical School to study health problems in football players, including heart issues, joint problems, and head trauma.¹⁵³
- January 2013: NFL announces new concussion safety measures requiring an independent neurologist to be on the sidelines at every game, as well concussion assessment protocols, such as a symptom checklist and neurological examination.¹⁵⁴
- April 2013: In court hearings during the concussion litigation, lawyers for the players argue that the league “set up a sham committee” that spread false information about the inherent risks of playing football. Lawyers for the NFL deny the allegations.¹⁵⁵
- August 2013: The NFL issues rule changes banning “‘crown of the helmet’ hits outside . . . the tacklebox – designed to reduce high impact hits to the head.”¹⁵⁶

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

- August 2013: The NFL settles the concussion litigation brought by former players for \$765 million with no admission of wrongdoing.¹⁵⁷

In the ensuing years, additional medical research continued to point to head trauma as a factor in CTE, including concussions as well as sub-concussive impacts. Despite the efforts of the NFL to implement rule changes giving players more protection, the number of concussions rose. For example, there were 281 concussions during the 2017 season, a 13.5% increase over the previous season. In fact, the number of concussions in the 2017 season was the highest of the past six years, with a nearly 16% increase over the five-year average.¹⁵⁸ Still, the NFL continues to tinker with the rules on contact, recently voting to make it a foul to lower the head to initiate contact with the helmet. It remains to be seen whether the penalty will be ejection from the game, as it is in college football, a practice called targeting.¹⁵⁹

Starting with Dr. Omalu's report in 2005, a review of the history of highly persuasive medical evidence tying concussions to CTE makes it clear that the NFL resisted recognizing the health dangers inherent in the sport until December 2009 when a spokesman finally admitted the connection. Further, the NFL did not just ignore the problem, but actively tried to discredit the research that brought the issue to light. It is no surprise that the NFL became a target of litigation by former players who felt abandoned by the league to which they had given so much of their lives.

2. Initial Litigation

The very first lawsuit against the NFL, and helmet maker Riddell, Inc., was brought by retired players over the issue of concussions on July 19, 2011. The action was filed in the Superior Court of California by seventy-three former players.¹⁶⁰ The first federal class action came about a month later in the Eastern District of Pennsylvania.¹⁶¹ Shortly thereafter, hundreds of cases were filed in

157. *Id.*

158. Paulina Dedaj, *NFL Releases Injury Report Showing Increase in Number of Concussions*, FOX NEWS (Jan. 26, 2018), <http://www.foxnews.com/sports/2018/01/26/nfl-releases-injury-report-showing-increase-in-number-concussions.html>.

159. Khadrice Rollins, *NFL New Rules: List of Changes for 2018 Season*, SPORTS ILLUSTRATED, Mar. 28, 2018, <https://www.si.com/nfl/2018/03/28/new-rules-next-season-catch-targeting-lowering-head>.

160. Plaintiffs' Complaint for Damages and Demand for Jury Trial, *Maxwell v. Nat'l Football League*, No. BC465842, (Cal. Super. Ct. July 19, 2011).

161. Class Action First Amended Complaint, *Easterling v. Nat'l Football League, Inc.*, No. 11-cv-05209-AB, (E.D. Pa. Oct. 5, 2011).

state and federal courts around the country.¹⁶² The California case was removed to federal court on the theory that federal labor law, which governed the NFL's Collective Bargaining Agreement (CBA) with the NFL Players Association, preempted state law claims.¹⁶³ Eventually, the cases were consolidated by the Judicial Panel on Multidistrict Litigation and assigned to Judge Anita Brody in the Eastern District of Pennsylvania as a multidistrict litigation.¹⁶⁴ The litigation encompassed over 300 state and federal lawsuits, and claims by more than 5,000 players.¹⁶⁵

3. Multidistrict Litigation

With the cases now consolidated, the District Court Judge then took steps to bring order to the massive litigation: (1) she appointed co-lead counsel; (2) she appointed a Steering Committee to accomplish or delegate pretrial work; (3) she appointed a smaller Executive Committee to coordinate the proceedings; and (4) she ordered the plaintiffs to submit a Master Administrative Long-Form Complaint (Complaint) and a Master Administrative Class Action Complaint to consolidate the claims made in the various proceedings.¹⁶⁶

In their Complaint, the plaintiffs essentially alleged that the NFL long knew of the dangers of mild traumatic brain injury in professional football, dating back to at least the 1950s. Further, the NFL assumed the responsibility for protecting players through the implementation of safety rules.¹⁶⁷ Despite this knowledge and duty the NFL actively concealed the dangers of MTBI, even going so far as to propagate "junk science" dispelling and downplaying the safety risks through its MTBI Committee.¹⁶⁸ The Player's Complaint therefore asked the court for a declaratory judgment as to liability on counts of wrongful death and survival, fraudulent concealment, fraud, negligent misrepresentation, negligence, loss of consortium, negligent hiring, and negligent retention. The Complaint also requested the institution of a medical monitoring program

162. See *Court Documents*, NFL CONCUSSION LITIG., http://nflconcussionlitigation.com/?page_id=18 (last visited Dec. 13, 2018).

163. *In re: Nat'l Football League Players Concussion Injury Litig.*, No. 15-2206 at 15 (3d Cir. April 18, 2016).

164. *Id.* at 16 (citing *In re Nat'l Football League Players' Concussion Injury Litig.*, 842 F. Supp. 2d 1378 (J.P.M.L. 2012)).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 17.

funded by the NFL that would allow the players to monitor the progress of their diseases related to MTBI.¹⁶⁹

The next major development in the concussion litigation was the filing of a Motion to Dismiss by the NFL. It argued that federal labor law preempted the state law claims pursuant to Section 301 of the Labor Management Relations Act because the resolution of the players' claims would necessitate an interpretation of the CBA. Under that agreement, players would be compelled to arbitrate any claims arising out of their employment. If successful, that argument would force the players out of court and into binding arbitration.¹⁷⁰ The players responded that the CBAs did not cover all retired players, and that both negligence and fraud claims did not require federal courts to interpret the CBAs.¹⁷¹

While the Motion to Dismiss was still pending, Judge Brody ordered the parties to mediation on July 8, 2013.¹⁷² For that purpose, she appointed retired District Court Judge Layn Phillips as mediator, with Perry Golkin later appointed as Special Master to assist in analyzing the financial aspects of the settlement.¹⁷³ After two months of negotiation and formal mediation, the parties agreed to a capped payment of \$765 million for all retired NFL players.¹⁷⁴ However, in January 2014, the district court rejected the settlement amount on the grounds that it was probably insufficient to pay all claims.¹⁷⁵ With the assistance of the Special Master and after another five months of negotiation, the parties agreed to uncap the compensation fund. A second request for preliminary approval was granted, the class was conditionally certified and a fairness hearing was scheduled.¹⁷⁶ Although seven players requested an

169. Plaintiffs' Amended Master Administrative Long-Form Complaint at 52-53, *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa. July 17, 2012).

170. *In re Nat'l Football League Players Concussion Injury Litig.*, No. 15-2206 at 18.

171. *Id.* at 18-19 (noting that some federal district courts had already embraced the NFL's labor law preemption argument in denying player requests to remand their cases to state court, and that one federal court had rejected that argument).

172. *Id.* at 19. The Complaint further asserted various counts against the helmet manufacturer, Riddell, Inc., the "official helmet of the NFL," for strict liability for defects in design and manufacturing, failure to warn and negligence. Plaintiffs' Amended Master Administrative Long-Form Complaint, *supra* note 169, at 76-82. The Riddell Defendants were not part of the settlement to be discussed later, and were eventually severed from the NFL Defendants into a separate action. *In re Nat'l Football League Players Concussion Injury Litig.*, No. 15-2206 at 19.

173. Sarah James, Comment, *Ring the Bell for the Last Time: How the NFL's Settlement Agreement Overwhelmingly Disfavors NFL Players Living with Chronic Traumatic Encephalopathy (CTE)*, 11 J. HEALTH & BIOMEDICAL L. 391, 408 (2016).

174. *In re Nat'l Football League Players Concussion Injury Litig.*, No. 15-2206 at 19.

175. *Id.*

176. *Id.*

interlocutory appeal, the court of appeals denied the relief on the grounds that the district court's order was merely preliminary.¹⁷⁷

The district court held the fairness hearing in November 2014, and suggested several changes to the settlement after hearing the arguments of the parties. An amended settlement agreement was finally approved by the court in February 2015, and the motion for class certification was granted in April 2015. Twelve appeals from the final order approving the amended settlement were filed with the United States Court of Appeals for the Third Circuit and consolidated by the court.¹⁷⁸

4. On Appeal

Reviewing the district court for abuse of discretion, the Third Circuit framed the appeal as presenting two main issues: (1) whether the class certification was appropriate, and (2) whether “the terms of the settlement were fair, reasonable, and adequate.”¹⁷⁹ The Third Circuit affirmed the district court on both issues.

In reaching its conclusion, the Third Circuit provided a synopsis of the settlement agreement, noting that it had essentially three components: (1) an unlimited Monetary Award Fund that would compensate retired players with qualifying medical conditions for a span of sixty-five years; (2) a Baseline Assessment Program that would allow retired players to obtain independent neurological testing; and (3) an Education Fund for purposes of informing football players regarding injury prevention.¹⁸⁰

The Monetary Award Fund gave retired players, or their beneficiaries, varying levels of maximum compensation for the “Qualifying Diagnoses”: (1) Level 1.5 Neurocognitive Impairment (\$1.5 million); (2) Level 2 Neurocognitive Impairment (\$3 million); (3) Alzheimer's (\$3.5 million); (4) Parkinson's (\$3.5 million); (5) Death with CTE (\$4 million); and (6) ALS (\$5 million).¹⁸¹ These maximum awards can be decreased by several factors: (1) a diagnosis later in a player's life; (2) participation in less than five eligible seasons; (3) a baseline assessment examination had not been performed; and/or (4) the player had a traumatic brain injury unrelated to playing football. The settlement also set forth filing deadlines and appeal procedures.¹⁸²

177. *Id.* at 19-20.

178. *Id.* at 20.

179. *Id.* at 26.

180. *Id.* at 20-21.

181. *Id.* at 21.

182. *Id.* at 22.

The Baseline Assessment Program was funded with a maximum of \$75 million for a duration of ten years. The purpose was to detect the initial level of neurological deterioration in a retired player to determine if that person initially qualified for an impairment award and to track any future decline in cognitive abilities. If the player demonstrated a Level 1 Neurocognitive Impairment, he could not collect an award, but would still be able to obtain medical benefits such as testing, treatment and medication.¹⁸³

The Education Fund of \$10 million was targeted at injury prevention in youth football, as well as educating retired NFL players about their medical and disability options under the CBA.¹⁸⁴

The proposed class of claimants included all NFL football players who retired before July 7, 2014, their representatives, and descendants. However, the class was further divided into two subsets: (1) those players who had a Qualifying Diagnosis prior to July 7, 2014, and were therefore immediately entitled to an award; and (2) those retired players who had not yet had a Qualifying Diagnosis. The NFL estimated that out of 21,070 retired players 28% were expected to qualify for the settlement, while the remaining 72% were not expected to develop a qualifying disease.¹⁸⁵

There were a number of challenges to the district court's decision. The first was that the requirement of commonality was lacking among the putative class members because the players were injured at varying periods of time and in varying ways, and the class members therefore did not share common issues of fact or law necessary to a class action.¹⁸⁶ The Third Circuit rejected that argument because the NFL allegedly injured the players through the same course of conduct, such as concealing the risk of concussion and failing to adequately protect players. Even though the extent of player injury varied greatly, the conduct of the NFL was common to the class.¹⁸⁷

A related objection was that the claims of the class representatives were not typical of the class due to factual differences such as the amount of playing time and the extent of head trauma. The two class representatives were Shawn Wooden, a retired player with no Qualifying Diagnosis, who sought the Baseline Assessment Examination, and Kevin Turner, a retired player with ALS who sought a monetary award. The Third Circuit held that class representatives did not need to share identical claims, but needed to seek redress under the same legal theories as the members of the class. The appellate court agreed with the

183. *Id.* at 23.

184. *Id.* at 24.

185. *Id.* at 24-25.

186. *Id.* at 28; *see* FED. R. CIV. P. 23.

187. *In re Nat'l Football League Players Concussion Injury Litig.*, No. 15-2206 at 29.

district court that the class representatives were “typical of those they represent.”¹⁸⁸

The appellants also challenged the adequacy of representation, advancing two arguments. First, they asserted that when the district court divided the class into subclasses (those players who already had Qualifying Diagnoses versus those who did not), class counsel for those players who did not have a Qualifying Diagnosis should not have been selected from the lawyers already litigating with the NFL. In light of the fact that the district court found the counsel experienced in multi-district litigation and class actions, the Third Circuit could find no abuse of discretion.¹⁸⁹ Secondly, neither did the fact that the class counsel represented both types of claimants constitute a conflict of interest. The attorney, Arnold Levin, disclosed that representation to the District Court and no abuse of that discretion was found.¹⁹⁰

The appellants further asserted that there was a conflict of interest between the two classes of claimants: those who immediately qualified as a result of a Qualifying Diagnosis and those who had not yet exhibited symptoms. However, the Third Circuit disagreed, noting that the interests of both classes were aligned because they had been injured by the same actions of the NFL, both classes benefitted from the settlement, and there were structural safeguards built into the settlement such as uncapping the injury fund, adjusting it for inflation, a guaranteed Baseline Assessment Examination, and the appointment of a mediator and special master.¹⁹¹

Perhaps the most interesting assertion by the appellants was that, in approving the settlement, the District Court did not adequately take into account the likelihood of the plaintiffs’ success on the merits and the potential damage award.¹⁹² The Third Circuit noted that if the NFL prevailed on its federal labor law preemption defense, all but a small subset of claims would probably be dismissed.¹⁹³ Further, the Third Circuit agreed with the District Court that causation likely presented a severe obstacle to recovery against the NFL, with players having to prove both general causation (MBTI causes Alzheimer’s) and specific causation (a concussion in the NFL caused the disease versus a concussion suffered in college or high school).¹⁹⁴

188. *Id.* at 30 (quoting *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 371 (E.D. Pa. 2015)).

189. *Id.* at 31-32.

190. *Id.* at 34-35.

191. *Id.* at 38-39.

192. *Id.* at 53.

193. *Id.*

194. *Id.*

The appellants also challenged the settlement on the basis that it excluded CTE as a Qualifying Diagnosis, which was unfair because CTE “was the industrial disease of football.”¹⁹⁵ Note that the settlement only compensated players who were diagnosed postmortem after 2006 and prior to the settlement date of July 17, 2014.¹⁹⁶

The Third Circuit agreed with the district court that it was reasonable to exclude CTE from the settlement, noting that the science behind CTE was still relatively novel, that the studies of CTE were problematic due to selection bias (the postmortem studies only involved those with repetitive head injuries instead of the population as a whole), and the studies did not rule out other possible causes of CTE.¹⁹⁷ Further, the district court had noted that certain symptoms of CTE were covered by the Qualifying Diagnoses such as “memory loss, executive dysfunction, and difficulty with concentration.”¹⁹⁸ Additionally, players eventually diagnosed with CTE after death suffered from compensable diseases such as Parkinson’s and Alzheimer’s while alive. The district court found that 89% of the players examined in the CTE studies would have been compensated under the settlement agreement.¹⁹⁹ The Third Circuit admitted that symptoms such as aggression, depression and suicidal thoughts that are associated with CTE would not be compensable, but observed that those symptoms were “common in the general population”²⁰⁰

Even the March 2016 admission of the NFL before Congress that “there was a link between football and degenerative brain disorders like CTE” could not persuade the Third Circuit that the settlement was unfair.²⁰¹ Despite the admission, the court believed that CTE would still present a causation obstacle at trial. The court observed: “[t]his settlement will provide significant and immediate relief to retired players living with the lasting scars of an NFL career, including those suffering from some of the symptoms of CTE.”²⁰²

The appellants filed for a petition for certiorari to the United States Supreme Court, which was denied on December 12, 2016.²⁰³

195. *Id.*

196. *Id.* at 57.

197. *Id.* at 58-59.

198. *Id.* at 58.

199. *Id.*

200. *Id.*

201. *Id.* at 61.

202. *Id.* at 61-62.

203. *Gilchrist v. Nat’l Football League*, 137 S. Ct. 591 (2016), *cert. denied* (listing the Memorandum Decisions).

5. Attorney Fees

The denial of certiorari did not end the issues before the district court, for there was still the matter of attorneys' fees and third-party claims against the settlement fund.

The settlement agreement also contained a clause regarding attorney fees that provided for a capped maximum payment of \$112.5 million, separate and apart from the awards made to the players. The agreement also allowed plaintiff attorneys to petition the district court in the future for a 5% set aside from player awards to pay the costs of administering the settlement. Class counsel were to petition the district court for a fee award after the class action was certified and the settlement approved.²⁰⁴ The Third Circuit rejected the appellants' claim that the matter of the amount of attorney fees should have been decided at the same time as the settlement agreement, writing that the deferral of the determination of attorney fees neither violated the Federal Rules of Civil Procedure nor the plaintiffs' right to due process of law. The plaintiffs would have ample opportunity to challenge any fee award once the fee petition was submitted by counsel.²⁰⁵ The appellants further objected to the potential for collusion inherent in a "clear sailing provision," so named because the defendant agrees not to object to a certain amount of attorney fees as part of the overall settlement. The concern was that class counsel may have bargained away something beneficial to the class in return for a guaranteed fee. On the other hand, the defendant doesn't care where the money is allocated as long as the overall liability is defined. The Third Circuit joined other circuit courts that had held that clear sailing provisions were not per se invalid, but should be subjected to scrutiny by the district court. In any event, the district court had found that the attorney fees had not even been discussed in the settlement negotiations until after the plaintiffs' recovery fund had been agreed upon, the attorney fees would not diminish the recovery fund, and the fees were only approximately 10% of the forecasted recovery, which was not unreasonable.²⁰⁶

The attorneys for the class filed their petition for fees on February 13, 2017, claiming the entirety of the \$112.5 million and asking for a 5% set-aside from the claimant awards for future attorneys' fees and costs. Judge Brody appointed a Special Master to make recommendations on attorneys' fees and to review the petition for fees filed by counsel. The Special Master, Harvard Law School Professor William B. Rubenstein, is one of the foremost experts in the nation on class action litigation and lawyer fees. His opinion was that the court should

204. *In re Nat'l Football League Players Concussion Injury Litig.*, No. 15-2206 at 63.

205. *Id.* at 63-64.

206. *Id.* at 69.

set a “presumptive 15% cap on all contingent fee contracts” and that there should not be a 5% set-aside for future legal work.²⁰⁷ He reasoned that the \$112.5 million paid to class counsel constituted approximately 15.6% of the total award to players. Combining that figure with a fifteen percent cap on contingency arrangements would give class counsel a payment of 30.6% of the award.²⁰⁸ He argued that the 5% set-aside would be additional payment for work for which the attorneys had already been compensated. Rather, the class counsel award of \$112.5 million should encompass payment not only for securing the settlement, but implementation of it in the future. Essentially, counsel wanted to be paid in full at the present for work to be performed in the future. He suggested that the court take \$22.5 million of the class counsel payment and put it in a separate account for future payments to attorneys for implementation of the award in the sixty-five years it was to last.²⁰⁹

The Expert Report noted that “class counsel,” as defined by the Settlement Agreement, included six attorneys: two Co-Lead Counsel, two Subclass Counsel, and two additional attorneys.²¹⁰ These attorneys presented the entire class action in the litigation and performed work for the “common benefit” of the whole, as well as representing the interests of their own individual clients on a contingency fee basis. Other lawyers representing players did not participate as class counsel and were therefore not entitled to seek fees from the NFL funded fees, but would have to seek payment from their clients’ individual recoveries. Thus, class counsel was entitled to payment from both the NFL funded fees and from players, while the non-lead lawyers would only recover from the players. The Special Master did not have access to all the contingency agreements signed by the players, but a review of about 6% of them showed fees ranging from a low of 15% to a high of 40%.²¹¹

The Special Master first pointed out that Rule 23 of the Federal Rules of Civil Procedure required the district court to supervise and approve the payment of attorney fees in class actions. This is because in class actions, the fiduciary interests of class counsel are adverse to the interests of the plaintiffs during the fee calculation process.²¹² As for the separate contingency agreements with class members, the Special Master observed that the district court had inherent authority to regulate attorneys appearing before the court, including the ability

207. Expert Report of Professor William B. Rubenstein at 1, *In re Nat’l Football League Players’ Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa. Dec. 3, 2017).

208. *Id.* 30-31.

209. *Id.* at 1.

210. *Id.* at 3.

211. *Id.* at 10.

212. *Id.* at 12-13; *see* FED. R. CIV. P. 23.

to review the reasonableness of contingency fee arrangements, and institute a cap on those fees if necessary. In this case, the incapacity of many of the players due to illness heightened the duty of the court to prevent overreaching.²¹³

The Special Master believed that the circumstances of the case justified the imposition of a cap on contingency fee contract. If a player was represented by one of the class counsel, the payment of the 15.6 % out of the NFL fee, combined with a contingency fee of 45%, could result in a player forfeiting nearly two-thirds of his recovery in fees. He noted that class actions typically resulted in lower fees, about 13% for class counsel, and the typical class action did not employ non-lead counsel. He also observed that this case was resolved long before trial, without any discovery, significant motion practice, or any of the pre-trial practice, and the fees should reflect the amount of work necessary to secure settlement.²¹⁴

In sum (1) players with IRPAs [Independently Retained Plaintiff Attorneys] are paying two lawyers' fees (2) in a case settled on an aggregate basis (3) following relatively little litigation (4) requiring IRPAs to undertake a modest amount of work (5) that will likely generate small recoveries for (6) vulnerable clients (7) who may be subject to contingent fees contracts that were either problematic at time of formation or are no longer reasonable.²¹⁵

For those reasons, the Special Master believed that all the circumstances favored capping the contingency awards at 15%, although class counsel would receive another 15.6% for their work done for the common benefit of the class; bringing their clients' total payment to 30.6% of their overall recovery.²¹⁶

The Special Master further found the 5% set-aside to be meritless, first noting that it made no sense for the NFL to negotiate this set-aside when it would not be liable to pay for it separately. He thought it was evident that class counsel "sought to significantly enhance their own fees without significantly enhancing their own work or, most importantly, their clients' recoveries."²¹⁷ He also found class counsel's argument to be spurious that the NFL fee fund was

213. Expert Report of Professor William B. Rubenstein at 17 n.62, *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB.

214. *Id.* at 21-22.

215. *Id.* at 26.

216. *Id.* at 1. It should be noted that for purposes of calculating the total award, the NFL fee fund of \$112.5 million was added to the recovery fund of net present value \$720.5 million on the grounds that when the settlement fund and fee are paid by the same entity, it amounts to a "constructive common fund" for purposes of determining fees. *Id.* at 4-5.

217. *Id.* at 36.

fully earned by reaching the settlement, while another \$47 million was needed to implement it. He noted that the law is clear that fee awards are paid for both reaching and implementing settlement until claims are satisfied.²¹⁸ The settlement agreement merely stated that the NFL would not oppose payment of \$112.5 million in costs and fees. If class counsel did not believe that was sufficient to cover all fees, they should have gone back to the negotiating table with the NFL or petitioned the court to increase the overall award.²¹⁹ Rather than pay class counsel the full amount of their fees now, when the settlement fund would span another sixty-five years, the Special Master thought \$22.5 million of the fees should be held in reserve for future implementation work and attorneys could bill the fund when the fees were earned.²²⁰ Setting 5% aside for implementation would amount to the attorneys “getting paid twice for the same work.”²²¹

This filing of fees and subsequent expert report ignited a great deal of controversy among the attorneys who stood to benefit from the settlement. For example, one of the Co-Lead Counsel, Christopher Seeger, filed the petition for distribution of the \$112.5 million in NFL fee funds, on behalf of twenty-four law firms who he stated had done work benefitting the class. However, many of those firms protested their proposed allocation of fees. Three additional attorneys applied for fees as well on the grounds that they had done work benefitting the class but had not been included in Seeger’s calculations.²²² Additionally, many attorneys filed liens with the court on their former clients’ recoveries after they had been discharged and the clients obtained new counsel.²²³

In desperation, even the wives of two dozen former players wrote a group letter to the judge complaining of excessive legal fees that would reduce the eventual recovery, particularly citing the inequity of the class counsel receiving the \$112.5 million from the NFL fund fee and then also receiving a 5% set-aside.²²⁴ Poaching of clients by competing attorneys was also a concern,

218. *Id.* at 37-38.

219. *Id.* at 40.

220. *Id.* at 42.

221. *Id.* at 46.

222. *Id.* at 6.

223. *Id.* at 10.

224. Mark Fainaru-Wada, *Billion-Dollar NFL Concussion Settlement Turns Nasty as Lawyers, Others Vie for Pieces of Payouts to Players*, ESPN (Mar. 29, 2017), http://www.espn.com/espn/otl/story/_/id/19029607/billion-dollar-nfl-concussion-settlement-turns-nasty-lawyers-others-vie-pieces-payouts-players.

resulting in liens being filed by the former attorney and leaving families worried they would have to pay two attorneys before receiving any recovery.²²⁵

One plaintiff attorney who had been among the first to file a complaint, John Luckasevic, was especially vocal about the manner in which Co-Lead Counsel, Christopher Seeger, was dividing up the \$112.5 million in NFL funded fees: “[w]hat the hell, I have \$1.7 million of my firm’s costs into this case, and I’m gonna get \$700,000?”²²⁶ He also objected to the 5% set-aside from player recoveries, stating:

You want my \$700,000, Chris, have it, choke on it Just don’t take 5% of my hard work. You didn’t put this case together, you didn’t sign up guys who were truly injured. You didn’t rep them five and a half years. I did that work; don’t go reaching into my pants.²²⁷

On the other hand, Seeger’s firm billed for over 21,000 hours of work for the previous four years, with Seeger personally billing at \$985 per hour, for a total claim of \$51 million out of the fund.²²⁸ The disposition of the issues surrounding attorney fees is still pending before the district court.

6. Third-Party Claims

Another unseemly issue that came out of this case was the “cottage industry of opportunist lawyers, doctors, predatory lenders and other professionals” who sought to capitalize on the settlement.²²⁹ The retired players were so barraged with offers of “help” and predatory loans in advance of the settlement, it caused Judge Brody to order a notice to settlement class members that “claims service companies” offering assistance were not affiliated with the court, that no such services were required because the website for claims offered an easily navigable claims process, and only court approved physicians were able to make a Qualifying Diagnosis for purposes of the settlement. Further, she noted that emails were being sent out in the name of retired NFL players that were, in reality, mass solicitations by private lawyers or third-party companies.²³⁰

Co-Lead Counsel, Christopher Seeger, estimated that almost 1,000 players had signed contracts with lawyers and lenders seeking to capitalize on the

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. Notice & Order at 5, *In re Nat’l Football League Players’ Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa. July 19, 2017).

litigation. Some lenders charged rates of up to 50% payable out of the settlement. Some firms hired former players with promises of bonuses for signing up other players. Some firms promised to introduce the players to doctors who could exaggerate their symptoms to increase the size of the award.²³¹ The district court sought to counter these problems by prohibiting assignments to predatory lenders and voiding all such third-party contracts. Judge Brody also prohibited the Claims Administrator from paying a class member's monetary award to these predatory lenders on the grounds that the class members were by definition impaired, and the settlement agreement expressly forbid the assignment of monetary awards to third parties.²³²

7. Payouts

Despite the district court's approval of the settlement and confirmation by the Court of Appeals, the funds have been slow to reach the players. As of November 2017, only a small percentage of players had been approved for compensation: 140 notices of monetary awards for a total of \$195 million, with only \$100 million actually distributed. This was despite the NFL's assertion that approximately 665 settlement claims would be paid out within the first year.²³³ Although the district court appointed an independent claims administrator, BrownGreer,²³⁴ there have still been complaints that the claims process is slow, that applications are unreasonably delayed, and that claims have been unnecessarily kicked back requesting more information or additional evidence. One of the league's approved neurologists believed that his medical judgment was being unfairly questioned by claim administrators without a medical background.²³⁵

One of the most problematic areas in the payment process were dementia claims, which were being rejected by the claims administrator at a higher rate than any other. Dementia cases make up the bulk of the claims: out of 1,712 claims made in the first year, 1,113 were based on neuro-cognitive impairment.

231. Ken Belson, *Widespread Deceptive Practices May Reduce Payouts in N.F.L. Concussion Settlement*, N.Y. TIMES, Sept. 19, 2017, <https://www.nytimes.com/2017/09/19/sports/football/nfl-concussion-settlement.html>.

232. Explanation & Order, *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2017 WL 8785717, at *1 (E.D. Pa. Dec. 8, 2017).

233. Rick Maese, *Ten Months After NFL Concussion Settlement, Most Players Haven't Seen a Dime*, WASH. POST, Nov. 10, 2017, https://www.washingtonpost.com/sports/ten-months-after-nfl-concussion-settlement-most-players-havent-seen-a-dime/2017/11/10/9df64c28-c56b-11e7-afe9-4f60b5a6c4a0_story.html?utm_term=.714a8ad7c2d6.

234. *Id.* (explaining that BrownGreer is a Richmond, Virginia, company that served as claims administrator for the Vioxx and the BP oil spill litigation).

235. *Id.*

Only six of those dementia cases have actually been paid.²³⁶ Class Counsel filed a motion with the district court alleging that the NFL was “failing to provide a fraction of what [it] promised” and would “argue virtually anything to evade payments.”²³⁷ The claims administrator stated that the NFL had no role in the claims process, but Class Counsel noted that the NFL has the right to appeal any award, which resulted in further delays. Although the NFL had not filed appeals in the majority of awards, thirty-five cases were approved by the claims administrator and appealed by the NFL. Most claims for Parkinson’s, Alzheimer’s, and CTE had been paid, but 60% of the dementia cases had been red-flagged and referred for “indefinite review.”²³⁸ One expert in brain injury law, Michael Kaplan, stated that “[t]hese players are beginning to wake up and understand the settlement is a fraud. The majority of players who deserve compensation are not going to get compensation.”²³⁹ The NFL countered that their concern was fraudulent claims by unscrupulous lawyers, doctors who coached players to make their symptoms seem worse than they were, so they could qualify for a higher payout.²⁴⁰

Although the original settlement was hailed as a “historic” breakthrough in concussion litigation, it has descended into a demeaning squabble between greedy plaintiff attorneys, the NFL that continues to use “scorched earth” tactics to avoid liability, and predatory lawyers, doctors, and lenders, while the players and their families continue to suffer the effects of serious brain damage resulting from playing a game they loved, but showed no love in return. Meanwhile, the medical evidence continues to pile up. A recent study, the largest of its kind, found that the risk of dementia was highest among those who suffered from traumatic brain injury. Using a Danish health database of 2.7 million people, scientists found that those who had suffered even a single traumatic brain injury were at a 24% increased risk of dementia. While those with five or more traumatic brain injuries had triple the risk.²⁴¹ That raises the question of how to prevent concussions or at least minimize the effects of them.

236. Rick Maese, *Dementia Claims in NFL Concussion Settlement Are Going Unpaid, Lawyers Say*, WASH. POST, Mar. 20, 2018, https://www.washingtonpost.com/sports/redskins/dementia-claims-in-nfl-concussion-settlement-are-going-unpaid-lawyers-say/2018/03/20/00e635bc-2c7f-11e8-8ad6-fbc50284fce8_story.html?utm_term=.0a5641437566.

237. *Id.*

238. *Id.*

239. *Id.*

240. Ken Belson, *N.F.L. Says Fraud Plagues the Concussion Settlement*, N.Y. TIMES, Apr. 13, 2018, <https://www.nytimes.com/2018/04/13/sports/nfl-concussion.html>.

241. Nicholas Bakalar, *Traumatic Brain Injuries Are Tied to Dementia*, N.Y. TIMES, Apr. 10, 2018, <https://www.nytimes.com/2018/04/10/well/mind/traumatic-brain-injuries-are-tied-to-dementia.html>.

D. Concussion Protocols

“‘They ask you, ‘Where are you? What day is it? What’s your mom’s name? Where are you from?’ Just basic questions and hopefully you can answer them.’ This describes the extent of concussion testing Levens underwent during his tenure in the league.”²⁴²

The general debate over the degree of violence in the game of football is certainly nothing new, and goes back to the early years of the sport. One famous example was the 1894 “Bloodbath at Hampden Park” between rivals Harvard and Yale in which so many players were injured that it drew a national outcry.²⁴³ In 1904, the *Chicago Tribune* reported eighteen deaths and 159 serious injuries from playing football, which prompted President Theodore Roosevelt to summon Ivy League representatives to the White House in an attempt to curb the violence. It may not have been a coincidence that Roosevelt’s son played on the Harvard team that year and suffered a broken nose. Despite Harvard, Yale, and Princeton pledging to clean up the game, the 1905 season resulted in 219 player deaths and 137 serious injuries.²⁴⁴ With some schools dropping the game of football and others threatening to do so, President Roosevelt again pushed for rule changes, resulting in the establishment of the Intercollegiate Athletic Association of the United States (the pre-cursor to the NCAA), which established safety oriented rules such as legalizing the forward pass, eliminating mass formations, such as the “flying V,” and creating a neutral zone between the two sides. The result was a decline in deaths and injuries for the 1907 season, although an increase in traumatic injuries in 1909 lead to further rule reforms aimed at player safety.²⁴⁵

Therefore, player safety has long been a concern in the game of football, including head injuries, which caused the first leather football helmets to be adopted in 1893.²⁴⁶ Although the NFL began in 1920 as the American Professional Football League, it was the NCAA that led the way in terms of player safety, particularly in regard to the effect of concussions. In 1933, the NCAA warned of the dangers of concussions in its *Medical Handbook for*

242. Dylan Desimone, *NFL Concussion Awareness: An Exclusive with Dorsey Levens*, BLEACHER REPORT (Mar. 15, 2013), <http://bleacherreport.com/articles/1564720-nfl-concussion-awareness-an-exclusive-with-dorsey-levens> (explaining that Levens is a former NFL running back who played for the Green Bay Packers, Philadelphia Eagles, and New York Giants, and who is working on a documentary entitled *Bell-Rung: An Alarming Portrait of Professional Football*).

243. Bernard Corbett & Paul Simpson, *When Men Were Men and Football Was Brutal*, YALE ALUMNI MAG., Dec. 2004, http://archives.yalealumnimagazine.com/issues/2004_11/football.html.

244. *Id.*

245. *Id.*

246. *Concussion Timeline*, *supra* note 105.

Schools and Colleges, establishing the first recommendations that could be considered a protocol: immediate treatment such as rest, continual supervision, and brain x-rays. For those players with recurring symptoms, the guidelines indicated hospitalization until they were symptom free for a forty-eight-hour period. If symptoms continued, they “should not be permitted to compete for 21 days or longer, if at all.”²⁴⁷ By 1939, all NCAA players were required to wear helmets,²⁴⁸ while helmets were not mandatory in the NFL until 1943.²⁴⁹

Again, it was the NCAA that adopted the first official return-to-play guidelines for a concussion in 1994.²⁵⁰ Although the NFL established the MTBI Committee that same year, its chair, a rheumatologist named Dr. Elliot Pellman, spent the following years fighting the link between serious brain disease and concussions, despite all credible medical evidence to the contrary. It was only after Commissioner Roger Goodell ordered mandatory neurological baseline testing for the 2007 season that the NFL began to take concussions seriously as a specific health concern.²⁵¹ To be fair, the NFL had been trying to limit head injuries through rule changes for years. For example, in 1982 it became illegal “to use the crown or the top of [the] helmet against a passer, a receiver in the act of catching a pass, or a runner who is in the grasp of a tackler.”²⁵² In 1995, the rule was expanded to prevent defensive players from lowering their heads and using the facemask and forefront of their helmet against the opponent.²⁵³ However, it was only after Roger Goodell testified before Congress in 2009, where members of Congress had accused the league of denying proper care to players and comparing the NFL to the tobacco industry, that the NFL really began to move forward to implement proper safeguards, requiring teams to obtain the services of an independent neurologist to examine players suspected of a concussion, rather than just relying on the team physician.²⁵⁴ That same year, Commissioner Goodell disbanded the discredited MTBI Committee and instituted a new panel, the Head, Neck and Spine Committee (HNS) headed by

247. CONCUSSIONS & THE COURTHOUSE 24 (AM. ASS’N FOR JUSTICE 2015), available at <https://www.justice.org/research/concussions-and-courthouse>.

248. *Concussion Timeline*, *supra* note 105.

249. *Evolution of the Rules: From Hashmarks to Crackback Blocks*, NFL (Aug. 2, 2013), <http://www.nfl.com/news/story/0ap1000000224872/article/evolution-of-the-rules-from-hashmarksto-crackback-blocks>.

250. *Concussion Timeline*, *supra* note 105.

251. Dave Goldberg, *Goodell Pushes for NFL Concussion Summit*, WASH. POST, May 3, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/03/AR2007050300031.html>.

252. *Evolution of the Rules: From Hashmarks to Crackback Blocks*, *supra* note 249.

253. *Id.*

254. Alan Schwarz, *N.F.L. to Shift in Its Handling of Concussions*, N.Y. TIMES, Nov. 22, 2009, <https://www.nytimes.com/2009/11/23/sports/football/23concussion.html>.

noted neurological surgeons and granted autonomy to operate without undue influence from the league.²⁵⁵ The HNS eventually published the NFL's first true concussion protocol in 2011, adopting the "Madden Rule," named after famed football coach and sports analyst John Madden, which required concussed players to be removed from the game, taken into the locker room with medical staff in attendance, and not be permitted to return to play. The HNS adopted the motto, "when in doubt, leave them out."²⁵⁶ The HNS also adopted a new sideline concussion assessment protocol utilizing a symptoms checklist, a neurological evaluation, a cognitive evaluation, and a balance assessment. These assessments were based on two sources: (1) a survey of NFL team medical staff completed the prior season, and (2) recommendations from the 3rd International Consensus Conferences on Concussion in Sport, which had met in Zurich in 2008.²⁵⁷

In 2013, the NFL refined its protocol to include an "eye in the sky"—a certified athletic trainer who scanned the field for injured players while sitting in a stadium box and monitoring video feeds. Each team was also required to have a neuro-trauma expert physician on the sidelines who was unaffiliated with the team, and who could be consulted by the team or a player. A concussed player was required to be evaluated by an independent unaffiliated concussion expert before the player was allowed to return to play.²⁵⁸

255. Alan Schwarz, *N.F.L. Picks New Chairmen for Concussion Committee*, N.Y. TIMES, Mar. 16, 2010, <https://www.nytimes.com/2010/03/17/sports/17concussions.html>.

256. Michael David Smith, *NFL to Teams: Pull Players If You Even Suspect a Concussion*, NBC SPORTS (Sept. 1, 2011), <http://profootballtalk.nbcsports.com/2011/09/01/nfl-to-teams-pull-players-if-you-even-suspect-a-concussion/>.

257. National Football League, *NFL Announces New Sideline Concussion Assessment Protocol*, NFL (July 26, 2012), <http://www.nfl.com/news/story/09000d5d81e78cc4/article/nfl-announces-new-sideline-concussion-assessment-protocol>. The first International Symposium on Concussion in Sport was held in Vienna, Austria, in 2001, organized by the International Ice Hockey Federation, the Federation Internationale de Football Association Medical Assessment and Research Centre, and the International Olympic Committee Medical Commission. Mark Aubry et al., *Summary & Agreement Statement of the First International Conference on Concussion in Sport, Vienna 2001*, 36 BRIT. J. SPORTS MED. 6 (2002). The recommendations that grew out of this Symposium included a wide-ranging protocol that included obtaining clinical histories of players; sideline evaluation with neurological assessment and mental status testing; post-concussion neuroimaging; a stepwise return to play protocol, consideration of rule changes for safer play; and player education. *Id.* The authors of the recommendations included some of the leading neurosurgeons and scientists around the world, including the United States, Canada, and Australia. *Id.* The symposium was held again in 2004 (Prague), 2008 (Zurich), 2012 (Zurich), and 2016 (Berlin). *See generally* Paul McCrory et al., *Consensus Statement on Concussion in Sport—the 5th International Conference on Concussion in Sport Held in Berlin, October 2016*, 51 BRIT. J. SPORTS MED. 838 (2016).

258. *NFL's 2013 Protocol for Players with Concussions*, NFL (Aug. 22, 2014), <http://www.nfl.com/news/story/0ap2000000253716/article/nfls-2013-protocol-for-players-with-concussions>.

Further refinements to the protocol were made in 2015 to connect the NFL Team Physician, the Athletic Trainer Consultant, and the Unaffiliated Neurological Consultant by radio, and to give the Athletic Trainer Consultant in the booth a radio connection to the Side Judge so play could be immediately stopped for a player evaluation. The Team Physician was also required to consult with his “concussion team” regarding a player’s return to play, but retained the ultimate decision-making authority.²⁵⁹

Most recently, the HNS altered the protocol to define “fencing responses”²⁶⁰ and “impact seizure”²⁶¹ as two new “No-Go” criteria that justify immediate removal from play without return to the game. Further, the changes established a pilot program to require an Unaffiliated Neurological Consultant to monitor all games from the league office, who could contact the team medical staff if a player was spotted who might require an evaluation.²⁶²

The above shows that, while slow to join the party, the NFL eventually stopped refuting the scientific evidence and is following other sports in implementing and refining concussion protocols to improve player safety.²⁶³ However, in light of the more recent evidence that even sub-concussive hits can contribute to CTE, it can be argued that the protocols are insufficient to prevent brain damage and the sport must be fundamentally altered to protect the players.

259. 2015 *Concussion Protocol Checklist*, NFL (Oct. 10, 2015), <http://www.nfl.com/news/story/0ap3000000553510/article/2015-concussion-protocol-checklist>.

260. Dustin Fink, *The Fencing Response*, CONCUSSION BLOG (May 9, 2015), <https://theconcussionblog.com/2015/05/09/the-fencing-response/>.

The fencing response is an unnatural position of the arms following a concussion. Immediately after moderate forces have been applied to the brainstem, the forearms are held flexed or extended (typically into the air) for a period lasting up to several seconds after the impact. The Fencing Response is often observed during athletic competition involving contact, such as football, hockey, rugby, boxing and martial arts. It is used as an overt indicator of injury force magnitude and midbrain localization to aid in injury identification and classification for events including, but not limited to, on-field and/or bystander observations of sports-related head injuries.

Id.

261. Jeffrey Englander et al., *Seizures After Traumatic Brain Injury*, 95 ARCHIVES PHYSICAL MED. & REHABILITATION 1223 (2014) (explaining that players whom have a traumatic brain injury can have seizures post-impact, signaling the likelihood of a concussion).

262. *NFL Implements Modifications to League’s Concussion Protocol*, NFL (Dec. 24, 2017), <http://www.nfl.com/news/story/0ap3000000897109/article/nfl-implements-modifications-to-leagues-concussion-protocol>.

263. Concussion protocols were instituted in world soccer play, the NHL, NBA, MLB, NCAA, and even high school and youth sports.

E. The Enlightened Fan

Portrayals of football in popular culture have played a multi-faceted role in elevating the game of football from a pastime to an addiction and in bringing about the CTE crises. In terms of educating and warning viewers about the current risks of brain damage from playing the sport, the primary piece of popular culture in terms of major motion pictures is the 2015 film *Concussion*.²⁶⁴ Based on a true story, this film tells the dramatic story of Dr. Bennet Omalu's discovery of the disease in football players, his naming of this killer, and his fight for the NFL to recognize and take responsibility for the toll the game of football takes upon some of its best players. In one of the most powerful scenes in the film, Dr. Omalu (Will Smith) stands up for the truth in the face of those who want to silence him.²⁶⁵ The following dialogue takes place when Omalu and his ally, Dr. Julien Bailes (Alec Baldwin), a former team physician for the Pittsburgh Steelers, meet with Dr. Joseph Maroon (Arliss Howard), the current neurosurgeon for the Steelers, to discuss how to proceed in light of Dr. Omalu's findings:

DR. OMALU:

Dr. Maroon, would you like a drink?

DR. MAROON:

I said 5 minutes.

DR. BAILES:

He doesn't want a drink.

DR. MAROON (*to Omalu*):

Your conclusions totally misrepresent the facts. To say that Webster, and Long, and Waters were killed by football is . . .

DR. OMALU (*interrupting*):

Is fallacious reasoning. Yes, I know.

DR. MAROON (*to Bailes*):

Where's he going with this?

DR. BAILES:

Just hear him out.

264. *CONCUSSION* (Columbia Pictures 2015).

265. *Id.* A clip of this scene is available at Jodi Guglielmi, *Will Smith Takes on the Football Establishment in Exclusive Clip From Concussion*, PEOPLE, Nov. 17, 2015, <http://people.com/movies/will-smith-takes-on-the-football-establishment-in-exclusive-clip-from-concussion/>.

DR. OMALU:

I would like to propose a formal, controlled study of former and current NFL football players. We will bring together the greatest minds in America to solve the problem. We should be working together.

DR. MAROON:

Who do you think you're talking to?

DR. OMALU:

Excuse me?

DR. MAROON:

I was the President of the Congress of Neurological Surgeons.

DR. OMALU (*interrupting*):

And I was the man who performed the autopsies on Mike Webster, Terry Long. *Your* men. Men under *your* care. Do you know what Mike Webster's wife said? She said that if she had known that Mike was sick, she would have done more for him. But he died in disgrace. *Your* man. *You* took an oath. Tell the truth.

DR. MAROON:

The truth? . . . The truth is that the NFL is a blessing and a salvation, my friend. We employ hundreds of thousands of people. We send thousands and thousands of poor kids to school. The ownership of this football club has donated millions of dollars to countless charities. Do you want me to go on?

DR. OMALU:

That won't be necessary.

DR. MAROON:

Oh, it is necessary. Football is the most popular sport in America because it is so goddamn fantastic!

(pointing out the window of the restaurant which offers a panoramic view of Pittsburgh)

And that right there? *(pointing to the Steelers football stadium)*

That is the beating heart of this city. And you want to, what, end it? You want to fold up the National Football League?

DR. OMALU:

I want to solve a problem.

DR. MAROON:

Who are you?

DR. OMALU:

What are you asking?

DR. MAROON:

You're a pathologist. You perform autopsies.

DR. OMALU:

Yes, I am a mere pathologist. That's it. That's all I am.

DR. MAROON:

Do you have any idea of the impact of what you're doing?

DR. OMALU:

Yes, I do.

DR. MAROON:

Do you understand the impact of what you are doing? If just 10% of mothers in America decide that football is too dangerous for their sons to play, that is it. It is the end of football. Kids, colleges, and eventually, it's just a matter of time, the professional game.

DR. BAILES:

Joe, he does autopsies. He's not in the outcome business.

DR. MAROON:

He has no business.

DR. OMALU:

Do you know what history does to people, trained physicians who ignore science?

DR. MAROON (*interrupting*):

Well . . .

DR. OMALU (*angry*):

Sir, I am not done! History laughs. If you continue to deny my work, the world will deny my work. But men, *your* men continue to die, their families left in ruins. Tell the truth.

(*Omalu points his finger at Maroon's face*) Tell the truth.

DR. MAROON:

You sure . . . you sure you want to do this?

DR. OMALU:

I would ask you that same questions, Dr. Maroon.²⁶⁶

Perhaps Dr. Omalu's passion and tenacity portrayed in the prior scene is not all that surprising given that his true surname of Onyemalukwube translates as: "If you know, come forth and speak."²⁶⁷

The film *Concussion* also reminds viewers that the bottom-line for the NFL is profit, and how much pressure is placed on team doctors to keep the game going. In the following scene, Dr. Omalu takes Dr. Bailes to the lab so he can view the slides of Dr. Omalu's brain autopsies on deceased players. Dr. Cyril Wecht (Albert Brooks), Dr. Omalu's boss at the Allegheny County Coroner in Pittsburgh, is also present.²⁶⁸

(after viewing the slides of the brains of Andre Waters and Justin Strzelczyk)

DR. BAILES:

I just kept sending them back out there.

DR. WECHT:

What the hell were you thinking?

DR. BAILES:

You've got to be a part of it. You've got to be on the sidelines with them to understand. Whatever it takes to keep them in the game, to keep the whole thing going. Tape, needles, Vicodin, Toradol, Lidocaine, Percocet, Lexapro, Zoloft. Have I left anything out? It's tires and oil. Just mechanics trying to keep the cars on the racetrack.

266. CONCUSSION, *supra* note 264; *Concussion (2015) Movie Script*, *supra* note 62. In 2002, the real Dr. Bailes "cheered the portrayal of the disease's emergence," characterizing it as "very accurate." Adam Smeltz, 'Concussion' Takes Few Detours From Reality, *Former Steelers Physician Says*, PITTSBURGH POST-GAZETTE, Dec. 25, 2015, <http://www.post-gazette.com/a/movies/2015/12/26/Former-Pittsburgh-Steelers-team-physician-Julian-Bailes-Concussion-movie-takes-few-detours-from-reality/stories/201512260025>. However the film is not "perfect, especially in its portrait of longtime Steelers neurosurgeon Joseph Maroon While the screenplay shows Dr. Maroon resisting Bennet Omalu, the former Allegheny County pathologist who discovered CTE, Dr. Bailes said Dr. Maroon was neither an obstructionist nor a villain." *Id.* According to Bailes:

'Once [Dr. Maroon] understood what we were dealing with, he really brought it to the NFL. That shone a light and helped us get to the bottom of the science and ultimate acceptance,' said Dr. Bailes, a neurosurgeon who collaborated with Dr. Omalu. 'He facilitated that once he understood what we were dealing with.'

Id.

267. JEANNE MARIE LASKAS, CONCUSSION 139 (Random House 2015).

268. CONCUSSION, *supra* note 264.

DR. WECHT:

Yeah, well, it's not medicine. I don't know what it is.

DR. BAILES:

It's business.²⁶⁹

While *Concussion* made a mark, it was not the success predicted. The movie fumbled at the box office, earning only \$48 million on a film with a \$35 million budget.²⁷⁰ In an interview with *Vanity Fair*, actor Will Smith, who stars as Dr. Omalu, expressed his surprise and concern that *Concussion* had not had a bigger influence on the public's view of the game in light of the strong medical evidence, which clearly showed there were important issues surrounding the player health.²⁷¹ "I thought *Concussion* would have a bigger impact. I knew it would be hard because people love the game, but the science is so overwhelming, and it's something that we really need to take a look at," Smith explained. He had anticipated "that people would get behind the mission" of changing the way football is played to make it safer.²⁷² He was surprised that fans just wanted to ignore the truth and pretend there was no problem.²⁷³ "[P]eople were absolutely like, 'Nope, I'm not stopping watching football, so I don't want to know.'"²⁷⁴

It has been suggested that the reason *Concussion* did not live up to the expectation that its release would result in a major public relations crisis by damaging the NFL brand was that the final script of the film was not "nearly as damning to the sport as some believed it would be."²⁷⁵ It is certainly true that film scripts go through numerous drafts and that even filmed scenes end up on the cutting room floor for editing reasons, sometimes scenes in early drafts of a script can be more enlightening than the ones which eventually make it to the screen. Not surprisingly, a number of scenes were removed from earlier drafts of *Concussion*.²⁷⁶ In this instance, however, the media scuttlebutt was that Sony

269. *Id.*

270. Erika Harwood, *Will Smith Thought Concussion Was Going to "Have a Bigger Impact"*, VANITY FAIR, Sept. 27, 2016, <https://www.vanityfair.com/hollywood/2016/09/will-smith-concussion-reaction>.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. Abraham D. Madkour, *Why 'Concussion' Did Not Have Impact Many Expected*, SPORTS BUS. J. (Jan. 18, 2016), <https://www.sportsbusinessdaily.com/Journal/Issues/2016/01/18/Opinion/From-The-Executive-Editor.aspx>.

276. Daniel Roberts, *Sony Cut Scenes From Will Smith's 'Concussion' to Avoid Angering NFL*, FORTUNE, Sept. 2, 2015, <http://fortune.com/2015/09/02/sony-concussion-cut-scenes-nfl/>.

had cut scenes in order to pacify the NFL.²⁷⁷ The *New York Times* broke the story, which quoted a July 30, 2014, email saying a Sony lawyer had “taken most of the bite” out of the movie. In addition, the article referenced an August 1, 2015 email that stated some “unflattering moments for the NFL” had been removed or changed.²⁷⁸

For example, a scene implying that the Commissioner of the NFL, Roger Goodell (Luke Wilson) was “part of a wide NFL scheme to cover up the connection between professional football and brain damage” never made it to the screen. Peter Landesman, the writer and director of the film, revealed to *The Hollywood Reporter* that the scene “had been cut from the film” due to “legal concerns.”²⁷⁹ Because *Concussion* is based on a true story, Landsman cut the scene from the shooting script due to concerns that the scene, which “was based on a second-hand account,” could possibly result in a defamation suit.²⁸⁰

A script titled “Untitled Concussion,” dated May 30, 2014 that contains the scene was obtained by *The Hollywood Reporter*.²⁸¹ The scene opens with the commissioner taking a midnight phone call.²⁸² On the other end of the phone is Dr. Maroon (Arliss Howard), the Steelers’ team neurosurgeon, and Dr. Elliott Pellman (Paul Reiser), the former chairman of the NFL Mild Traumatic Brain-injury Committee.²⁸³ Arguably, criticisms of the 1994 appointment of Pellman as an odd choice for the position were well placed given that he was a rheumatologist; not a neuropsychologist nor a neurologist.²⁸⁴

184

OVER BLACK SCREEN WE HEAR A PHONE RINGING.

Two rings, three. SNAP. Light comes on. Revealing—

277. *Id.*

278. Ken Belson, *Sony Altered ‘Concussion’ Film to Prevent N.F.L. Protests, Emails Show*, N.Y. TIMES, Sept. 1, 2015, <https://nyti.ms/1KpMX4V>.

279. Seth Abramovitch, *‘Concussion’ Script: The Explosive Roger Goodell Scene That Sony Cut*, HOLLYWOOD REPORTER (Sept. 2, 2015), <https://www.hollywoodreporter.com/news/concussion-script-explosive-roger-goodell-819850>.

280. *Id.*

281. *Id.*

282. Peter Landsman, *Scene From “Untitled Concussion”*, HOLLYWOOD REPORTER, May 30, 2014, <https://www.hollywoodreporter.com/sites/default/files/custom/PDF/Goodell%20Concussion%20Watermark.pdf> (last visited Dec. 13, 2018).

283. Abramovitch, *supra* note 279.

284. *Id.* Pellman’s “name would later appear 26 times in a lawsuit contending the NFL attempted to conceal connections between football and CTE.” *Id.* In 2007, “Pellman resigned from the committee, less than one year after” Goodell became commissioner. *Id.*

185

INT. BEDROOM – ROGER GOODELL’S MANSION –
GREENWICH, CT – NIGHT. Clock reads midnight.

GOODELL (*picking up*):

What is it?

MAROON/PHONE (*Over*):

It’s Joe. I have Elliot on. We have a serious problem.

(*and we INTERCUT--*)

PELLMAN: (*in his den, in a robe*)

Dave Duerson killed himself today.

Goodell slips out of bed away from his sleeping wife. Takes the phone call into the hall. Now ADD--

MAROON: (*in running clothes, in his kitchen*)

He didn’t just kill himself. He shot himself in the chest,
Roger. In the heart.

GOODELL:

Jesus Christ.

MAROON:

He left a note. He wanted his brain donated. To be
looked at. For CTE.

GOODELL:

Good God. Was he symptomatic?

MAROON:

I thought he was just an asshole.

*Goodell’s gone to stand at a window looking out on a
massive lawn sloping down to the Long Island sound.*

MAROON (*CONT’D*):

Roger.

GOODELL:

Yeah.

MAROON:

For the brain’s last act to not just die, but preserve itself
in the act of killing, humans don’t do that. (*then*) We
can’t explain it. This is going to unravel.²⁸⁵

285. Landsman, *supra* note 282.

In the prior scene in the earlier script, the viewer sees Duerson's kitchen and laid out on his kitchen table is an issue of Sports Illustrated. The cover piece says "*CONCUSSIONS*" (the word superimposed over Steelers linebacker JAMES HARRISON mercilessly spearing a receiver). And photos of an ex-wife. Children. Parents. A portrait of himself in a Chicago Bears uniform. A typed note:

My mind slips. Thoughts get crossed. Cannot find words. Feel really alone. Eyesight blurry. Something is seriously damaged in my brain. I'm thinking of all the NFL players. I cannot tell you how many times I saw stars in games, but I know there were times I "woke up" hours after a game, and we were all at dinner.

Now [Duerson] goes from mirror to the note, adds: "*Please, give my brain to be examined. They were right.*"

Now we see the gun. .38 Special. Duerson palpates his breast bone for his heart. Puts the gun muzzle there. Eyes wide. Crying. Goodbye. And--

CUT TO BLACK

*Pause, then-- BANG!*²⁸⁶

Additional scenes from this earlier script were also published by *USA Today*. In an email to *For The Win*, *USA Today Sports*, Landesman called this version the "first draft" and cautioned while it was the "[s]ame bones as the movie," the first draft and final script contained too many differences "to even address."²⁸⁷ The writer-director also admonished that "any changes made to the film should not be portrayed as cowering to the NFL but rather as a way of making the movie 'better, richer and fairer' by removing scenes that may have left it open to criticism from a league notorious for its aggressive media arm."²⁸⁸

While there are no scenes in the film that really focus on the legal and monetary concerns surrounding the CTE crises, the "draft" script contained an interesting conversation among officials from the NFL, Fox Sports, ESPN, and the lawyers:

286. *Id.*

287. Chris Korman, *The Chilling First Script of 'Concussion' Is Everything the NFL Doesn't Want You to See*, *USA TODAY: FOR THE WIN*, Sept. 2, 2015, <https://ftw.usatoday.com/2015/09/the-chilling-first-script-of-concussion-is-everything-the-nfl-doesnt-want-you-to-see>.

288. *Id.*

FOX SPORTS LAWYER (*without inflection or emotion*):
What's the prognosis. How many years before this dam breaks?

(*INTERCUTTING with--*)

BERN:

What you're asking is, how many more clean years of profit can you get out of professional football?

(*now adding*)

ESPN LEGAL – BRISTOL, CONNECTICUT (AND ITS LEAFY VIEW)

ESPN LAWYER (*with his own crew*):

Before people stop buying team jerseys--

HICKS:

Before we have to put warning labels on our sport.

ASSOCIATE:

Sixteen years. Give or take. (*prepared for this*)

We expect television ratings to steadily rise for ten, then hit a steep decline in year eleven. Merchandise – hats, player jerseys, etcetera – start sliding in five. League and team profits are currently at 9-billion. Ancillary profits – concessions, third-party product boost, endorsement deals – at roughly 11-billion per annum. Television advertising dollars is at 4.6-billion. Average team value is currently at 1.4-billion. Dallas Cowboys the high at 2.1, Oakland Raiders low at 825-million. We expect all those benchmarks to rise over the next five years, skid sideways for three, then start to slide.

HICKS (*dutifully taking notes*):

When we go off a cliff. No one denies that. They all let it sink in.²⁸⁹

It has also been surmised that the repercussions of the film were far from what was anticipated due to the NFL's smart strategy of basically ignoring the pre-release publicity for the film.²⁹⁰ While *Concussion* "was positioned early

289. *Id.*

290. Madkour, *supra* note 275.

as a film that would damage the NFL brand, the league didn't fight it."²⁹¹ Instead, it engaged in "a disciplined approach of not attacking the plot" thereby "preventing any controversial news stories to build."²⁹² Rather than focusing on the film, the NFL chose to focus on the future by highlighting its efforts to make the game safer. When asked about the film after attending an event recognizing "the three winners of the second Head Health Challenge, an open innovation program sponsored by the NFL and GE to invest up to \$20 million in new technologies that might be better able to diagnose or prevent brain injuries," NFL Commissioner, Roger Goodell, simply replied:

We are not focused on a movie, we're focused on continuing to make progress We have incredible progress that has been made, not only in rule changes, but also in what we saw today with materials and protection that will prevent these injuries from happening. From protocols that we implemented, research we are doing, coaching changes we have had, in taking certain techniques out of the game. What you are seeing is an incredible amount of progress and real impact.²⁹³

If the league had chosen to "loudly criticize the film's merits" it is likely it would simply have piqued "public curiosity" the accuracy of the film, which ultimately would only have increased ticket sales.²⁹⁴ Perhaps the NFL's concerns about the film were not unfounded. Prior to the film's general release to the public, there was a special screening of *Concussion* by *Sports Illustrated's Monday Morning Quarterback* for "70 former NFL players and their families."²⁹⁵ After watching the film, Keith McCants, a former linebacker, reacted by noting "I watch[ed] this movie and I know we were paid to hurt people We were paid to give concussions. If we knew that we were killing people, I would have never put on the jersey."²⁹⁶

291. *Id.* Brand image is extremely important, in that it has a direct correlation with fan loyalty and behavior. Hans H. Bauer et al., *Brand Image and Fan Loyalty in Professional Team Sport: A Refined Model and Empirical Assessment*, 22 J. SPORT MGMT. 205, 205-07 (2008). Branding also plays a role in creating "emotionally engaged fans, increased game viewership, and increased purchases of licensed merchandise." Robert Passikoff, *NFL Teams By the (Loyalty) Numbers*, BRAND KEYES (Sept. 11, 2015), <https://brand-keys.com/nfl-teams-by-the-loyalty-numbers/>.

292. *Id.*

293. Jenny Vrentas, *The NFL's Reaction to the 'Concussion' Movie Starring Will Smith*, SPORTS ILLUSTRATED, Dec. 23, 2015, <https://www.si.com/mmqb/2015/12/23/nfl-reaction-concussion-movie-will-smith-bennet-omalu>.

294. Madkour, *supra* note 275.

295. Chris D'Angelo, *Will Smith Disappointed 'Concussion' Didn't Have More Impact on NFL*, HUFFINGTON POST (Sept. 28, 2016), https://www.huffingtonpost.com/entry/will-smith-concussion-nfl_us_57eb147ce4b024a52d2b6e56.

296. *Id.*

The NFL's approach to *Concussion* may simply have resulted from the lesson it learned from its earlier response to another movie, *League of Denial*, which raised the clarion call about the link between CTE and football and the dangers of concussions. Aired by *PBS Frontline* in 2013, this powerful documentary investigates the growing link between CTE and concussions incurred while playing football, telling the story "through the people who discovered . . . [the] size, seriousness and specific shape" of the CTE crises.²⁹⁷ It also highlights the NFL's efforts "to obfuscate, obscure, bury and discredit the[] hard truths" revealed in the film."²⁹⁸ Originally, *ESPN* collaborated with *PBS Frontline* on the documentary project. However, in 2013, "NFL officials met with *ESPN* executives . . . and voiced concern over the documentary's portrayal of the league."²⁹⁹ In response, *ESPN* dropped the project, thus creating public perception that *League of Denial* was the film "the NFL didn't want viewers to see."³⁰⁰ Arguably, NFL executives did not want to make the same public relations error by reacting to the content of *Concussion*.

Unfortunately, in addition to serving as the Hermes of CTE, popular culture has played an important role in creating a climate in which players are encouraged to fall victim to the disease. While the NFL is certainly culpable for the plight that players face today, through film and television, popular culture is also one of the primary suspects due to its contribution of creating a passion for the game of football that has elevated it to America's number one pastime.³⁰¹ In addition, popular culture has arguably assisted in the de-sensitization of fans and viewers to the plight of their gridiron heroes. The primary suspect for creating this change is television.

297. David Roth, *Into the Light*, SB NATION (Oct. 9, 2013), <https://www.sbnation.com/nfl/2013/10/9/4817818/league-of-denial-nfl-concussion-crisis-authors-interview-pbs-frontline>. See *League of Denial: The NFL's Concussion Crisis*, PBS: FRONTLINE (Oct. 8, 2013), <https://www.pbs.org/wgbh/frontline/film/league-of-denial/>.

298. *Id.*

299. Madkour, *supra* note 275.

300. *Id.* The League's conduct regarding *League of Denial* is not the only time that the NFL has pressured companies to drop films or shows which portray the League in an unfavorable light. See generally James Andrew Miller & Ken Belson, *N.F.L. Pressure Said to Lead ESPN to Quit Film Project*, N.Y. TIMES, Aug. 23, 2013, <https://www.nytimes.com/2013/08/24/sports/football/nfl-pressure-said-to-prompt-espn-to-quit-film-project.html?pagewanted=all>. "In 2004, the N.F.L. complained to the chief executive of the Walt Disney Company, the parent company of ESPN, about a hard-hitting television series on the sports network that delivered an unsavory depiction of professional football players. The show ended after one season." Belson, *supra* note 278.

301. Norman, *supra* note 1. "American football, under attack from critics in recent years, has lost some of its popularity but is still the champion of U.S. spectator sports—picked by 37% of U.S. adults as their favorite sport to watch. The next-most-popular sports are basketball, favored by 11%, and baseball, favored by 9%." *Id.*

F. *A Match Made in Heaven*

In American society today, media sources have grown in impact. Almost from the moment of their first cry of victory, potential sports fans are surrounded by a world replete with a plethora of electronic gadgets, tools, and avenues of technology, which promulgate popular culture.³⁰² In addition to, perhaps playing football or attending games with family or friends, chances are that the budding fan's most frequent exposure to a major component of popular culture—the game of football—will be via the powerful device of the television.³⁰³ It is interesting to note that a 1998 ESPN poll revealed that 54% of NFL fans would rather attend a football game in person than see the game at home.³⁰⁴ In 2011, the poll revealed “a precipitous drop,” with only 29% preferring to actually attend games.³⁰⁵ According to the owner of the Miami Dolphins, Steve Ross, “I think the biggest challenge an owner of any sports team in any league today has today is knowing that the fan experience at home, watching [the game] on TV, is probably a better experience today than it is going there live.”³⁰⁶ And no sport is better suited for television viewing than football.

1. Football and Television: The Perfect Union

It has been observed that not “all sports” are “created equal” when it comes to television viewing.³⁰⁷ “The most popular sports on television are those best served by the medium's limitations” in terms of what cameras and microphones can do.³⁰⁸ Further, the characteristics of certain sports make them ideal

302. GERBNER ET AL., *Living with Television: The Dynamics of the Cultivation Process*, in PERSPECTIVES ON MEDIA EFFECTS 17, 23 (1986), available at http://wiki.commres.org/pds/CultivationTheory/LivingWithTelevision_TheDynamicsoftheCultivationProcess.pdf.

303. L.J. Shrum, *Effects of Television Portrayals of Crime and Violence on Viewers' Perceptions of Reality: A Psychological Process Perspective*, 22 LEGAL STUD.F. 257, 257 (1998) (noting that “[f]ew would argue that television is not a powerful medium” with “its ability to capture both our attention and our imagination. Empirical evidence of this power is demonstrated not only by the sheer frequency with which Americans view television . . . , but also by its centrality in American life.”).

304. Darren Rovell, *NFL Taking Note That for Many Fans, Watching Games on TV Beats Going to Stadiums*, ESPN (Nov. 16, 2012), http://www.espn.com/espn/otl/story/_/id/8636927/nfl-taking-note-many-fans-watching-games-tv-beats-going-stadiums.

305. *Id.*

306. *Id.*

307. Stanley J. Baran, *Sports and Television*, in THE BUSINESS OF SPORTS 143-146 (Jones & Bartlett Learning 2d ed., 2004). See Stanley J. Baran, *Sports and Television*, MUSEUM OF BROADCAST COMMUNICATIONS – ENCYCLOPEDIA OF TELEVISION, <http://www.museum.tv/eotv/sportsandte.htm> (last visited Dec. 13, 2018).

308. Baran, *Sports and Television*, *supra* note 307 (quoting Julie Talan).

candidates to be broadcast.³⁰⁹ According to long-time director of *Monday Night Football*, Chet Forte, “It’s impossible to blow a football game Football works as a flattened sport. Its rectangular field fits on the screen far more readily than, for example, golf’s far-flung woods and sand traps. The football moves right or left on the screen and back again.”³¹⁰ Further, football’s “limited repertoire - kick, pass, and run--sets it apart from, say, baseball, where the range of possibilities for the ball and the players at any given moment is enormous.”³¹¹ Emmy award winning football director, Sandy Grossman,³¹² found that “[t]he reason (the gridiron) is easier to cover is because every play is a separate story. There’s a beginning, a middle, and an end, and then there’s 20 or 30 seconds to retell it or react to it.”³¹³ Sustaining the interest of the viewer is also of paramount importance to the success of a televised sport. Arguably, one of the reasons football is so exciting is that:

Any pass can produce a touchdown or an interception. In contrast, the first three quarters of a basketball game usually serve only to set up the last three minutes and much of soccer’s action happens at mid-field, yards and yards away from the goal (and a potential exciting save or game-saving score).³¹⁴

Another characteristic of football that makes it ideal for television is its structure of time-outs, quarters, and a half-time. “Those covering and those watching the event can establish a rhythm that allows for more-or-less natural insertion of commercials and visits to the refrigerator.”³¹⁵ In contrast, “[s]occer has continuous action, as does hockey, which makes commercial insertion more complex.”³¹⁶

Also, as a “visual medium,” television “lives by the pictures it offers its viewers [F]ootball offers spectacle -big, full, beautiful stadiums, lovely playing surfaces, the blimp and cheerleaders”³¹⁷ Finally, “[n]othing adds to visual variety like physical action, people moving and competing. In football there are incredible tests of strength and aggression.”³¹⁸ In 2012, legendary

309. *Id.*

310. *Id.*

311. *Id.*

312. Richard Sandomir, *Sandy Grossman, Maestro of N.F.L. on TV, Dies at 78*, N.Y. TIMES, Apr. 3, 2014, <https://www.nytimes.com/2014/04/04/sports/sandy-grossman-maestro-of-nfl-on-tv-dies-at-78.html>.

313. Baran, *Sports and Television*, *supra* note 307.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

sports dealmaker, Barry Frank, noted that the game of football “is tailor-made for television.”³¹⁹

2. The Man Who Officiated at the Marriage Between Football and Television

It is hard to imagine, but the NFL was not always America’s game. At the start, “pro football was plagued by fan apathy” and was slow to grow in popularity.³²⁰ In fact, the game used to be “equated to pro wrestling in terms of national respect.”³²¹ The mastermind behind the game’s titanic success was Pete Rozelle, who became commissioner of the NFL in 1960.³²² Known as “the Boy Czar,” Rozelle’s most important achievement was “wedding his league to that great American pastime -television.”³²³ Ultimately this union empowered the NFL via television and paid commentators to dictate the way fans watch football and believe the game should be played.

Rozelle’s powerful public relations campaign for the NFL was to transform every game “into Waterloo and every player into an epic hero,”³²⁴ including creating its own “greatest hits” via NFL Films.³²⁵ NFL films has been described as “perhaps the most effective propaganda organ in the history of America.”³²⁶ Currently owned by the NFL, “[s]ince the early 1960s . . . NFL Films [has been] a corporate tool proclaiming the professional football exemplifies American society by embodying the characteristics of teamwork, manliness, perseverance, courage, discipline, sacrifice, and leadership.”³²⁷ Over 10,000

319. Rovell, *supra* note 304.

320. Peter King, *The Path to Power How Did Pro Football Become, At Century’s End, the Titan of American Sports? Eight Landmarks, One from Each Decade of the NFL’s Existence, Were Critical to Its Success*, SPORTS ILLUSTRATED, Aug. 30, 1999, <https://www.si.com/vault/1999/08/30/265643/the-path-to-power-how-did-pro-football-become-at-centurys-end-the-titan-of-american-sports-eight-landmarks-one-from-each-decade-of-the-nfls-existence-were-critical-to-its-success>. The first professional football game took place on November 12, 1892, when the Pittsburgh Athletic Club was defeated by the Allegheny Athletic Association (AAA) football team. *Birth of Pro Football*, PRO FOOTBALL HALL OF FAME, <http://www.profootballhof.com/football-history/birth-of-pro-football/> (last visited Dec. 13, 2018). What made the game memorable was that—for the first time one—of the AAA players, William (Pudge) Heffelfinger, was paid \$500.00 to play in the game. *Id.* As a result, the game of professional football was born.

321. *Id.* (quoting Wellington Mara, co-owner of the Giants and the franchise founder’s son).

322. *Id.*

323. *Id.*

324. Rich Cohen, *They Taught America How to Watch Football*, ATLANTIC, October 2012, <https://www.theatlantic.com/magazine/archive/2012/10/they-taught-america-to-watch-football/309083/>.

325. TRAVIS VOGAN, *KEEPERS OF THE FLAME: NFL FILMS AND THE RISE OF THE SPORTS MEDIA* (2014).

326. King, *supra* note 320.

327. *Id.* at 5. See Ron Briley, *Keepers of the Flame: NFL Films and the Rise of Sports Media* by Vogan, Travis, 42 J. SPORT HIST. 285, 285-86 (2015) (book review) (discussing how “NFL Films was the brainchild of Ed Sabol,” and how “the Sabol family convinced [NFL Commissioner] Rozelle and the NFL to purchase their company so that the league would have control over representation of its image and history.”); *see also*

features have been produced by NFL Films since 1964, each with a “signature style” that creates a “dramatic storyline” by employing microphones, close-ups, and slow motion in order to “convey professional football’s pain and emotion by situating the male body as an object of pleasure, desire, and consumption.”³²⁸

Chris Wesseling, *Ed Sabol, Founder of NFL Films, Dies at Age of 98*, NFL (Feb. 10, 2015), <http://www.nfl.com/news/story/0ap3000000469569/article/ed-sabol-founder-of-nfl-films-dies-at-age-of-98>.

328. VOGAN, *supra* note 325 at 286. As portions of the Amended Master Complaint filed by the players in the United States District Court for the Eastern District of Pennsylvania highlight:

- NFL Films focuses on violence as one of the NFL’s greatest selling points: the football player as gladiator. To advance the NFL Defendants’ purpose, NFL Films has created numerous highlight features that focus solely on the hardest-hits in pro football. These featured videos are marketed and sold to advance the NFL’s culture of violence as entertainment.
- The list of videos created by NFL Films glorifying violent plays includes, but is not limited to, the following titles: “*NFL: Moment of Impact*” (2007); “*NFL’s 100 Greatest Tackles*” (1995); “*Big Blocks and King Size Hits*” (1990); “*The Best of Thunder and Destruction – NFL’s Hardest Hits*”; “*NFL Films Video: Strike Force*” (1989); “*The NFL’s Greatest Hits*” (1989); “*Crunch Course*”; “*Crunch Course II*” (1988); “*Crunch Masters*”; “*In the Crunch*” (1987); “*NFL Rocks*”; “*NFL Rocks: Extreme Football*” (1993).
- NFL Films created the “*Top Ten Most Feared Tacklers*” series that was shown on the NFL Network. Now, it has its own section on the NFL’s website. These features are comprised of videos highlighting the most vicious tacklers the NFL has ever seen. These videos contain numerous explicit examples of how the NFL Defendants market and glorify the violent nature of the NFL. The back cover of 2007 film “*Moment of Impact*” advertises the film as follows: “First you hear the breathing, then you feel the wind coming through your helmet’s ear hole. Suddenly you’re down, and you’re looking through your helmet’s ear hole. Pain? That’s for tomorrow morning. Right now you’ve gotta focus – focus on the play and try not to focus on the next moment of impact.”
- The entire message deemphasizes the acute and chronic risks associated with head impacts. The 1990 film “*Big Blocks and King Size Hits*” prominently features a head-to-head collision between Minnesota Vikings’ defender Jack Tatum and Oakland Raiders’ receiver Sammy White in Super Bowl XI in which White’s helmet is knocked clear off his head. In 1993’s “*NFL Rocks*,” the late Junior Seau offers his opinion on the measure of a punishing hit: “If I can feel some dizziness, I know that guy is feeling double [that].” In a segment of the same film, glorifying gutsy receivers who expose themselves to big hits by going “over the middle” of the field, former Houston Oilers receiver Ernest Givens is quoted as saying: “I get knocked out a lot, I get concussions, I get broken noses, that is part of being a receiver, that’s what separates you from being a typical receiver than a great receiver.” Former Dallas Cowboys receiver Michael Irvin recites a similar unawareness of the risks of concussions: “Before the game, I go to the [defensive backs] and tell them, ‘Hey, you know I’ll trade a concussion for a reception!’”
- NFL Films, therefore, advances the NFL Defendants’ agenda to promote the most violent aspects of NFL football and to urge players at every level of the game to disregard the results of violent head impacts.
- The NFL Defendants, through NFL Films, promote a culture in which playing hurt or with an injury is both expected and acclaimed in a mythical gladiator world. Through NFL Films, the NFL has produced videos that praise players who embody the ethos of playing hurt (for example, “*Top Ten Gutsiest Performances*”). This film and others like it celebrate

In essence, the films produced represent the ideology of “hegemonic masculinity” which “refers to the social ascendancy of a particular version or model of masculinity that, operating on the terrain of common sense and conventional morality, defines what it means to be a man.”³²⁹ The portrayals of professional football players by NFL Films constitute a “culturally idealized form of masculine character” which connects “masculinity to toughness and competitiveness.”³³⁰

As much as famous coaches or players, NFL Films has shaped the modern game of football into “a contest more in tune with the speed and violence of modern America than any other sport . . . Football is blood and guts, the ticking clock, sudden death, the sack, the blitz, the bomb -symbols of a nation locked in endless wars.”³³¹ It also brilliantly manages to extol the virtues of the NFL, while avoid all “[i]ssues that might cast the NFL in a negative light, such as the impact of concussions or criminal activities beyond the playing field . . . When a topic such as racism was depicted, it was to celebrate the league’s success in addressing prejudice.”³³²

Pete Roselle’s NFL public relations campaign was also successful as a result of the abilities of the TV sportscaster. “Sportscasters and their entire apparatus involved in producing programs have become the definers” of pro football and are “the interpreters of its meaning, and most important, a crucial means by which hegemonic ideology is propagated and reproduced.”³³³

players’ ability to play through the pain and injury and promote an expectation among players and fans that players must and often do play through any injury, including MTBI.

- This culture encourages NFL players to play despite a head injury. Moreover, failure to play through such an injury creates the risk that the NFL player will lose playing time, a starting position, and possibly a career.
- Within this culture, the NFL Defendants purposefully profit from the violence they promote.
- This culture of violence, sponsored and encouraged by the NFL Defendants, has too many examples to provide in this Complaint.

Plaintiffs’ Amended Master Administrative Long-Form Complaint at ¶55-59, 61-64, *In re Nat’l Football League Players’ Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa. July 17, 2012).

329. Robert Hanke, *Hegemonic Masculinity in Thirty Something*, 7 CRITICAL STUD. IN MASS COMM. 231, 232 (1990).

330. Raewyn W. Connell, *An Iron Man: The Body and Some Contradictions of Hegemonic Masculinity*, in *SOCIOLOGICAL PERSPECTIVES ON SPORT: THE GAMES OUTSIDE THE GAMES* 141, 141, 148 (Routledge 2015).

331. Cohen, *supra* note 324.

332. Briley, *supra* note 327.

333. GEORGE H. SAGE, *POWER AND IDEOLOGY IN AMERICAN SPORT: A CRITICAL PERSPECTIVE* 129 (1990).

3. Raised on Madden: The Tougher You Are, the Cooler You Are

Another prime illustration of how the NFL and its marriage to television encouraged fans to worship and glorify those players who can have “their bell rung” and keep on going was the All-Madden team.

In 1984, Rams coach, John Robinson, suggested to his lifelong friend, John Madden, that he create his own roster “that . . . best represented pro football” with member who “played the game the way he thought it should be played.”³³⁴ Thus was born the “The All-Madden” team. Madden, the former head coach who lead the Oakland Raiders to a Super Bowl XI victory in 1976, turned color commentator for NFL telecasts following his retirement from football in 1978.³³⁵ He worked for all four major networks during his career as a broadcaster.³³⁶ When creating the All-Madden team, Madden would pick his favorite players from the season at each position, interview players and talk about hard-nosed football. In addition to selecting the best players for each position, he would sometimes simply include a player because of how tough he was. One year, he included Craig “Iron Head” Heyward because a 275-pound running back named “Iron Head” just needed to be on the All-Madden team.³³⁷ In 1991, the Hall of Famer³³⁸ praised how Bears wide receiver, Tom Waddle, was administered more smelling salts than any other player in the league. According to Madden, Waddell was “amazing . . . he took every hit they could give him” and “it was once of the gutsiest performance by a wide receiver that I have ever seen. It seemed that every time he would catch a ball he would get knocked every way but loose.”³³⁹ According to Madden, to be “All-Madden” meant “a whole range of things. For defensive linemen and linebackers, it’s about Jack Youngblood playing with a busted leg, Lawrence Taylor wreaking havoc on the offense and Reggie White making the other guy wish he put a little

334. John Turney, *Pro Football Journal: The First All-Madden Team - 1984*, PRO FOOTBALL J. (May 18, 2016), <http://nflfootballjournal.blogspot.com/2016/05/the-first-all-madden-team-1984.html>; JOHN MADDEN WITH DAVE ANDERSON, *ALL MADDEN: HEY, I’M TALKING PRO FOOTBALL!* 19 (HarperCollins Publishers 1996).

335. Len Pasquarelli, *Young Fans Introduced to NFL Through Madden Games*, ESPN (Feb. 4, 2006), http://www.espn.com/nfl/columns/story?columnist=pasquarelli_len&id=2319004.

336. *Id.*

337. Matthew Coller, *If the All-Madden Team Still Existed, Who Would Make It?*, 1500 ESPN TWIN CITIES (Jan. 29, 2017), <http://www.1500espn.com/vikings-2/2017/01/madden-team-still-existed-make/>.

338. Madden was inducted into the Pro Football Hall of Fame in 2006. Pasquarelli, *supra* note 335.

339. Coller, *supra* note 337. See Mike Waddell, *Tom Waddle 1991 Season All-Madden Show*, YOUTUBE (Jan. 16, 2008), https://www.youtube.com/watch?time_continue=4&v=gRpAApFyokU.

more in the collection plate at church. It's about a guy who's got a dirty uniform, mud on his face and grass in the ear hole of his helmet."³⁴⁰

Madden also created a special 10th Anniversary All-Madden team in 1994, an All-Madden Super Bowl Team in 1997 and an All-Time All-Madden team in 2000.³⁴¹ In fact, Coach Madden is still with sports fans today, but it is due to his move into the video game market. In 1988, the first version of the long-running *Madden Football* video game series was released.³⁴² For almost thirty years, *Madden Football* has influenced the way the actual game of football is played.³⁴³ In addition, the NFL "takes *Madden [Football]* very seriously. The game has become a way for the league to hold back encroaching hordes of young, shaggy, soccer-loving misfits and hook yet another generation on pigskin."³⁴⁴ In fact, it has even been surmised "that the *Madden* franchise is regarded by the NFL as the league's '33rd franchise.'"³⁴⁵

It appears that Coach Madden was always proud of each version of the video game bearing his name, commenting that "[i]t's a way for people to learn the game and participate in the game at a pretty sophisticated level." One particular ramification of *Madden Football* about which the Hall of Famer has paternal pride is how the video game changed the way fans now watch live football games at home.³⁴⁶ "I really knew [what *Madden Football* accomplished] when I was at Fox," Coach Madden expressed to one interviewer.³⁴⁷ "David Hill, the president of Fox Sports at the time, had a meeting with a bunch of us, and he said, 'What we want to do is make our game on television look like the video game.'"³⁴⁸ It was clear which video game Hill was referencing.³⁴⁹ The game which "showed visible lines of scrimmage

340. JOHN MADDEN WITH DAVE ANDERSON, *supra* note 334, at 18. See Justin Block, *The 25 Gutsiest Performances in Sports History*, COMPLEX (June 19, 2013), <http://www.complex.com/sports/2013/06/the-25-gutsiest-performances-in-sports-history/>. The article discusses how Los Angeles Rams player, Jack Youngblood, broke his leg in a game against the Dallas Cowboys and still finished the game, "played in the NFC Championship a week later, and then in the Super Bowl a week after that." *Id.* The article also recognizes other football greats who played injured, including San Francisco 49ers defensive back, Ronnie Lott, who finished a game with a crushed pinky that had to be amputated later. *Id.*

341. JOHN MADDEN WITH DAVE ANDERSON, *supra* note 334, at 18.

342. *Madden NFL All-25: Coach John Madden*, EA SPORTS (July 25, 2013), <https://www.ea-sports.com/madden-nfl/news/2013/all-25-john-madden>.

343. Tom Bissell, *Kickoff: Madden NFL and the Future of Video Game Sports*, GRANTLAND (January 26, 2012), <http://grantland.com/features/tom-bissell-making-madden-nfl/>.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

floating beneath players' feet . . . and the forward-pointing yardage arrows."³⁵⁰ This "visual language" could only be traced directly to one football video game - *Madden Football*.³⁵¹ Clearly, "[h]ow professional football is played from year to year is reflected in *Madden*, and how *Madden* is experienced is reflected in how professional football is watched. That cannot really be said about any other sports-game franchise."³⁵²

II. PART II

A. *The Intersection Between Football and Popular Culture*

Commissioner Pete Rozelle and Coach John Madden didn't create the current football culture in America alone. They were assisted by a three-step process composed of (1) the cultivation theory, (2) heuristic reasoning, and (3) resonance.

1. Football, the Cultivation Theory, and Heuristic Reasoning

When televised football becomes a viewer's primary source of information about the game, "continued exposure to its messages is likely to reiterate, confirm, and nourish (i.e. "cultivate") their values and perspectives."³⁵³ This process is identified as the "cultivation theory" or "cultivation effect."³⁵⁴ This phenomenon serves as a link between fans and the exciting, though fabricated, world of football that is the brainchild of the television industry.

Underlying the cultivation theory is a mental process known as heuristic reasoning.³⁵⁵ Heuristic reasoning comes into play when viewers make "a social

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. The "cultivation theory" is also sometimes referred to by various scholars as the "cultivation effect" or the "cultivation hypothesis." See, e. g., W. James Potter & Ik Chin Chang, *Television Exposure Measures and the Cultivation Hypothesis*, 34 J. BROADCASTING & ELECTRONIC MEDIA 313 (1990). While scholars have advanced a number of theories to explain the influences of television on a viewer's perception, beliefs, and attitudes, the "cultivation theory" or "cultivation effect" is the most prominent. See Steven Eggermont, *Television Viewing, Perceived Similarity, and Adolescents' Expectations of a Romantic Partner*, 48 J. BROADCASTING & ELECTRONIC MEDIA 244, 248 (2004). One alternative approach to the cultivation theory to determine how viewers process legal popular culture is the Elaborative Likelihood Model. For an excellent discussion of this method, see Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion* in 19 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 123 (discussing the central and peripheral routes to persuasion to explain how attitudes are shaped, formed and reinforced by persuasive arguments to determine the effectiveness of persuasive communication).

355. Shrum, *supra* note 303, at 262 (1998) (Heuristic reasoning or the heuristic process model "refers to a limited mode of processing that is relatively effortless and expends few cognitive resources.").

judgment relying upon “rules of thumb” instead of engaging in an in-depth memory search to make a decision or form a judgment.”³⁵⁶ Examples of using such simple rules to make judgments might be “all football players are tough” or “no gain without pain.” To pare the concepts down, the cultivation/heuristic reasoning theory suggests that over time, exposure to films about football or consistently viewing televised games will subtly “cultivate” or influence viewers’ perceptions of the reality of playing the game.³⁵⁷ Essentially, the more fans watch football, the more likely they are to believe what is shown on the screen.³⁵⁸ For example, for over twenty years, between 1986 - 2010, “a recurring opening sequence on ‘Monday Night Football’ featured an image of two helmets crashing into each other and exploding into smithereens.”³⁵⁹ When viewers are repeatedly exposed to such a particular television image, their views of social reality are “cultivated” and eventually the viewer will presume that the television depiction of violence is not a product of someone’s imagination, but rather is a reflection of the truth about the way the a talented, dedicated player should play the game.³⁶⁰

If viewers also employ heuristic “rules of thumb” reasoning “as mental short-cuts to come up with quick answers,” they will gravitate towards the information that is the most accessible to them.³⁶¹ Arguably, the information stored in their memories about how football should be played which is readily available comes from television viewing.³⁶² Depending on how recently a football game was seen, how often football is watched, and the extent of the game’s “dramatic nature” and the “vividness” of the coverage of the play, in particular the coverage of tackles, sacks, hits, and injuries on the field, the more accessible this information about the game of football will be to the viewer when

356. Taylor Simpson-Wood, *The Rise and Fall of Bad Judge: Lady Justice is No Tramp*, 17 TEX. REV. ENT. & SPORTS L. 1, 8 (2015) (citing Shrum, *supra* note 303, at 262) (When viewers make “an exhaustive search of memory for information pertaining to a particular decision,” they are engaging in “systematic processing” in order to “scrutinize a great deal of information in an effort to form a judgment.”).

357. GERBNER ET AL., *Growing Up With Television: The Cultivation Processes*, in MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 43, 46-47; JAMES SHANAHAN & MICHAEL MORGAN, TELEVISION AND ITS VIEWERS: CULTIVATION THEORY AND RESEARCH (1999).

358. See Potter & Chang, *supra* note 354, at 5 (discussing “that within mass media studies, [the] social construction of reality perspective has been called the cultivation hypothesis” and that “[i]ts proponents argue that the more people are exposed to the mass media, especially television, the more they will come to believe that the real world reflects media content.”).

359. Katie Thomas, *N.F.L. 's Policy on Helmet-to Helmet Hits Makes Highlights Distasteful*, N.Y. TIMES, Oct. 21, 2010, <https://www.nytimes.com/2010/10/22/sports/football/22hits.html>.

360. *Id.*

361. Simpson-Wood, *supra* note 356, at 9.

362. *Id.*

forming an opinion or making a judgment about how players should play the game.³⁶³

Of key importance to this process is the omission by viewers to consistently store the information learned as fact or fiction.³⁶⁴ This failure to “source discount” means that the viewer may not recall that the information being accessed to make a judgment came from an announcer who works for the network and is paid to make the brutal game exciting, acceptable, and the norm. Instead, viewers tend to treat the commentary as truth.³⁶⁵ The reality of this brutality and dangers of the game in terms of concussions and CTE has resulted in some football analysts and commentators resigning, or perhaps been given the opportunity to depart, from jobs previously held for years.

For example, the main reason that Bob Costas retired early and did not host a final Super Bowl was his “dampening enthusiasm for football.” According to Costas, “[t]he decision” between Costas and NBC “was mutually agreeable” and he expressed that he was “actually happy about it” because he had “long had ambivalent feelings about football”³⁶⁶ Those feelings were amply expressed in November 2017, at a seminar held at the University of Maryland, in which Costas “offered a bleak assessment of football’s future.”³⁶⁷ According to Costas, even prior to the seminar, he had expressed his concerns about the “undeniable connection” between foot and brain trauma a number of times over the past several years.³⁶⁸ He felt compelled to speak out “[b]ecause the evidence is overwhelming and the effects are often devastating. It’s the elephant in the stadium at every game whether others choose to acknowledge it or not. And it’s not going away.”³⁶⁹

Another well-known ESPN analyst for college football, who walked away from one of the most coveted jobs in sports—broadcasting as a color commentator, is former professional player Ed Cunningham.³⁷⁰ According to Cunningham, “the hits kept coming, right in front of him, until . . . he could not,

363. *Id.*

364. See MICHAEL ASIMOW & SHANNON MADER, *LAW AND POPULAR CULTURE* 56 (Peter Lang Inc., International Academic Publishers 2d ed. 2013).

365. *Id.*

366. John Ourand, *NBC’s Bob Costas: Decision to Skip Super Bowl “Mutually Agreeable”*, SPORTSBUS. DAILY (Jan. 24, 2018), <https://www.sportsbusinessdaily.com/Daily/Morning-Buzz/2018/01/24/Costas.aspx>.

367. *Id.*

368. *Id.*

369. *Id.*

370. John Branch, *ESPN Football Analyst Walks Away, Disturbed by Brain Trauma on Filed*, N.Y. TIMES, Aug. 30, 2017, <https://www.nytimes.com/2017/08/30/sports/espn-ed-cunningham-football-concussions.html>.

in good conscience, continue his supporting role in football's multibillion-dollar apparatus."³⁷¹ Cunningham's ethical concerns are not hypothetical. They are personal. In an interview with the *New York Times*, he expressed that he "know[s] a lot of people who say: 'I just can't cheer for the big hits anymore. I used to go nuts, and now I'm like, I hope he gets up It's changing for all of us. I don't currently think the game is safe for the brain.'"³⁷² Then he added "[a]nd, oh, by the way, I've had teammates who have killed themselves. Dave Duerson put a shotgun to his chest so we could study his brain."³⁷³ In addition to former teammate Duerson, who was diagnosed posthumously with CTE, Cunningham also played with Andre Waters and "has vivid memories of being humiliated in his first college start by future Hall of Fame linebacker Junior Seau."³⁷⁴ Both Waters and Seau committed suicide and were later diagnosed from suffering from CTE.³⁷⁵

In response to Cunningham's resignation, play-by-play announcer, Mike Patrick, who was usually paired with Cunningham to cover the Saturday afternoon games on ESPN and ABC, explained that from his perspective, "[t]he sport is at a crossroads. I love football - college football, pro football, any kind of football. It's a wonderful sport. But now I realize what it can do to people, that it can turn 40-, 50-year-old-men into walking vegetables, how do you stay silent?"³⁷⁶

Cumulatively, however, the greater the amount of football consumed, the more viewers will adopt the simulated values, attitudes, beliefs, and perceptions

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* Even former players have expressed that if they knew what they know now about the danger of the game in terms of causing head trauma, they might well have never played. In an interview with *USA Today*, former Oakland Raiders star, Bo Jackson, told the reporter, "If I knew back then what I know now . . . I would have never played football. Never. I wish I had known about all of those head injuries, but no one knew that. And the people that did know that, they wouldn't tell anybody." Bob Nightengale, *Bo Jackson's Startling Hindsight: 'I Would Have Never Played Football'*, USA TODAY, Jan. 13, 2017, <https://www.usatoday.com/story/sports/mlb/columnist/bob-nightengale/2017/01/12/bo-jackson-football-cte-mlb/96492338/>. Jackson went on to note:

The game has gotten so violent, so rough. We're so much more educated on this CTE stuff . . . , there's no way I would ever allow my kids to play football today. Even though I love the sport, I'd smack them in the mouth if they said they wanted to play football. I'd tell them, 'Play baseball, basketball, soccer, golf, just anything but football.'

Id.

portrayed on screen as their own.³⁷⁷ The ramification of this “internalization” of the football images and messages of a televised game is that viewers now see this information as fact.³⁷⁸ Violence is not only acceptable, it is glorified.

2. Resonance and Disturbing Tales

Basically, there are three main ways that fans may gain knowledge about football. First, they could actually be playing the game or be close to someone who does. This clearly provides a first-hand experience of the physical aspects of the sport. Second, this knowledge may be acquired through attending games. Finally, they can watch the games on television or see the game portrayed in a film. It is interesting to note that the majority of fans today would rather watch a football game from the comfort of their own living room rather than attend the game.³⁷⁹ In light of the cultivation effect and heuristic reasoning, this is an important development.

As previously discussed, over time, heavy consumption of football by a viewer with little or no direct experience with the game produces long-term effects which, while small, gradual and indirect, are cumulative and significant. Ultimately, viewer beliefs, feelings, and attitudes about those who play professional football are altered.³⁸⁰

Finally, certain fans will form their opinion of the game from a combination of attending games and television. When the perceptions about the sport of fans are formed by simply being a spectator, whether from attending a game or watching it electronically, reinforced by actual incidents of player violence off the field, the result is another facet of the cultivation process known as resonance.³⁸¹

In essence, resonance refers to an intensified effect on viewers when what they see on television, i.e., player violence during a game, is confirmed by what they experienced in real life.³⁸² Such a confirmation by the news or social media

377. L.J. Shrum et al., *A Process Model of Consumer Cultivation: The Role of Television Is a Function of the Type of Judgment*, in *THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION* 177, 179 (Lawrence Erlbaum Associates 2003).

378. *Id.*

379. Rovell, *supra* note 304.

380. Shrum et al., *supra* note 377.

381. See L.J. Shrum & Valerie Darmanin Bischak, *Mainstreaming, Resonance, and Impersonal Impact: Testing Moderators of the Cultivation Effect for Estimates of Crime Risk*, 27 *HUM. COMM. RES.* 187 (2001).

382. Michael Pfau et al., *Television Viewing and Public Perceptions of Attorneys*, 21 *HUM. COMM. RES.* 307, 310 (1995). (“[W]hen experiences and television images are consonant, people’s experiences ‘resonate and amplify’ cultivation patterns. This involves the cultivation process termed ‘resonance,’ and explains the way that direct experience and TV play off of each other, thus reinforcing the social order and the power structure.”).

amplifies the cultivation effect. While viewers may not have directly witnessed the violent actions of a player, when such factual information is learned from a reliable source, arguably it is basically synonymous to a viewer gaining first-hand knowledge. Consequently, off-field domestic violence involving players is extremely influential in terms of creating a resounding resonance for fans in two respects: because football players are inherently violent outside of the game, if they are injured on the field, they brought it upon themselves; ergo, the fans bear no responsibility nor are they complicit in encouraging the violent nature of the game.³⁸³

a. Actions Speak Louder Than Words: Examples of Violence on the Field

For fans, a prime example of players being encouraged to commit acts of violence on the field is the bounty system. In 2007:

ESPN reported that [Green Bay] Packers defenders were paid \$500 each by members of the team if they could hold Adrian Peterson to less than 100 yards rushing, and that defenders later were offered \$500 each if they could hold the Carolina Panthers to under 60 yards rushing as a team.³⁸⁴

After an investigation, the NFL declined to punish the Packers and released the following statement: “The club has handled the matter with the players and the incentive pool has been discontinued.”³⁸⁵

383. *Id.*

384. NFL, ‘Bounty’ System Probe is Well-Worn Territory for NFL, NFL (July 26, 2012), <http://www.nfl.com/news/story/09000d5d827678cd/article/bounty-system-probe-is-wellworn-territory-for-nfl> (finding that in addition to a bounty program by the New Orleans Saints which ran from 2009-2011, at least four other teams in league history have been investigated for suspected ties to “bounty” systems,” the 1985 Chicago Bears, 1989 Philadelphia Eagles, 2007 Green Bay Packers, and the 2008 Baltimore Ravens). Although ultimately escaping punishment, according to former players, the Washington Redskins also employed a similar bounty system to that of the Saints where they were “compensated more for a kill shot [a hit that knocks another player out of the game] than you did other hits” with “compensation ranging from “hundreds to thousands of dollars” and the largest some received estimated to be around \$8,000. Mark Maske, *Washington Redskins, New Orleans Saints Had Bounty Systems that Paid for Big Hits*, WASH. POST, Mar. 22, 2012, https://www.washingtonpost.com/blogs/football-insider/post/new-orleans-saints-had-bounty-system-that-paid-for-injuring-opponents-nfl-announces/2012/03/02/gIQAP-NDDnR_blog.html?utm_term=.fd3ee25047ee. Matt Bowen, a former Redskins defender, wrote the following in the Chicago Tribune:

We targeted big names, our sights set on taking them out of the game. Price tags started low during regular season – a couple hundred bucks for going after the quarterback hard or taking a running back out below the knee. Chop him down and give a quick smile when you got back to the huddle. You just got a bonus.

Matt Bowen, *Bounties Part of Game Across the NFL*, CHI. TRIB., Mar. 2, 2012, <https://www.chicagotribune.com/sports/ct-xpm-2012-03-02-ct-spt-0304-bowen-nfl-20120304-story.html>.

385. NFL, *supra* note 384.

Again, in 2008, Terrell Suggs, a linebacker for the Baltimore Ravens, made waves when he shared “on an Atlanta sports talk show that the Ravens had a ‘bounty’ on Pittsburgh Steelers wide receiver Hines Ward and running back Rashard Mendenhall. Mendenhall left the game against the Ravens with a season-ending shoulder injury from a Ray Lewis tackle.”³⁸⁶ After Sugg’s comments were made, “former Ravens coach Brian Billick confirmed that there had been bounties during his nine seasons leading the team. ‘Every team does it,’ Billick said on “The Dan Patrick Show.” Now, to go out and talk publicly about it is about as foolish a thing as I’ve ever heard.”³⁸⁷ Later, Suggs “said he misspoke when he used the word bounty with respect to Ward and Mendenhall. No punishment was handed down, but the league said the second meeting of these teams would be watched very closely.”³⁸⁸

A final example of brutality as the mentality of the game of football is an episode referred to as “Bountygate,” which involved the New Orleans Saints engaging in a bounty program.³⁸⁹ Commissioner Roger Goodell concluded that that between 2009 through 2011, “coaches and 22-27 players participated in a bounty system that gave cash rewards for knocking opponents out of games”³⁹⁰

In a written statement, Goodell made it clear that in the NFL, there is no place “for deliberately seeking to injure another player, let alone offering a reward for doing so. . . . Programs of this kind have no place in our game and we are determined that bounties will no longer be a part of the NFL.”³⁹¹

Some players viewed the league’s investigation of the Saint’s bounty system as an attempt to change what they considered an “on-field code, one that attempts to take star and others off the field with crushing, but legal blows.”³⁹² Former Redskins cornerback, Shawn Springs, explained that, from a player point of view, it’s impossible to play in the NFL unless you realize:

[A]t some point, you’re gonna go out there and try to knock the [wind] out of somebody We all know that. That’s the

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.* The sanctions levied against the Saints “were unprecedented” and included a \$500,000 fine, losing a 2013 second-round draft pick, and the suspension of Coach Sean Payton for all of the 2012 season. *Id.*

391. Mark Maske, *NFL Hits Saints with Harsh Penalties for Bounty System; Redskins Cleared for Now*, WASH. POST, Mar. 21, 2012, https://www.washingtonpost.com/sports/redskins/nfl-hits-saints-with-harsh-penalties-for-bounty-system-redskins-cleared-for-now/2012/03/21/gIQA22dbSS_story.html?utm_term=.b18d6cfa1f44.

392. *Id.*

underlying rule of the NFL. So when it comes down to it, it's gonna be him or me. But that's within the rules of the game.³⁹³

He went on to support his position by pointing out that the “the first thing coaches say to kids in Pop Warner [youth football]” is “‘Go in there and hit somebody.’ They say, ‘You gotta knock his head off.’ And you know how many coaches and dads go out there and yell, ‘You gotta get him.’ So that’s instilled in you at an early age.”³⁹⁴

Perhaps even more telling were the comments by Pete Kendall, a former Redskins offensive lineman, during a phone interview with the Washington Post:

When you boil it right down to it, violence is obviously a large part of what the game is . . . It’s a game where you’ve got 11 guys trying to overwhelm another group of 11 guys. And intimidation is part of that. But that being said, going out of one’s way to specifically incentivize and reward somebody for injuring another player . . . that makes me a little bit uncomfortable.³⁹⁵

Arguably, all fans and viewers of the game of football should be a bit more than just “a little bit uncomfortable” with a game which encourages hits which take opponents out of the game. Ironically, most fans feel they bear no responsibility for engaging in what could be viewed as unethical behavior by “paying money to persuade” players “to permanently damage themselves” for the fan’s entertainment.³⁹⁶ According to ethicist, Jack Marshall, the president and founder of ProEthics, football fans avoid facing that reality by rationalizing the situation. Irrespective of the violent nature of the game, at the end of the day, a football player is not conscripted. It is his voluntary decision to place himself in harm’s way, even in situations where the ramifications of injury might be fatal.³⁹⁷ Consequently, because it is the player’s choice to play, it is fine for fans to watch. In other words, if the players are “happy for us to pay them to cripple themselves, ergo, we shouldn’t care about it. If they want to do

393. Jason Reid, *Gregg Williams’s Bounty System Flourished in Warped NFL Culture*, WASH. POST, Mar. 6, 2012, https://www.washingtonpost.com/sports/redskins/gregg-williamss-bounty-system-flourished-in-warped-nfl-culture/2012/03/06/gIQA1T3ZvR_story.html?utm_term=.f36e887df967.

394. *Id.*

395. *Id.*

396. Michel Martin, *Are Fans to Blame for Violence in NFL?*, NPR (Mar. 8, 2012), <https://www.npr.org/2012/03/08/148226481/are-fans-to-blame-for-violence-in-nfl> (interview between Michel Martin, host of “Tell Me More,” and Jack Marshall, president and founder of ProEthics).

397. Sacks et al., *Aggression and Violence in Sport: Moving Beyond the Debate*, 1 INT’L J. SPORT & EXERCISE PSYCHOL. 167, 175 (2003), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4743757/>.

it, that's fine."³⁹⁸ But as Marshall points out, "[e]verybody will have a price and they may feel now, when they're crippling themselves -that it's a good buy." However, "later on, when their families have to care for them when they're in their 50s and they're . . . suffering premature dementia and simply can't function" the cost paid may seem way too high.³⁹⁹

Further, fans often have the benefit of distance. While the game may be "live" on TV, seeing a rookie cornerback down and out as a result of being blindsided by an opposing blocker with a helmet-to helmet hit or witnessing an injury causing tackled resulting in a broken leg arguably has a different impact when viewed on TV as compared to being on the sidelines and hearing the hit. There is even some cushioning from the actual level of violence occurring on the field when sitting in the stands. But, when watching the game on television, which most fans do, the screen, the input of the announcers, and often a commercial break after an injury, create a distance or a barrier between the viewer and the true nature of the game.⁴⁰⁰

b. Actions Speak Louder Than Words: Instances of Violence Off-the-Field

Imagine the following:

A couple is arguing as they cross a casino lobby in Atlantic City, heading for the elevator. You see her push at him. They enter, she pushes the button for their floor, but before the elevator doors even close, the elevator surveillance camera catches the man slapping the woman across the head. She quickly launches herself at him and he punches her in the temple. As she falls, her head connects with the elevator's metal safety rail, knocking her unconscious. The elevator door opens and the man tries to pick the woman up, but he is unable to lift her unconscious body. Dead weight is hard to move even for 5-foot-8, 206-pound running back in the NFL.⁴⁰¹ Eventually, he is able to drag her part way out of the elevator, with her dress riding up above her thighs.⁴⁰²

398. Martin, *supra* note 396.

399. *Id.*

400. *Id.*

401. Ray Rice, RB, NFL, <http://www.nfl.com/player/rayrice/941/profile> (last visited Dec. 13, 2018).

402. See e.g., Ray Rice – ELEVATOR KNOCKOUT ... Fiancee Takes Crushing Punch [Video], TMZ SPORTS, http://www.t TMZ.com/videos/0_ekaficqq/ (last visited Dec. 13, 2018).

Such was the footage contained in the shocking, graphic video catching Ray Rice knocking out his then fiancée, now wife, Janay Rice.⁴⁰³ Not surprisingly, the video went viral, and currently has garnered over twelve million hits on YouTube.”⁴⁰⁴

More recently, in April 2018, Reuben Foster, a linebacker for the San Francisco 49ers, was “charged with three felonies stemming from an incident with his girlfriend” in February 2018.⁴⁰⁵ Specifically, he is charged with “felony charges of domestic violence with an allegation of inflicting great bodily injury, forcefully attempting to prevent a victim from reporting a crime, and possession of an assault weapon.”⁴⁰⁶ Tramaine Block, a cornerback for the Minnesota Vikings, was luckier. In April 2017, Brock “was arrested on suspicion of felony domestic violence” after being “accused of punching his girlfriend and attempting to strangle her.”⁴⁰⁷ In a letter dated January 5, 2018, league investigators determined that there was “insufficient evidence” to find that he had violated the NFL Personal Conduct Policy.⁴⁰⁸ Not an odd outcome considering that Brock’s girlfriend ultimately “refused to cooperate in the investigation.”⁴⁰⁹

In response to the Rice incident, Commissioner Goodell announced a new Personal Conduct Policy relating to punishment for domestic violence:

Effective immediately, violations of the Personal Conduct Policy regarding assault, battery, domestic violence or sexual

403. Brittany Britto, *Former Raven Ray Rice, Wife Janay Expecting Second Child*, BALT. SUN, May 4, 2016, <http://www.baltimoresun.com/features/baltimore-insider-blog/bal-former-ravens-player-ray-rice-and-wife-janay-expecting-second-child-20160504-story.html> (discussing that “[a]fter a domestic violence incident in an Atlantic City casino in February 2014 . . . Rice was indicted on aggravated assault charges on March 27; the two married on March 28.”).

404. TMZSports, *Ray Rice Knocked Out Fiancee – FULL VIDEO*, YOUTUBE (Sept. 8, 2014), <https://www.youtube.com/watch?v=VbwTMJroTbI> (showing that as of November 10, 2018, the video has been viewed 12,004,893 times).

405. Scooby Axson, *Reuben Foster: 49ers LB Charged with Domestic Violence*, SPORTS ILLUSTRATED, Apr. 12, 2018, <https://www.si.com/nfl/2018/04/12/san-francisco-49ers-reuben-foster-domestic-violence-charge>.

406. *Id.* For an excellent article on the history of the NFL and domestic violence, see Jerri Kay-Phillips, *Unnecessary Roughness: The NFL’s History of Domestic Violence and the Need for Immediate Change*, 5 BERKELEY J. ENT. & SPORTS L. 65 (2016). See also SI WIRE, *15 NFL Players Arrested for Violence Against Women in Last Two Years*, SPORTS ILLUSTRATED, Sept. 11, 2014 (discussing the 33 players who were arrested between Jan. 1, 2012 to Sept. 17, 2014, “on charges involving domestic violence, battery, assault and murder . . . [and] at least 15 of those players were arrested for violence against women.”).

407. Adam Wells, *Tramaine Brock Won’t Face NFL Punishment After Domestic Violence Arrest*, BLEACHER REPORT (Jan. 5, 2018), <http://bleacherreport.com/articles/2752597-tramaine-brock-wont-face-nfl-punishment-after-domestic-violence-arrest>.

408. *Id.*

409. *Id.*

assault that involve physical force will be subject to a suspension without pay of six games for a first offense, with consideration given to mitigating factors, as well as a longer suspension when circumstances warrant.⁴¹⁰

A player who is guilty of a second violation, will be “ban[ned] from the league, with the opportunity to apply for reinstatement after one year.”⁴¹¹

While the words sound good, it does not seem that the League general managers are taking the crime of domestic violence seriously. Why should they, when for years the League’s “punishment of personal conduct violations has been inconsistent and on average less harsh than its punishment of drug offenses.”⁴¹² Not surprising. Bashing a woman does not interfere with player performance; drugs can.

The lack of respect given to Goodell’s new sanctions for violating the NFL Personal Conduct Policy and the failure of teams to take domestic violence as seriously as they should was evident at the 2017 draft. For example, “[i]n the first round, the Oakland Raiders drafted Gareon Conley, who has been accused of rape [and] [i]n the second round, the Cincinnati Bengals selected Joe Mixon, who in a much-viewed video punches a woman so hard that she falls down unconscious.”⁴¹³ It appears that general managers just do not care in light of the drafting of “at least a half-dozen players who have been accused of physical or sexual assaults.”⁴¹⁴ Instead, these players were welcomed into the league “with little more than a shrug by their new teams.”⁴¹⁵ In response to why he drafted Dede Westbrook, “whose talent as a wide receiver – he was a finalist for the Heisman Trophy – apparently outweighed his two arrests for assaulting the mother of his children,” Dave Caldwell, the general manager of the Jacksonville Jaguars, replied “I think we have all been accused of things Not all of us, . . . but many of us have been accused of things.”⁴¹⁶ The bottom line is that football is a money-making proposition and teams will try to draft the most talented, aggressive players they can.

410. Allison McCann, *The NFL’s Uneven History of Punishing Domestic Violence*, FIVETHIRTYEIGHT (Aug. 28, 2014), <https://fivethirtyeight.com/features/nfl-domestic-violence-policy-suspensions/>.

411. *Id.*

412. *Id.*

413. Stephen L. Carter, *The NFL Has a Serious Violence Problem*, CHI. TRIB., May 2, 2017, <http://www.chicagotribune.com/news/opinion/commentary/ct-nfl-sexual-assault-violence-20170502-story.html>.

414. Nancy Armour, *NFL Draft Shows Teams Still Don’t Care About Domestic Abuse*, USA TODAY, May 2, 2017, <https://www.usatoday.com/story/sports/columnist/nancy-armour/2017/05/01/nfl-draft-domestic-violence-joe-mixon/101176656/>.

415. *Id.*

416. *Id.*

Lack of respect for the required penalty of a six-game suspension has also been evident by the stalling tactics used by the NFL's office to keep players on the field. A prime example is that of Dallas Cowboys running back, Ezekiel Elliot. While he eventually was suspended for six games, it took over a year for the suspension to go into effect. In July 2016, Elliot's former girlfriend, from Columbus, Ohio, filed a police report alleging domestic violence.⁴¹⁷ The NFL took over a year to investigate these charges, and finally determined that Eliot had committed violent acts toward his girlfriend on three separate occasions.⁴¹⁸ In August 2017, the suspension was issued. However, he was on the field through Week 9 of the season as his suspension was repeatedly on-again, off-again as a result of a suit filed by the NFL Players Association (NFLPA) against the NFL which alleged that the league's "disciplinary process was fundamentally unfair."⁴¹⁹ While the NFL ultimately prevailed, the victory is not "one that will inspire a lot of confidence in the league's ability to adjudicate incidents of domestic violence."⁴²⁰ While the league has made strides by forming a league-wide "Social Responsibility" team and is making a true effort to educate its players and staff about domestic violence and sexual assault, the take-away for fans is that "the state of the NFL's domestic violence initiatives" haven't really changed much since 2015 or 2016.⁴²¹ They continue to be "[a] work in progress whose future success is anything but guaranteed."⁴²²

For the fan who sees violence on the field and experiences resonance as he or she reads about or sees videos showing the violence of the players off the gridiron, violence has become the norm. As such, it is acceptable behavior.⁴²³ This legitimizes the position that "*Volenti non fit injuria* - to one who consents no injury is done."⁴²⁴ Fans bear no responsibility for the welfare of the players.

417. Jeanna Thomas, *The Ezekiel Elliot Suspension Explained in a 2-Minute Read*, SB NATION (Dec. 24, 2017), <https://www.sbnation.com/2017/11/19/16666714/ezekiel-elliott-nfl-suspension-cowboys-ex>.

418. *Id.*

419. *Id.*

420. Lindsay Gibbs, *Three Years After Ray Rice, the NFL's Domestic Violence Initiatives Are Still in Flux*, THINKPROGRESS (Nov. 3, 2017), <https://thinkprogress.org/nfl-domestic-violence-year-3-1cddcf8be60/>

421. *Id.*

422. *Id.*

423. Sacks et al., *supra* note 397.

424. *Id.*

B. That Unique Animal, the Fan-atical Football Fan

The word fan is derived from “the Modern Latin *fanaticus*, meaning . . . ‘insanely but divinely inspired.’”⁴²⁵ Die-hard fans are “committed” to their team almost from the “cradle to the grave.”⁴²⁶ Psychologists have found that this emotional tie is the result of a fan viewing his or her team as “an expression of a fan’s sense of self.”⁴²⁷ Consequently, when a fan uses the word “we” in referring to his team, “[i]t is not an obnoxious affectation.”⁴²⁸ Rather, the fan’s brain is literally confused “about what is ‘me’ and what is ‘the team.’”⁴²⁹ In a variety of “unconscious ways, a fan mirrors the feelings, actions and even hormones of the players.”⁴³⁰ When their team wins, they experience “BIRGing,” “Basking in Reflected Glory.”⁴³¹ When their team loses, they are subject to “CORFing,” with the result that the fan “Cut off Reflected Failure.” It is not “we” lost, but “they” who lost.⁴³² Not only are “BIRGing” and “CORFing” a cognitive phenomenon, such behaviors are also the result of “physiological changes.” A 1998 study found that there is approximately a 20% increase in the testosterone levels of fans whose team won, while there is a decrease of 20% in the fans of the team that lost.⁴³³ Consequently, a fan’s “self-esteem rides on the outcome of the game and the image of the franchise.”⁴³⁴ While there are positive results from this dependence on the outcome of a football game, including not only “self-esteem,” but also a sense of belonging, identity, and pride, there is a correlating downside.⁴³⁵ In contrast to fans who can boast about how “we won” and who feel “stronger and more

425. Thomas Van Schaik, *The Psychology of Social Sports Fans: What Makes Them So Crazy?*, SPORTS NETWORKER, <http://www.sportsnetworker.com/2012/02/15/the-psychology-of-sports-fans-what-makes-them-so-crazy/> (last visited Dec. 13, 2018).

426. *Id.*

427. Eric Simons, *The Psychology of Why Sports Fans See Their Teams As Extensions of Themselves*, WASH. POST, Jan. 30, 2015, https://www.washingtonpost.com/opinions/the-psychology-of-why-sports-fans-see-their-teams-as-extensions-of-themselves/2015/01/30/521e0464-a816-11e4-a06b-9df2002b86a0_story.html?utm_term=.2448e7c41e3b.

428. *Id.*

429. *Id.*

430. *Id.*

431. Susan Krauss Whitbourne, *The Psychology of Sports Fans*, PSYCHOL. TODAY (Dec. 30, 2011), <https://www.psychologytoday.com/us/blog/fulfillment-any-age/201112/the-psychology-sports-fans>.

432. *Id.*

433. Paul C. Bernhardt et al., *Testosterone Changes During Vicarious Experiences of Winning and Losing Among Fans at Sporting Events*, 65 PHYSIOLOGY & BEHAV. 59 (1998).

434. Simons, *supra* note 427.

435. *Id.*

optimistic, and prouder of themselves,” the fan whose team lost “feels defeated, depressed and angry.”⁴³⁶

The early draft of the *Concussion* script contained a stunning speech by Dr. Bailes that brilliantly captures the nature of the game and the symbiotic relationship of fans to those they view as “their” players.

The entire life of the professional athlete – the football player more than any other – is built on one principle: vanquish and destroy. From the time he’s 14 or 15, the world treats him different. His family re-forms around his needs. He becomes larger than life, even to his parents, and what’s rewarded isn’t grades or good behavior but his violence on the field. Most of the time, his family doesn’t have much else going on, so they put everything they have into this kid. By the time he’s 18, there isn’t a thing he wants that he doesn’t get: girls, cars, clothes, maybe money. He’s treated like a god. By the time he’s 21, vanquish isn’t what he does, it’s literally oxygen. He now lives in a world where nothing else matters. He’s not just elite. He’s a deviant. (*so*) So you take *that* guy, and you give him *this* disease? No one wants to know their gods can [redacted] their pants or drool like babies. They go die in the dark, and only come out in a box.⁴³⁷

The conversion to becoming a fan of a game and forming an attachment to a particular team or player begins at a fairly early age. Somewhere between seven and eleven years old, children have developed the skill of concrete operational thinking.⁴³⁸ At this point, they are capable of forming an emotional, long-term attachment to a sport, team, or particular athlete.⁴³⁹ During the

436. Bernhardt et al., *supra* note 433. Another disturbing aspect of fan “team identification,” meaning the degree of psychological dependency fans have on the whether their team is winning or losing, is that “[s]tudies have shown that violence in the game, particularly if perceived [by the fan] as unfair, increases the likelihood of violent acts by the spectators.” Leonard L. Glass, *The Psychology of Violence in Sports – On The Field and in the Stands*, WBUR 90.9 (Mar. 18, 2014), <http://www.wbur.org/cognoscenti/2014/03/18/sports-violence-psychology-leonard-l-glass>. Even more concerning is the fact that family violence can be linked to team performance on game days. A study has shown that “upset losses (defeats when the home team was predicted to win by four or more points) lead to a 10% increase in the rate of at-home violence by men against their wives and girlfriends.” David Card & Gordon B. Dahl, *Family Violence and Football: The Effect of Unexpected Emotional Cues on Violent Behavior*, 126 Q.J. ECON. 103 (2011).

437. Korman, *supra* note 287 (the redacted text appears in the original).

438. Jeffrey D. James, *Becoming a Sports Fan: Understanding Cognitive Development and Socialization in the Development of Fan Loyalty 20-21* (1997) (unpublished Ph.D. dissertation, Ohio State University) (on file with Ohio Department of Higher Education).

439. *Id.*

“formative years,” there are a number of factors that primarily influence the development of fan loyalty, which include not only the child’s immediate family, but also their “peers, school, community groups, and media sources.”⁴⁴⁰ Fan loyalty, or “the degree to which an individual demonstrates continued support for a sport, team and/or player,” has two dimensions: behavioral and attitudinal.⁴⁴¹ The behavioral dimension of football fans is measured by how often a fan purchases tickets to a game, the amount of sport related merchandise purchased, and how frequently they watch football games.⁴⁴² The attitudinal dimension concerns the fan’s “psychological commitment” to a particular football team or player.⁴⁴³ Arguably, once that commitment is entrenched, fans will never waiver in their loyalty.⁴⁴⁴ In other words, they are “hooked.” This is not surprising. It has been proposed that being an American football fan satisfies some deep need in the human psyche to experience not just a football game, but reenact a ritual similar to those practiced by our more primitive ancestors.⁴⁴⁵ Engaging in the ritual of watching your favorite team play is more than just watching a sport; the experience is “both sacred and mysterious in the sense that the football ritual celebrates the Harvest and the fruits of vegetation, emphasizes the struggle between the forces of life and death, and re-enacts the creation of the universe.”⁴⁴⁶

One of the main values in being a sports fan is that, during this ritual, the fan is allowed “to feel real emotional investment in something that has no actual real-world consequences,” at least for the fan.⁴⁴⁷ “As a fan, you will feel actual joy or actual pain – this is precisely what non-sports-fans usually ridicule about being a sports fan – in relation to events that don’t really affect your life at all.”⁴⁴⁸ The most traumatic event that evokes the strongest reaction is “the epic collapse,” which occurs when there is an unexpected loss.⁴⁴⁹ The results of the game “fall[] outside [of] the emotional parameters of what the sports fan had signed up for.”⁴⁵⁰

440. *Id.*

441. *Id.*

442. *Id.*

443. *Id.*

444. Krauss Whitbourne, *supra* note 431.

445. Mark Axelrod, *Popular Culture and the Rituals of American Football*, 3 COMP. LITERATURE & CULTURE 1 (2001).

446. *Id.*

447. Adam Sternbergh, *The Thrill of Defeat for Sports Fans*, N.Y. TIMES MAG., Oct. 21, 2011, <https://www.nytimes.com/2011/10/23/magazine/the-thrill-of-defeat-for-sports-fans.html>.

448. *Id.*

449. *Id.*

450. *Id.*

C. *Four Lessons in Seduction: How Popular Culture Assisted in Enshrining Football As America's Secular Religion*

It is undeniable that witnessing the human spirit fight and often overcome the odds is uplifting and inspiring. In sports, rooting for the underdog who unexpectedly prevails makes fans feel good. “The brain processes this situation as out of the ordinary, but positive, so the rewards center of your brain is stimulated and releases hormones that make you happier.”⁴⁵¹ Not surprisingly, such occurrences are one of the key ingredients to a successful team sport film.⁴⁵² While such films include ennobling stories about players and coaches from the stadiums and arenas of America's most watched sports of baseball⁴⁵³ and basketball,⁴⁵⁴ a large percentage of them focus on the game of football.⁴⁵⁵ Such films encourage the love affair between fans and football. Four of the best examples of such films playing cupid are: *Knute Rockne All American*,⁴⁵⁶ *Rudy*,⁴⁵⁷ *Invincible*,⁴⁵⁸ and *The Replacements*.⁴⁵⁹

451. Julia Bernstein, *Why Do We Root for the Underdog*, BAYLOR C. OF MED. (Jan. 25, 2018), <https://www.bcm.edu/news/psychiatry-and-behavior/why-we-root-for-underdog>.

452. In addition to the rousing team sport films about baseball and basketball, there are also some very heart-warming films in other sporting areas, including: Ice Hockey films, such as *MYSTERY, ALASKA* (Baldwin/Cohen Productions 1999) and *MIRACLE* (Walt Disney Pictures 2004); boxing, with classics such as *THE CHAMP* (Metro-Goldwyn-Mayer 1931), *SOMEBODY UP THERE LIKES ME* (Metro-Goldwyn-Mayer 1956), *ROCKY* (Chartoff-Winkler Productions 1976), or *THE FIGHTER* (Closest to the Hole Productions 2010). Even horse racing has its share of films that can arguably move an audience to tears, from *NATIONAL VELVET* (Metro-Goldwyn-Mayer 1944) to *SEABISCUIT* (Universal Pictures 2003). It should be noted that the game of soccer is also on the verge of surpassing America's love of baseball. See Norman, *supra* note 1 (“Soccer now nearly matches baseball's popularity. Seven percent say it is their favorite sport to watch, the highest that sport has registered to date.”).

453. Films about baseball that are uplifting include: *THE PRIDE OF THE YANKEES* (Samuel Goldwyn Company 1942), *THE BINGO LONG TRAVELING ALL-STARS & MOTOR KINGS* (Motown Productions 1976), *THE NATURAL* (TriStar Pictures 1984), *FIELD OF DREAMS* (Gordon Company 1989), *MAJOR LEAGUE* (Mirage Enterprises 1989), *A LEAGUE OF THEIR OWN* (Columbia Pictures 1992), *ANGELS IN THE OUTFIELD* (Walt Disney Pictures 1994), *THE ROOKIE* (Walt Disney Pictures 2002), and *THE PERFECT GAME* (IndustryWorks Pictures 2009).

454. Rousing basketball films include: *HOOSIERS* (De Haven Productions 1986), *COACH CARTER* (MTV Films 2005), and *GLORY ROAD* (Walt Disney Pictures 2006).

455. Other football films, which would come under the heading of inspirational, include: *THE LONGEST YARD* (Paramount Pictures 1974), *REMEMBER THE TITANS* (Jerry Bruckheimer Films 2000), *GRIDIRON GANG* (Columbia Pictures 2006), *WE ARE MARSHALL* (Warner Bros. 2006), and *THE BLIND SIDE* (Alcon Entertainment 2009).

456. *KNUTE ROCKNE, ALL AMERICAN* (Warner Bros. 1940).

457. *RUDY* (TriStar Pictures 1993).

458. *INVINCIBLE* (Walt Disney Pictures 2006).

459. *THE REPLACEMENTS* (Warner Bros. 2000).

1. Lesson No. 1: Win One for the Gipper or How to Play America's Heart Strings

The 1940 film classic, *Knute Rockne All American*⁴⁶⁰ is based on the true life story and career of the Norwegian immigrant who played football at Notre Dame and then went on to become head coach of the Fighting Irish of Notre Dame from 1918 to 1930.⁴⁶¹ The film starred Pat O'Brien as Rockne and Ronald Reagan as his star player, George Gipp.⁴⁶² Rockne's success as a coach helped to catapult football from simply "a game to a colossal money-making enterprise" that "became a national craze with alarming rapidity just a few years after World War I" which began to "rival[] baseball as America's favorite team sport."⁴⁶³

Perhaps the most moving scene in the film occurs when Rockne gives his "Win One for the Gipper" half-time speech to inspire his team to re-group and go on to victory to defeat Army in 1928.⁴⁶⁴

The scene opens with the interior of the Notre Dame dressing room [at half-time]. The players, seated with blankets draped over their shoulders, are dejected and silent. The door pushes open and Rockne is wheeled in. [The players] look at Rockne (played by Pat O'Brien) in mute apology, then guiltily away, as if to avoid his eyes. [Rockne's] dark-circled eyes range over the players for a full moment of unbroken silence. Then, quietly, as if the game didn't matter to him:

ROCKNE:

Well, boys . . . I haven't a thing to say. Played a great game . . . all of you. Great game.

(He tries to smile.)

I guess we just can't expect to win 'em all.

(Rockne pauses and says quietly.)

I'm going to tell you something I've kept to myself for years -- None of you ever knew George Gipp. It was long before your time. But you know what a tradition he is at Notre Dame . . .

460. KNUTE ROCKNE, ALL AMERICAN, *supra* note 456.

461. *Id.*

462. *Id.*

463. Michael K. Bohn, *Notre Dame vs. Army: The Game That Changed College Football 100 Years Ago*, INDYSTAR, Oct. 30, 2013, <https://www.indystar.com/story/sports/college/2013/10/30/notre-dame-vs-army-the-game-that-changed-college-football-100-years-ago/3313083/>.

464. KNUTE ROCKNE, ALL AMERICAN, *supra* note 456.

(There is gentle, faraway look in his eyes as he recalls the boy's words).

And the last thing he said to me -- "Rock," he said - "sometime, when the team is up against it -- and the breaks are beating the boys -- tell them to go out there with all they got and win just one for the Gipper . . .

(Knuté's eyes become misty and his voice is unsteady as he finishes).

I don't know where I'll be then, Rock", he said - "but I'll know about it - and I'll be happy."

There is a hushed stillness as Rockne and the crowd of boys look at each other. In the midst of this tense silence, Rockne quietly says "Alright," to the men beside him, and his chair is wheeled slowly out of the dressing room.

PLAYER #12:

Well, what are we waiting for?

*With a single roar, the players throw off their blankets and rush through the doorway.*⁴⁶⁵

A 1939 review of the film in *Variety* noted that it contained:

Highlights in the colorful life of Knute Rockne, one of the most prominent figures in the world of football, [which] [were] woven into a biographical film drama [based on private papers of his wife and the University of Notre Dame] that carries both inspirational and dramatic appeal on a wide scale Through it all runs the theme of Rockne's whole purpose in life -- moulding [sic] boys under his care to become good Americans who are conscious of their responsibilities and opportunities.⁴⁶⁶

More recent reviewers have accurately noted that while the film was perhaps a bit "corny and sentimental" by today's standards, it "set the bar for all future sports films,"⁴⁶⁷ especially the approach subsequent filmmakers have taken when making "the Hollywood sports biography"⁴⁶⁸

465. See Knute Rockne's "Win One for the Gipper" Speech, U. NOTRE DAME ARCHIVES, <http://archives.nd.edu/research/texts/rocknespeech.htm> (last visited Dec. 13, 2018).

466. Variety Staff, *Knute Rockne All American*, VARIETY (Dec. 31, 1939), <http://variety.com/1939/film/reviews/knute-rockne-all-american-1200413034/>.

467. *Knute Rockne---All American (1940)*, ROTTEN TOMATOES, https://www.rottentomatoes.com/m/knute_rockne_all_american/ (last visited Dec. 13, 2018) (listing critic reviews of the film).

468. Dennis Schwartz, *Knute Rockne, All American*, OZUS' WORLD MOVIE REVIEWS (Mar. 14, 2005), <http://homepages.erver.net/~ozus/knuterockne.htm>.

2. Lesson No. 2: The Honor of Football – Sacrificing All for the Dream and the Team

Notre Dame and the fighting Irish once again play a key role in *Rudy*, the 1993 biopic about Dan “Rudy” Ruettiger.⁴⁶⁹ Sean Astin stars as Rudy, a blue-collar kid whose father, portrayed by Ned Beatty, worships Notre Dame football. Never in his father’s wildest dreams would one of his own sons be able to attend Notre Dame and be part of the football team. The film follows Rudy’s trials and tribulations as he strives to achieve that goal, despite tremendous obstacles in physical stature, academics, and finances.⁴⁷⁰

Perhaps the scene that best encapsulates Rudy overcoming the odds takes place when, after making the scout (practice) team and giving 110%, he is ready to quit when he finds out he will never be allowed to dress and run out onto the field as a recognized player as promised by a prior coach. This means his father will never be able to attend a game and see that he was actually on the team.⁴⁷¹ When learning of his decision to quit, Fortune (Charles S. Dutton), the Notre Dame stadium grounds keeper with whom Rudy has become friends with, basically reads him the riot act:

FORTUNE:

What are you doing here? Don’t you have practice?

RUDY:

Not anymore. I quit.

FORTUNE:

Well since when are you the quitting kind?

RUDY:

I don’t see the point anymore.

FORTUNE:

So you didn’t make the dress list. There are greater tragedies in the world.

RUDY:

I wanted to run out of that tunnel for my dad. To prove to everyone --

FORTUNE:

PROVE WHAT? (*emphasis added*)

469. *Id.*

470. *Id.*

471. *Id.*

RUDY:

That I was somebody.

FORTUNE:

Oh you are so full of crap. You're [five] feet nothing. A hundred and nothing. And you've got hardly a speck of athletic ability. You hung in with the best college football team in the land for [two] years! And you're gonna walk out of here with a degree from Notre Dame. In this life you don't have to prove nothing to nobody except yourself. And after what you've gone through, if you haven't done that by now . . . it ain't gonna never happen. Now go on back.

RUDY:

I'm sorry I never got you to see your first game.

FORTUNE:

Hell, I've seen too many games in this stadium.

RUDY:

You said you never saw a game.

FORTUNE:

I've never seen one from the stands . . . I rode the bench for two years. Thought I wasn't being played because of my color. I got filled up with a lot of attitude, so I quit. Still not a week goes by, I don't regret it. And I guarantee a week won't go by, you won't regret walking out . . . letting them get the best of you. Now, you hear me clear enough?

RUDY:

Yeah.⁴⁷²

3. Lesson No. 3: The Glorification of “We” and the Need for Community

In addition to having characteristics ideally suited to engaging fans while they watch the game on their big-screen, high-definition television in their living room from their favorite armchair, while, according to commercials, eating pizza and/or ribs and drinking a coke or a beer, football also offers its fans so much more psychologically and perhaps even atavistically. Televised football is a powerful device that allow viewers vicariously to bond “with their

472. *Rudy Script*, SCRIPT-O-RAMA, http://www.script-o-rama.com/movie_scripts/r/rudy-script-transcript-sean-astin.html (last visited Dec. 13, 2018).

team, their favorite players, those warriors who carry the good name of their city, college, conference, nation, ethnic heritage, or other characteristic, into battle.”⁴⁷³ In contrast to television shows, which only offer fictional characters, every football game provides fans with real heroes to cheer for or, if your team is losing, villains to boo.⁴⁷⁴ It provides fans with the opportunity to make a deep “emotional investment in something that has no actual real-world consequences.”⁴⁷⁵ Watching your team play “hinge[s] on the unpredictability of real life.”⁴⁷⁶ There are no guarantees of a happy ending where your time carries the day.⁴⁷⁷ Or, in the words of Jim McKay, the long-time Emmy award winning host of *ABC’s Wide World of Sports*, fans are able to share “the thrill of victory...and the agony of defeat...the human drama of athletic competition”⁴⁷⁸ as if they too had played in the game.⁴⁷⁹

This vicarious, almost symbiotic, relationship between fan and player is particularly appealing to “viewers, who find their own lives mundane or prosaic, especially in comparison to the captivating and seductive world of [televised football]. Some viewers may even come to rely on the medium as their primary source of choice for cultural and community interaction.”⁴⁸⁰ For such viewers it almost becomes a reality of “I am a fan, therefore I am.”

No film better exemplifies this concept of football generating a community more than *Invincible*, the stirring tale of the true story of Vince Papale, who, at the age of thirty, is an out of work teacher whose wife has just left him.⁴⁸¹ All he really has in his life is working as a bartender and playing football with his buddies who are all die-hard Philadelphia Eagles fans. In fact, for most of them, football is the only thing that keeps them going in their lives as blue collar workers. When the new coach of the Eagles, Dick Vermeil, announces that he will hold open tryouts for the team, Vince reluctantly decides to give it his best shot. One of the most moving scenes in the film takes place after Vince has

473. Stanley J. Baran, *Sports and Television*, in *THE BUSINESS OF SPORTS* 143-146 (Jones & Bartlett Learning 2d ed., 2004). See Stanley J. Baran, *Sports and Television*, MUSEUM OF BROADCAST COMMUNICATIONS – ENCYCLOPEDIA OF TELEVISION, <http://www.museum.tv/eotv/sportsandte.htm> (last visited Dec. 13, 2018).

474. *Id.*

475. Sternbergh, *supra* note 447.

476. *Id.*

477. *Id.*

478. Dave Miller, *Jim McKay: The Thrill of Victory...The Agony of Defeat*, BLEACHER REPORT (June 14, 2008), <http://bleacherreport.com/articles/29612-jim-mckay-the-thrill-of-victorythe-agony-of-defeat>.

479. *Id.*

480. SHANAHAN & MORGAN, *supra* note 357 (noting the viewers “with certain social and psychological characteristics, dispositions, and worldviews, and fewer alternatives as attractive and compelling, use television as their major vehicle of cultural participation.”).

481. *INVINCIBLE*, *supra* note 458.

made the team. The scene encapsulates how football becomes the glue that keeps a community together when Vince's father, Frank Papale, tells his son what the Eagles and Vince being on the team means to him.

FRANK:

You know how I used to tell you about Van Buren scoring that touchdown back in '48?

[*Chuckles*]

VINCE:

Yeah, I know. [*waving hands*]

FRANK:

I know. That touchdown got me through 30 years at that factory. Got me through all those times your mother being sick. When I told you not to get your hopes up, didn't mean that I wasn't.⁴⁸²

Finally, there is no better illustration of the fanatical fan and just how important team loyalty can be to a fan than the romantic tale in *Diner* of Eddie (Steve Guttenberg) and Elyse (Sharon Ziman), a girl the viewer hears a great deal about, but never actually sees.⁴⁸³ Eddie is such a Baltimore Colts fanatic, that he designs a quiz on the Colts for his fiancée. He plans to give it to her two days before the wedding is scheduled. If she cannot pass, then the wedding is off.⁴⁸⁴

4. Lesson No. 4: Glorification of the Ultimate Underdogs – The Key to Greatness Is Having Heart

No discussion of football films about underdogs would be complete without including *The Replacements*.⁴⁸⁵ Based loosely on the 1987 professional football players' strike, and the plight of the Washington Redskins, the film stars Gene Hackman as Jimmy McGinty, a legendary coach who is brought in to put together a professional football team, the Washington Sentinels.⁴⁸⁶ He is given exactly one week to achieve this task after the league players walk-out in a strike. Against all odds, he succeeds in putting together a motley group of players, which includes a "scab" quarterback named Shane Falco, played by

482. *Invincible Movie Script*, SCRIPTS, https://www.scripts.com/script.php?id=invincible_10931&p=20 (last visited Dec. 13, 2018).

483. *DINER* (Metro-Goldwyn-Mayer 1982).

484. *Id.*

485. *THE REPLACEMENTS*, *supra* note 459.

486. *Id.*

Keanu Reeves.⁴⁸⁷ From the beginning of the film, the viewer is encouraged to root for these underdogs, as Coach McGinty notes before their first game, while the strike may be a disaster for fans and owners, it is a chance of a lifetime for the replacement players.

An outstanding example of the motivational theme of football, which can be quite attractive to fans, is Coach McGinty's farewell pep talk to the team.

[McGinty walks into the middle of the locker room and goes into pre-game speech mode.]

MCGINTY:

Alright, listen up. The strike is just about history. By tomorrow, you will no longer be Sentinels. It's important that you leave here, however, with the knowledge that you have made a difference in your own Life, in the owner's life -- or what's left of it -- and especially the fans'. You have proven to a skeptical America that sports is not about contracts, or agents or shoe deals. Sports is about rising to the occasion. We have one more opportunity tonight to do that, one more chance to show what heart is all about. The Dallas Cowboys are waiting out there to kill you. I expect nothing less than for you to win even in your death throes. We have a powerful weapon on our side tonight: there is no tomorrow for most of you. And that makes you very dangerous people. Use it.⁴⁸⁸

The film ends with an eloquent speech by McGinty that once again educates viewers that playing football can be a marvelous, life changing sport which allows players to experience greatness.

MCGINTY:

When the replacement players for the [Washington] Sentinels left the stadium . . . there was no ticker-tape parade . . . no endorsement deals for sneakers . . . or soda pop or breakfast cereal. [J]ust a locker to be cleaned out[,] and a ride home to catch. But what they didn't know, was that their lives would be changed forever . . . because they had been part of something great. And greatness, no matter how brief[,] stays with a man. Every athlete dreams of a second chance. These men lived it.⁴⁸⁹

487. *Id.*

488. *Id.* See Replacements, *The (2000) Movie Script*, SPRINGFIELD! SPRINGFIELD!, https://www.springfieldsspringfield.co.uk/movie_script.php?movie=replacements-the (last visited Dec. 13, 2018).

489. *Id.*

In reality, the contributions made by the actual replacement players, who were Washington Redskins for a brief time during the stand-off between the players' union and the NFL, were not forgotten.⁴⁹⁰ On March 6, 2018, the Virginia General Assembly presented two of the replacements players, "with a copy of House Joint Resolution No. 151."⁴⁹¹ The two players, quarterback Tony Robinson and defensive lineman Anthony Sagnella, helped the team win the super bowl that year by leading Washington to a 3-0 record during the twenty-four-day strike.⁴⁹² In response to the Resolution, which honored the replacement players for the "critical role" they had played in the Redskins' ultimate "Super-Bowl winning season" and the announcement from Bruce Allen, the Redskin's President "that all of the replacement players from the 1987 team would receive Super Bowl rings."⁴⁹³ Robinson commented:

Thirty-some years later, but hey, better late than never. It's a good feeling, a real good feeling. To be called Super Bowl champion, a lot of people can't say that. And a lot of people can't say they have a Super Bowl ring. It's a big accomplishment. I was just so happy and blessed to be a part of that. I'll cherish it for the rest of my life. It's a great honor.⁴⁹⁴

Once again, "Hail to the Redskins! Hail to Victory!" rang out, stirring the hearts of worshipping fans across the U.S.A.⁴⁹⁵ And once again what was seen on the silver screen was reinforced by the resonance of real life events.

D. Four Reasons Players Are No Longer Gods, But Commodities: Films, Television and Fantasy Football

Once fans are hooked on the game of football, over time their attitude towards the players may change. It is this change in fan attitude that perpetuates the violence in the game despite scientific evidence of dangers to player health and well-being. While the reasons for such a shift are many, key premises are: (1) it's all about the money, not team loyalty; (2) you gotta dance for the fans;

490. Scott Allen, *Redskins to Honor 1987 Replacements with Super Bowl Rings*, WASH. POST, Mar. 7, 2018, https://www.washingtonpost.com/news/dc-sports-bog/wp/2018/03/07/their-contributions-are-part-of-redskins-history-1987-replacement-players-will-receive-super-bowl-rings/?utm_term=.43add978b8b6.

491. *Id.*

492. *Id.*

493. *Id.*

494. *Id.*

495. *Washington Redskins' Fight Song - Hail to the Redskins*, HOGS, <http://www.thehogs.net/History/fightSong.php> (last visited Dec. 13, 2018) (modern version of the Washington Redskins fight song).

- (3) the commodification⁴⁹⁶ and fan objectification of their gridiron heroes; and
 (4) football is no game, it is war and, as in any war, there will be casualties.

1. Reason No. 1: Show Me the Money

The film *Jerry Maguire* explores the bond between sports agent Maguire, played by Tom Cruise, and his client Rod Tidwell, a professional football player, portrayed by Cuba Gooding Jr.⁴⁹⁷ When the audience first meet Maguire, he is a successful agent at a major firm, Sports Management International, where “[t]hirty-three . . . agents guide[] the careers of 2,120 of the most finely-tuned athletes alive.”⁴⁹⁸ However, his life radically changes when he experiences an epiphany after an exchange with the son of one of his clients, a hockey player, is put into the hospital injured with a concussion.

INT. HOSPITAL BEDROOM -- NIGHT

Hockey Player STEVE REMO, 33, is a big man in a small bed. He is in traction, with concussion. DOCTOR stands nearby, shoots Jerry a look of concern. Family is nearby.

DOCTOR:

Do you know your name?

REMO:

I uh . . . wait. Wait, here it comes. I have it. My name is Steve Remo. I play for the Blackhawks. *(now on a roll)* You are my son. This pretty lady is my wife. And you are . . .

Jerry nods encouragingly, presents his best “familiar” face.

My agent!

JERRY:

Yes!

REMO:

And I gotta play this weekend, Doc. If I play in 65% of the games, I make my bonus.

496. Ethan Sherwood Strauss, *When Stats Turn Players Into Commodities*, ESPN (Mar. 8, 2013), <http://www.espn.com/blog/truehoop/print?id=55625#>.

497. JERRY MAGUIRE (TriStar Pictures 1996).

498. *Jerry Maguire Script*, INTERNET MOVIE SCRIPT DATABASE (IMSDb), <http://www.imsdb.com/scripts/Jerry-Maguire.html> (last visited Dec. 13, 2018).

EXT. HOSPITAL HALLWAY -- NIGHT

Remo's 14 year-old SON (JESSE) confronts Jerry outside the hospital room. He's a hulking kid, a Pop Warner football player himself. His voice is in the process of changing.

SON:

This is his fourth concussion. Shouldn't somebody get him to stop?

As he talks, Jerry's cellular phone rings in his bag.

JERRY

(glib, easy)

Come on -- it'd take a tank to stop your dad. It would take all five Super Trooper VR Warriors, right?

The kid stares at Maguire. It feels as if the kid is peering into his soul . . . and all he sees is trash.

SON:

Fuck you.

*The kid turns and exits in disgust. He leaves Jerry standing in the hallway. Devastated.*⁴⁹⁹

As a result of this encounter, Jerry has an epiphany and writes a mission statement entitled: "THE THINGS WE THINK AND DO NOT SAY" which he proceeds to copy and distribute to all agents attending his company's corporate conference.⁵⁰⁰ The thrust of the statement is that the key to being a good sports agent are "personal relationships." The ramifications of his action is that he is fired. While he immediately scrambles to keep clients, he is ultimately only able to hang on to one, Rod Tidwell, a wide-receiver for the Arizona Cardinals, but only after he makes his client a promise.⁵⁰¹

Jerry on the phone.

JERRY: Rod! How ya doing? Jerry Maguire.

INTERCUT

INT. TIDWELL KITCHEN/HOUSE -- DAY

ROD TIDWELL, 27, begins this conversation in the kitchen. He is a powerful physical presence, and he holds a hot new cellular phone. He fixes [4 year old son] Tyson

499. *Id.*

500. *Id.*

501. *Id.*

a bowl of cereal as he talks. In the background, monitoring the crisis is Marcee Tidwell [Rod's wife who is 5 months pregnant].

TIDWELL:

"How am I doing?" I'll tell you. I'm sweatin, dude! That's how I'm "doin." I'm sweatin my contract. I'm sweatin' Bob Sugar calling and telling me I'm blowing the big endorsements if I stay with you. I'm sweatin'. You hear what I'm saying?

JERRY:

I hear what you're saying . . .

TIDWELL:

No. I hear that you hear what I'm saying. But do you hear what I'm saying?

**

INT. JERRY'S OFFICE

Jerry is still on the same Tidwell call. Looking at his watch.

Alright, we're just getting started on my list of things you need to know. Take notes if you want to.

JERRY:

Okay.

INT. TIDWELL HALLWAY – NIGHT

Tidwell walks down the hallway, past clippings and citations from his career. Marcee follows, always listening.

TIDWELL:

Good, 'cause see, I am a valuable commodity. I go across the middle. I see the ball and a dude coming right at me, wanting to kill me, I tell my brain "get killed, catch the ball." That's New York Steak, baby. Rare. And yet, nobody's giving me LOVE. Nobody's giving me PROPS. Nobody. I went to Arizona State, I'm from Arizona, I break Arizona records, I'm a Sun Devil, man!!!

JERRY:

Now you want Arizona dollars.

TIDWELL:

Exactly. And I'm sitting here with an ant problem . . .

-- the house is fallin' apart, we don't even know where we're gonna live in a year, and I'm supposed to be a "superstar," man! Are you catching my flow, here?

Jerry looks at his watch. Doomed.

JERRY:

I need a decision from you, Rod.

**

TIDWELL:

-- now to recap, I want to stay in Arizona, I want my new contract, I like you, you're nice to my wife, I will stay with you, that's what I'm doing for you, but here's what you're gonna do for me. You listening?

JERRY:

Mmm. Hmm.

TIDWELL:

It's a very personal, very important thing. It's a family motto. So I want to share it with you. You ready?

JERRY:

Yes.

TIDWELL:

Here it is. "Show me the money."

(pause) Show. Me. The. Money.

JERRY:

I got it.

TIDWELL:

Now doesn't that just make you feel good to say it?

Say it with me.

JERRY:

Show. Me. The. Money.

TIDWELL:

Congratulations. You're still my agent.⁵⁰²

In many ways, Rod's view of himself as a "valuable commodity" and his concern about money are totally understandable. As he expresses to Jerry, his days as a professional player are numbered, and he needs to make the most of the time that he is young enough and healthy enough to play professional

502. *Id.*

football. In another scene, Tidwell clearly expresses the plight of the professional football player to Jerry.

INT. AIRPLANE -- LATER DAY

They sit together. Jerry holds another drink.

TIDWELL:

Man, I got a shelf life of ten years, tops! My next contract's gotta bring me the dollars that'll last me and mine a very long time. I'm out of this sport in five years. What's my family gonna live on? What you get me Anybody else would have left you by now, but I'm sticking with you. I said I would. And if I got to ride your ass like Zorro, you're gonna show me the money.⁵⁰³

Compared to the average American, most NFL players are well compensated for the years they can perform. Even practice squad players bring home a nice weekly paycheck.⁵⁰⁴ In 2018, the minimum salary for such players will be \$7,600 a week.⁵⁰⁵ This amount will continue to increase under the current CBA, with a minimum weekly salary of \$8,400 a week by 2020.⁵⁰⁶ In terms of NFL minimum salaries, they “are determined in relation to a player’s NFL experience.”⁵⁰⁷

According to the CBA, “[t]he league measures time spent in relation to minimum salary by the number of ‘Credited Seasons’ . . . a player has completed,” which “sets the floor” for player compensation.⁵⁰⁸ For example, in 2018, a player with zero Credited Seasons would receive a minimum salary of \$480,000 while a player with ten or more Credited Seasons would be paid a minimum of \$1,015,000.⁵⁰⁹

In 2017-2018, the average salaries for NFL players ranged from \$2.07 million (the San Francisco 49ers) to \$2.99 million (the Oakland Raiders).⁵¹⁰ The

503. *Id.*

504. Tadd Haislop, *NFL Practice Squads: Minimum Salary, Rules for 2018*, SPORTING NEWS, Sept. 3, 2018, <http://www.sportingnews.com/nfl/news/nfl-practice-squad-salary-minimum-pay-how-much-2017-rules/1ogcj7f2emewr13zm4jrd0s45k>.

505. *Id.*

506. *Id.*

507. *NFL Contracts Explained: NFL Minimum Salaries*, FRONT OFFICE FOOTBALL (Mar. 10, 2017), <https://frontofficenfl.com/2017/03/10/nfl-contracts-explained-nfl-minimum-salaries/>.

508. *Id.*

509. *Id.*

510. *Average Player Salary in the NFL 2017/18*, STATISTA, <https://www.statista.com/statistics/675385/average-nfl-salary-by-team/> (last visited Dec. 13, 2018).

top five highest paid players in the 2017 season were: Kirk Cousins, former quarterback for the Washington Redskins, who earned \$23,943,600; Drew Brees, quarterback for the New Orleans Saints, who was paid \$24.25 million; Andrew Luck, quarterback for the Indianapolis Colts, who, in 2016, signed a six-year deal worth \$122,970,000; Derek Carr, quarterback for the Oakland Raiders, who, in June 2017, signed a contract extension for over five years for a whopping \$125,025,000; and finally, Mathew Stafford, quarterback for the Detroit Lions, who made history in 2017 when he cut a \$135 million deal, making \$27 million annually.⁵¹¹

Not surprisingly, it is also more lucrative to play for a winning team. Winning teams go on to the playoffs and perhaps even the Super Bowl. For example, in 2018, the NFL players who advanced to—and won—the Super Bowl earned \$219,000 in bonuses.⁵¹² So, Rod Tidwell’s command to his agent to “show me the money” is an accurate depiction of the mindset of an NFL player. It is also a lesson for fans. Arguably, when players are compensated so highly, it makes it easier for fans to accept that injuries can come with the territory. The players are choosing to play a high stakes game. And with high stakes, comes high risk.

However, it can also be maintained that the players are not adequately compensated in light of two considerations: (1) the fact that NFL players have the greatest risk of being injured than any athlete in the other three major professional sports, basketball, baseball and hockey,⁵¹³ and (2) that the majority of NFL players do not have guaranteed contracts.⁵¹⁴ In March 2018, Kirk Cousins may have changed the contract landscape in the NFL, at least for superstars, with his “groundbreaking, fully guaranteed, three-year, \$84 million deal as the new quarterback of the Vikings.”⁵¹⁵ In addition, in 2016 and 2017, the top twenty-one first-round draft picks received fully guaranteed four year contracts, with a fifth-year option that must be exercised by the team before the

511. Aric Jenkins, *The 5 Highest-Paid NFL Players of 2018*, MONEY, Jan. 29, 2018, <http://time.com/money/5120707/highest-paid-nfl-player-2018/>.

512. Ryan Dunleavy, *Super Bowl 2018: How Much Will Eagles, Patriots Earn in Super Bowl LII?*, NJ, Jan. 29, 2018, http://www.nj.com/sports/index.ssf/2018/01/nfl_playoffs_2018_how_much_do_players_earn_for_eac.html.

513. Ben Volin, *Why All NFL Contracts Aren’t Fully Guaranteed*, BOS. GLOBE, July 9, 2016, <https://www.bostonglobe.com/sports/patriots/2016/07/09/why-all-nfl-contracts-aren-fully-guaranteed/99WBMntCztDjYr8et12qJ/story.html>.

514. *Id.*

515. Albert Breer, *NFL Contracts May Be Forever Altered After Kirk Cousins*, SPORTS ILLUSTRATED, Mar. 15, 2018, <https://www.si.com/nfl/2018/03/15/kirk-cousins-contract-quarterbacks-guaranteed-money-mmqb>.

player's third regular season in the NFL is over.⁵¹⁶ But the majority of players are playing in the league on a "year to year" basis, and few players have "more than two or three years of job security."⁵¹⁷ The reality is that the majority of professional players need to make their money while they can, or as Tidwell would say "show me the money." Which means that Tidwell is going to have to become a bit of a superstar with the fans if he wants management to give him the contract he thinks he deserves.

2. Reason No. 2: You Gotta Dance for the Fans If You Want the Owners to Pay

Having only one client, Jerry Maguire now devotes himself to Tidwell's career. Tidwell wants to continue to play for the Cardinals, but is unhappy with the terms of his contract. Jerry has attempted to talk to the team's General Manager, Dennis Wilburn, but he is getting nowhere with re-negotiations.

INT. LOCKER ROOM SHOWER AREA -- DAY

Jerry stands in pre-season locker-room. Off-stage we hear a shower. In the [background], one of those locker-room psych-up signs like: Injuries happen first in the mind.

JERRY:

I started talking with Dennis Wilburn about your renegotiation.

Rod emerges naked, dripping wet, pissed.

TIDWELL:

Did you tell him about the "ten million for four years?"

JERRY:

Uh, not today, but --

TIDWELL:

John Taylor. J.J. Stokes. Andre Rison. I SMOKE all these fools, and yet they're making the big sweet dollars. They're making the money, and I got an agent that ain't even put the number on the table.

**

516. Joel Corry, *Agent's Take: Here's a Close Look at the Contracts First-Round Picks Are Expected to Sign*, CBS SPORTS (May 1, 2018), <https://www.cbssports.com/nfl/news/agents-take-heres-a-close-look-at-the-contracts-first-round-picks-are-expected-to-sign/>.

517. Volin, *supra* note 513.

JERRY:

Rod, I say this with great respect, but those players you mentioned are marquee players and –

**

The conversation continues as Tidwell fixes hair in the mirror. Jerry speaks to the reflection, taking him on, gesturing passionately. Tidwell, still naked, may or may not be listening.

JERRY:

Here's what I'm saying. This is a renegotiation. We want more from them, so let's show them more from us. Let's show them your pure joy of the game, let's bury the Attitude a little, let's show them --

TIDWELL (irritated):

You're telling me to dance.

JERRY:

No, I'm saying to be --

[Tidwell] mimes a dainty little showboat-touchdown dance.

TIDWELL (little voice):

"Love me love me love me. . . put me on t.v."

(pissed)

That's the iconography of racism, man!

JERRY:

Rod, I'm not a racist. I'm telling you to be the best version of you, to get back to the guy who first started playing this game. Way back when you were a kid. It wasn't just about the money, was it?

Tidwell gives him a look. Money was always a factor.

TIDWELL:

Do your job, man, don't tell me to dance.

JERRY:

Fine.

He begins gathering his things.

TIDWELL:

I'm an athlete, not an entertainer. These are the ABC's of ME. Get it? I don't dance.⁵¹⁸

Unfortunately the terms and amount of the renegotiated contract, which is only \$1.7 million for three years, is nowhere near what Tidwell and Jerry had hoped. On the advice and support of his wife, Marcee, who is also expecting their second child, Tidwell decides to risk it all for a better deal.

Marcee is passionate. Focused on Rod.

MARCEE:

You know what you're gonna do, Rodney. You're gonna reject this shitty contract. You're gonna play out your existing shitty contract and go be a free agent next year and the hell with Arizona. This is us, and we determine our worth. You're a fine, proud, surviving, splendid black man.

Beat. Truer words. . . The big man looks into his wife's eyes.

TIDWELL:

Honey, you are just --

No one else in the world exists. They are focused totally on each other

JERRY:

If you get injured, you get nothing.

TIDWELL:

Won't happen. I'm strong in my mind.

JERRY:

It's a risk.

Jerry looks over to Dorothy, who grits her teeth at the implications of the decision.

TIDWELL:

Bet on me, dude. Bet on me like I bet on you.

*Tidwell puts his hand out. Maguire is conflicted, but he takes a breath and shakes.*⁵¹⁹

518. *Jerry Maguire Script*, *supra* note 498.

519. *Id.*

Ultimately, Rod's future as a Cardinal all comes down to a Monday Night Football match-up against the Philadelphia Eagles, which will determine whether the Cardinals go to the playoffs.

INT. TIDWELL HOME -- NIGHT

They watch the game.

GIFFORD (ON T.V.):

It's a bruiser out there tonight.

MICHAELS (ON T.V.):

Arizona refusing to go into the quiet night of this rough football season. Come on, I'm trying to be poetic here.

Tidwell takes a rough hit, and they respond loudly.

DIERDORF (ON T.V.):

Ooof. Another rough hit across the middle on Rod Tidwell. Nothing poetic about that.

**

INT. FIELD -- NIGHT

Tidwell takes a hit. Hangs onto the ball.

**

FRANK GIFFORD'S VOICE:

They don't pay enough for a man to take that kind of ugly hit –

**

INT. PRESS BOX -- NIGHT

Maguire watches as Arizona's quarterback John Swenson drops back for a pass, and is sacked. Philadelphia fans cheer wildly. The game is turning uglier by the minute. Jerry looks up to the monitor for a closer look at the next play.

ON PRESS BOX MONITOR

Swenson, the Arizona quarterback, throws a wobbly pass into the end-zone. Tidwell leaps for the catch, tucks the ball in and is promptly and brutally hit by two defenders from two different sides. This hit is bad. Worse than bad. Tidwell flips and comes down like a sack of potatoes, with a thud, ball still in his hands. His head hits the astroturf, hard. Tidwell is out cold. And the ripple effect of the injury shoots through the stadium. Jerry stares at the monitor, stunned by the sudden brutality.

EXT. ARIZONA FIELD -- NIGHT

We are thrust into the vortex, inside the game. Tidwell lies still on turf. Overhead, the fight music continues for a few seconds before disappearing abruptly. Players and coaches begin to gather around the still body of Rod Tidwell.

TV MONITOR -- SLO-MO

The hit in replay. It is brutal. And we can see a flash of his pride as he catches the lousy pass, and then. . . like two bulls, the Philadelphia defenders enter from each side. One cuts his legs out from under him, and Rod's taut body literally flips. The second defender then hits him at the shoulders. Tidwell lands on the back of his neck, crumpling downwards. Still holding the ball. Still.

**

GIFFORD'S VOICE:

-- you sure hope his family wasn't watching that.

**

EXT. CENTER OF PLAYING FIELD -- NIGHT

We're now just a few inches in front of his peaceful, sleeping face. They are all. YELLING, trying to pull him out.

**

ON TIDWELL -- CLOSE

Dead to the world as sound disappears. There is now only silence.

POV TIDWELL - SLO-MO -- SILENCE

The Doctors and the Trainers are now truly panicked. We don't hear them. We see them, their motions increasingly manic. Shoving fingers in front of him. Screaming. We read their lips. ("Rod!" "Rod can you hear us!") We see the anguish and escalating fear on their faces. The Trainer leans in close, bellowing, he spreads his hands wide to clap right in front of Rod's still face. His hands head toward each other . . . closer . . . bringing with them the first inkling of sound . . . getting closer and then finally coming together, bringing with him the sounds of the stadium.

ON TIDWELL

who blinks back to life. Concerned men are yelling very loudly, right in his face. Tidwell becomes aware he is the absolute center of attention of the entire stadium. As crowd noise begins to rise.

TRAINER:

Let's get you off the field!

TIDWELL:

Wait.

TRAINER:

Can you feel your legs?

TIDWELL:

Yeah. Just let me enjoy this for a minute.

**

He rises. Stadium explodes. At first on wobbly feet, he raises the football and for the first time -- salutes the crowd. Crowd noise doubles.

**

ON TIDWELL

Has never felt like this before in his life. It is the pure and absolute love of the spotlight. And his fans. And then. . . it's real and he feels it. Tidwell breaks out in a small but unmistakable move -- a flutter step. He does a high-stepping move, all his own, for about ten yards.

ON JERRY MAGUIRE

who watches, now in complete disbelief. Tidwell will not let go of the spotlight.

**

BACK ON TIDWELL -- CLOSE

Finishes his small but heartfelt dance. It is a personal catharsis he is sharing now with 2 billion people.

TIDWELL (to himself):

Nike.⁵²⁰

So in the end, despite being seriously injured, Tidwell is able to rise like a phoenix from the ashes and do the dance. Jerry Maguire comes through for his

520. *Id.*

client with a signed deal memo with the Arizona Cardinals for four years for \$10.2 million. This also is not bad for Jerry in light of the commission he will receive. In terms of the fans, the lessons learned from the film is that a player's future in the sport is short, players are in it to get as much money as they can during this time period; money is more important than the team they play for; being seriously injured should not keep a real player down; and while team management may try to nickel and dime its players, it will ante up for those who, like puppets on a string, please the fans by doing the dance.

3. Reason No. 3: The Commodification of the NFL Player

In 1979, the film *North Dallas Forty* came to the silver screen.⁵²¹ Based on an autobiographical novel authored by Pete Gent, a former receiver for the Dallas Cowboys, the film has been recognized as “a milestone in the history”⁵²² of the genre of football films by its effective conveyance of “the brutality, racism, sexism, drug abuse, and callousness that were part of professional football—just a part, but the part that the public rarely saw and preferred not to acknowledge at all.”⁵²³ It was unique in being “the first football movie in which the games looked like real football (rather than the usual odd mix of newsreel footage from actual games and ineptly staged shots of the actors in ‘action’).”⁵²⁴ The movie highlights the physical pain, fear, and psychological damage that players like the protagonist, Phil Elliott (Nick Nolte), have to endure not while playing a game; but, upon entering into a field of battle which, although at times exhilarating, can be destructive. It is also the story of one man's rebellion against the bureaucratic, manipulative world of professional football.

These themes are brilliantly captured in the scene where Elliot replies to B.A. Strothers, the coach of the North Dallas Bulls, when he is lectured about “discipline and giving back to the game.”⁵²⁵

My nose is busted. I can't even breathe through it I can hardly stand up. I haven't slept more than three hours at a stretch in two years. Now isn't that giving something back?

521. NORTH DALLAS FORTY (Paramount Pictures 1979).

522. Janet Maslin, *Film: 'Dallas Forty': Cynicism and Comedy*, N.Y. TIMES, Aug. 1, 1979, <https://www.nytimes.com/1979/08/01/archives/film-dallas-forty-cynicism-and-comedy.html>

523. Michael Oriard, *The Impact and The Darkness: The Lasting Effect of Peter Gent's North Dallas Forty*, DEADSPIN (Oct. 10, 2011), <https://deadspin.com/5847792/the-impact-and-the-darkness-the-lasting-effect-of-peter-gents-north-dallas-forty>.

524. *Id.*

525. Stefan Fatsis, *What Curtis Painter and North Dallas Forty Tell Us About the Real NFL*, DEADSPIN (Oct. 4, 2011), <https://deadspin.com/5846522/what-curtis-painter-and-north-dallas-forty-tell-us-about-the-real-nfl>.

For crissake, B.A., there's pieces of me scattered from here to Pittsburgh on these football fields! Now isn't that giving something back to the game? Isn't it?⁵²⁶

Equally powerful is the scene where Elliot, responding to the team doctor who is twisting "a syringe filled with painkiller [into] his wrecked knee," asks "Christ, how often do you put this shit in the coaches' hearts?"⁵²⁷

But perhaps the most moving scene is when Elliot gives a speech about how management is the "team" while players are just more pieces of equipment owned by the club.⁵²⁸

While *North Dallas Forty* is clearly geared toward showing the true violence of the game, even films which glorifying the game of football, such as *Rudy*⁵²⁹ are also important reminders that the dangers from sub-concussive hits and concussions are not limited to just professional football players.⁵³⁰ This reminder also contains the seeds for transforming a fan's perspective of a player not as a hero, but as a commodity. Consider the following speech from *Rudy* made by Coach Warren to the potential players, including Rudy, who came to the walk-on tryouts at Notre Dame to make the team.

[addressing players at the walk-on tryouts]

COACH WARREN:

Let me tell it to you as clean as I can. We have 95 players here . . . so accomplished as athletes in high school . . . they have full scholarships to the best football program in the country. NCAA regulations allow us to dress just 60 for home games . . . which means at least 35 scholarship players . . . will be watching the game from the stands.

So if any of you has any fantasies . . . about running out of that tunnel with your helmet shining in the sun . . . you best leave them right here. Of you 15 dreamers out there, maybe we'll keep one or two.

My job is to basically beat the shit out of you for the next five days. And whoever is still standing at the end . . . maybe we'll use for our scout teams. You'll be running the opposition's plays week in and week out. Your greatest value to us is, we don't care whether you get hurt. Our first teams are gonna

526. *Id.*

527. *Id.*

528. *Id.*

529. RUDY, *supra* note 457.

530. Mez et al., *supra* note 86.

pound on you like you're their worst enemies. Like what you hear so far? Any of you want to run home to Mama? Now's your chance.⁵³¹

The takeaway for the viewing fan is that a player is simply a commodity: a necessary piece of team equipment that can be bought, discarded, or traded. This takeaway is made abundantly clear in *Draft Day* when Kevin Costner, portraying Sonny Weaver Jr., the General Manager of the Cleveland Browns, has a terse conversation with his current starting quarterback, Brian Drew (Tom Welling).⁵³² Drew is afraid he will be relegated to second string after Sonny traded for the number one draft pick, Bo Callahan, the top NFL prospect for a starting quarterback spot.

DREW:

I've been in this league for eight seasons. I've been to the playoffs. I know the system that Penn wants to run and I know I can make it work. I've busted my ass this off-season. I set the bar high. I'm in great shape. I feel 10 years younger. I'm tellin' you, man, I swear to you, the best thing for this team, this season, is me.

WEAVER JR.:

Are you finished?

DREW:

No.

WEAVER JR.:

Well, get finished. And then get back to work. If I trade you, I trade you. If I don't, I don't. Do yourself a favor. Worry about Brian. Don't worry about Bo. And definitely, most absolutely goddamn importantly, do not bother me with your shit right now, Brian. I'm workin' here!⁵³³

But perhaps the greatest culprit in objectifying players and de-sensitizing fans to the violence of the game is fantasy football. Indeed, a full discussion about the place of sports within pop culture could not be complete without considering fantasy football and the dehumanizing effect it has on public perceptions of athletes.

531. *Rudy Script*, *supra* note 472.

532. *DRAFT DAY* (Summit Entertainment 2014).

533. *Draft Day* (2014) *Movie Script*, SPRINGFIELD! SPRINGFIELD!, https://www.springfieldspringfield.co.uk/movie_script.php?movie=draft-day (last visited Dec. 13, 2018).

Fantasy sport leagues are actually not the product of the modern digital age, but were born in the 1950's, mostly the brainchild of a part-owner of the Oakland Raiders, Wilfred "Bill" Winkenbach.⁵³⁴ According to legend, on a rainy day in 1962, Winkenbach was in a Manhattan hotel room passing the time before a Raiders game with a Raiders staffer named Bill Tunnell and Oakland Tribune sports writer Scotty Stirling. Winkenbach had previously invented a fantasy game for professional golf where the gamers would draft professional players each week and add up their scores to determine a winner.⁵³⁵ He mused whether the same could be done for football and the three stayed up most of the night drinking, creating the rules for their new game. When he returned to Oakland, he further refined the rules with Tribune sports editor George Ross. That summer of 1963, a few friends joined Winkenbach in his basement to hold the first fantasy football draft.⁵³⁶ The first league fielded eight teams in what was called the Greater Oakland Professional Pigskin Prognosticators League (GOPPPL) and points were awarded only for touchdowns. However, what brought the game to national attention was the opening of the Kings X Bar in Oakland in 1968 by Andy Mousalimas, one of the original members of the GOPPPL. He altered the rules to allow points for yardage, and created a game with six divisions. To calculate standings in time for the Monday lunch crowd, he would get the first edition of the local paper as it rolled off the presses early in the morning. The bar customers were so enthused by the game, Mousalimas had to create a waiting list. Word of the game spread and he soon was fielding phone calls from bar owners all over the country who wanted to know how the game worked. GOPPPL is also credited with creating the first fantasy baseball league as well.⁵³⁷

Over the ensuing decades fantasy sports was primarily an amateur hobby, although it was slowly gaining in popularity. Consequently, many entrepreneurs sought ways to commercialize it, publishing magazines and other publications devoted to the topic, such as *Fantasy Sports Magazine* in 1989. By 1999, the Fantasy Sports Trade Association was founded due to the popularity

534. Jon Wilner, *Fantasy Football Was Born in Oakland, Original League Still Thriving*, CHI. TRIB., Sept. 14, 2015, <http://www.chicagotribune.com/sports/sns-tns-bc-fbn-fantasy-sportsplus-20150914-story.html>.

535. *Id.*

536. *Id.*

537. *Id.* There are several origin stories for fantasy baseball. Most sources credit sportswriter Daniel Okrent as the "father of fantasy sports" due to his invention of Rotisserie Baseball in 1979, which popularized multiplayer gaming based on player statistics. Rick Burton et al., *The Historical Development and Marketing of Fantasy Sports Leagues*, 2 J. SPORT 185, 194 (2013).

of the pastime.⁵³⁸ However, what fueled the boom in fantasy sports was the creation of the internet and the World Wide Web. Prior to the advent of online communication, fantasy players had to get their statistics through the sports pages of the daily newspaper and tabulate standings by hand. The digitalization of this information made tracking player performance infinitely easier, but league commissioners still had to manually tabulate scores. It was ESPN that offered the first online sports fantasy website in 1995, called ESPN SportZone.⁵³⁹ Similar services were launched such as Commissioner.com in 1997. The drawback was that these were pay for use services. It was in 1999 that Yahoo.com offered the first major free fantasy league hosting service, funded by website advertising fees, to become the industry leader it still is today.⁵⁴⁰

As of 2017, some 59.3 million people play fantasy sports in the United States and Canada. Of those, 71% are male and 29% female. The average age is 32 years, 50% have a college degree and 53% have annual income in excess of \$75,000. The most popular fantasy sport is football.⁵⁴¹ As of 2015, some 89.8% of fantasy players were Caucasian and the revenue generated is estimated to be approximately \$11 billion dollars annually.⁵⁴²

Although the professional leagues were at first suspicious of fantasy sports drawing fans away from loyalty to individual teams, they eventually embraced the fantasy fan as an additional revenue source. Studies indicate that “fantasy football has been one of the best brand-building tools for the league during the past decade, for fans around the world are watching the NFL more intently than ever, and the continued growth of fantasy football translates into very real advertising and merchandising dollars for the league.”⁵⁴³ It is no wonder, then, that the leagues, broadcasting companies, and advertisers now vie for a share of this lucrative market. However, there is a darker side to this story: the dehumanization and objectification of the players themselves.

For example, NFL.com created an advertisement for its online fantasy football services, which depicted an injured player, Kansas City Chiefs running back, Jamaal Charles, after he had suffered a torn ACL that ended his season.

538. Louise Baker, *The History and Evolution of Fantasy Sports*, FUTURE OF FANTASY (Jan. 25, 2011), <http://futureoffantasy.com/the-history-and-evolution-of-fantasy-sports>.

539. Burton et al., *supra* note 537.

540. *Id.* at 198.

541. *Industry Demographics*, FANTASY SPORTS TRADE ASS'N, <https://fsta.org/research/industry-demographics/> (last visited Dec. 13, 2018).

542. Jimmie Kaylor, *Fantasy Sports Statistics: Facts About the Players*, CHEATSHEET (May 25, 2016), <https://www.cheatsheet.com/sports/so-who-actually-plays-fantasy-sports.html?a=viewall>.

543. Brendan Dwyer, *Divided Loyalty? An Analysis of Fantasy Football Involvement and Fan Loyalty to Individual National Football League (NFL) Teams*, 25 J. SPORT MGMT. 445 (2011).

The ad copy read, “Injury ruined your fantasy season? Start again on NFL.com.” The purpose was to promote fantasy leagues that began midseason. Critics pointed out that the NFL was using the player’s injury for profit and “dehumanizing” him as a mere fantasy football commodity.⁵⁴⁴ Another such ad for Sprint Wireless depicted a doctor treating an injured player, who asked what his injury would mean for him, and the doctor responded, “it means I’m dropping you from my fantasy team.”⁵⁴⁵

Of course, there is not a more glaring example of the dehumanization of football players than the mascot of Fox Sports, Cleatus the Robot.⁵⁴⁶ This CGI animated robot figure of a football player made his debut during the middle of the 2005-06 football season and was named during a contest held by Fox Television the following year. He was typically featured by the channel during NFL football games before and after commercial breaks. Originally, he would perform a warm up routine of jumping up and down, stretching his neck, running in place, and pointing his finger at the camera. In the 2008-09 season, he expanded his routine to include dance moves like the Swim and the Electric Slide, as well as playing an electric guitar. In the years since, he has engaged in physically violent confrontations with other mascots and movie characters such as the Burger King, Iron Man, a dragon from Eragon, and a Terminator robot. He has also been licensed by Fox to toy manufacturers who sell him in NFL and collegiate logo designs.⁵⁴⁷

This dehumanization of football players through fantasy football and marketing imagery has a real-world effect on players. It has been observed that fantasy football has actually changed how fans perceive athletes. That instead of human beings, they are simply “cogs in a machine, chess pieces to move around a virtual board.”⁵⁴⁸ One player, Jonathan Stewart of the Carolina Panthers, complained that fantasy football fans only cared about players to the extent that they were productive for their fantasy team. If a player were injured, the fan’s concern was not the well-being of the player, but the effect of his loss on their fantasy roster. Stewart has also been subjected to harsh criticism on social media for not scoring enough fantasy points despite being a valuable and productive player for his NFL team. His reaction was, “I don’t think they look

544. Burton et al., *supra* note 537.

545. *Id.*

546. Mark Coogan, *Cleatus the Robot: The Unsung Hero of the NFL*, ROUND TABLE (Nov. 18, 2011), <https://beroundtable.wordpress.com/2011/11/18/cleatus-the-robot-the-unsung-hero-of-the-nfl/>.

547. *Id.*

548. William C. Rhoden, *Fantasy Sports’ Real Crime: Dehumanizing the Athletes*, N.Y. TIMES, Nov. 25, 2015, <https://www.nytimes.com/2015/11/26/sports/football/fantasy-sports-real-crime-dehumanizing-the-athletes.html>.

at us as human anymore. I think they look at us as an opportunity [to make money].”⁵⁴⁹

Another former player, who wrote about his own experiences with fantasy football after retirement commented that:

[I]t’s brutal the way we objectify these guys and the way we treat them on our fantasy teams when they’re not working for us. When a guy sustains some debilitating injury that’s going to involve surgery, rehabilitation, medication for that human being, we just cut him. He’s gone for us . . . I love the sport of football. I don’t love the business. I don’t love the way it objectifies the players.⁵⁵⁰

The question also arises as to whether this dehumanization by fantasy football fans and others is a result of racial bias. African American players account for 69.70% (1,573) of the NFL players in 2017, while 27.40% (618) identified as white.⁵⁵¹ This means that black players are highly over-represented relative to their share of the US population (13%), while white, Latino, and Asian/Pacific Islanders are all extremely under-represented in the NFL relative to their shares of the US population (63%, 17%, and 5% respectively).⁵⁵² Add to this lopsided racial imbalance the demonstrated stereotype that whites often see black athletes as “superhuman” as opposed to white athletes.⁵⁵³ Furthermore, “people assume that, relative to Whites, Blacks feel less pain because they have been exposed to hardship.”⁵⁵⁴

549. *Id.*

550. Michel Martin, *Former NFL Player Nate Jackson Wades Into the ‘Brutality’ of Fantasy Football*, NPR (Oct. 1, 2016), <https://www.npr.org/2016/10/01/496226390/former-nfl-player-nate-jackson-wades-into-the-brutality-of-fantasy-football> (interview between Michel Martin, host of “All Things Considered,” and Nate Jackson, former NFL player).

551. Richard Lapchick & Saahil Marfatia, *The 2017 Racial and Gender Report Card: National Football League*, INST. FOR DIVERSITY & ETHICS IN SPORT (Oct. 18, 2017), <http://nebula.wsimg.com/1a7f83c14af6a516176740244d8afc46?AccessKeyId=DAC3A56D8FB782449D2A&disposition=0&alloworigin=1>.

552. Mark J. Perry, *Overall the NFL Gets a Letter Grade of A+ for Players’ Race, But an F- for Kickers and Punters*, AEI (Aug. 23, 2017), <http://www.aei.org/publication/overall-the-nfl-gets-a-letter-grade-of-a-for-players-race-but-for-kickers-and-punters-it-gets-an-f/>.

553. Matthew Hutson, *Whites See Blacks as Superhuman: Strength, Speed, Pain Tolerance, and the Magical Negro*, SLATE (Nov. 14, 2014), http://www.slate.com/articles/health_and_science/science/2014/11/whites_see_blacks_as_superhuman_strength_speed_pain_tolerance_and_the_magical.html.

554. Sophie Trawalter et al., *Racial Bias in Perceptions of Others’ Pain*, PLOS ONE (Nov. 14, 2012), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0048546>. The study utilized NFL injury reports for the 2010 and 2011 seasons to study how coaches and medical staff evaluated player injuries in relation to how soon they would be able to return to play. *Id.* The study found a bias that favored black players returning to play sooner than whites based on the amount of pain they experienced based on the

This means that a fantasy football audience that is 89% Caucasian is making a roster that is almost 70% black players. It would be logical to conclude that the racial bias shown by whites generally carries over into the perception of black athletes on the fantasy roster, and the result is the perception of a superhuman, pain-free robot whose only purpose is to win points for the fantasy manager.

Perhaps there is no better illustration of the influence of fantasy football on de-humanizing players than an episode from the first season of *The League* in which Antonio Gates makes an appearance, the first by an NFL player on the series.⁵⁵⁵ This particular episode illustrates how an actual player might respond to a Fantasy team manager/owner for getting angry at them for costing the manager a win.

In a previous scene, the fantasy players meet in a bar and Ruxin complains bitterly about Antonio Gates wrecking his fantasy standings by playing too well. Now, one of the friends whose team is part of the league, Ruxin, sits alone in a hotel hot tub mumbling to himself about his fantasy picks when Gates enters the spa.

RUXIN:

How are you, man?

GATES:

Nice to meet you, man.

RUXIN:

I cannot believe you just got into this hot tub. What are you doing here?

GATES:

Just bye week. Visiting some family.

RUXIN:

All right.

subjective judgment of the coaches and staff. *Id.* However, when more objective criteria, such as criteria used for concussions, was used to determine next game status for players, the bias disappeared. *Id.*

555. *The League: Mr. McGiblets* (FX Networks television broadcast Nov. 19, 2009); *The League s01e04 Episode Script*, SPRINGFIELD! SPRINGFIELD!, https://www.springfieldspringfield.co.uk/view_episode_scripts.php?tv-show=the-league&episode=s01e04 (last visited Dec. 13, 2018). *The League*, which ran from 2009-15, was a television series about a group of friends who are all avid fantasy football fans, and who annually form a league. In each episode, viewers watch as the friends try to balance their time between the league and their real lives. Throughout the season, what starts out as good-natured competition, gives way to a cutthroat mentality, which begins to affect friendships, home life, and even the work place as each owner tries to win the league—and the bragging rights that come with such a victory.

GATES:

Relaxing.

RUXIN:

Chilling.

GATES:

Yeah.

RUXIN:

Well, I can't tell you how excited I am to meet you. Because I have been cursing your name all week long. And now I get to yell at you in person.

GATES:

Excuse me?

RUXIN:

Excuse me? You ruined my Fantasy Football team this week.

GATES:

I'm just doing my job. My job is to go play football.

RUXIN:

Well, when you catch balls, it has a negative effect on my team. You ravaged my Fantasy Football team.

GATES:

You know what?

RUXIN:

What?

GATES:

I didn't know that. But now that I met you, I'm happy that it turned out that way.

RUXIN:

I don't like your tone, sir.

GATES:

You're an angry little man.

RUXIN:

I'm about to get angry all up in your face.

GATES:

Yeah?

RUXIN:

Yeah.

Ruxin lunges towards Gates and the scene cuts to the outside of the hotel with the whole group of friends leaving

PETE:

I told you Ruxin would wreck the weekend.

KEVIN:

Wrecked? The guy took a punch in the face from Antonio Gates. Put it up.

RUXIN:

Well, actually I slapped him and then fell running away. But . . .

KEVIN:

Hey, it counts.

TACO:

You know. I like this spa. That was relaxing.

PETE:

Shut up, Taco.

KEVIN:

Yeah, we're never gonna hear the end of this Ruxin-Antonio Gates thing . . .⁵⁵⁶

Arguably, Gates is not an “individual” to Ruxin. He represents a valuable commodity, one that can be bought, sold or traded. It is his performance that matters. He is a statistic, and in this case, his stats did not turn out to be in Ruxin’s favor. When a manager/owner selects his or her team, the focus is not on the athlete’s personhood. The focus is on how to successfully use the player.⁵⁵⁷ The player becomes a “data point. A number. A series of values that can be compared against other values in the dry, info-rich process of reducing gamble to certainty, of taking human performance and extracting every last win from it.”⁵⁵⁸ The reality is that in current society, where access to reliable information can be gleaned quickly, “better information means a greater commodification of athletes.”⁵⁵⁹ It is such commodification that allows fans to feel justified in cheering when a player exits the game with an injury, to going

⁵⁵⁶. *Id.*

⁵⁵⁷. Sherwood Strauss, *supra* note 496.

⁵⁵⁸. *Id.*

⁵⁵⁹. *Id.*

to the home of an “underperforming player . . . and burn his jersey,” or to do the wave as a player for the other team is carried off the field “on a stretcher with a neck injury.”⁵⁶⁰ Clearly, some fans now view NFL players in a manner similar to the position of Karl Marx “that members of the bourgeois the upper class came to view members of the proletariat working class as mere commodities, or material possessions whose value is only as good as what they were worth to them”⁵⁶¹ This deplorable state of affairs is one which all true fans of NFL and members of the media need to remedy.

4. Reason No. 4: Fallen Players Are Simply Casualties of War

Twenty years after *North Dallas Forty*, Oliver Stone’s *Any Given Sunday* was released in December 1999. An important sports film that continues to be just as relevant and timely today as at the time of its release; the film is one of the grittiest and most realistic football pictures ever to have been made.⁵⁶² It provides a unique portrayal of the violence on the field from the perspective of the players.⁵⁶³ Tony D’Amato (Al Pacino), the coach of the Miami Sharks (the fictional pro team in the film), instructs his players:

I don’t know what to say, really. Three minutes till the biggest battle of our professional lives. All comes down to today. Either we heal as a team, or we’re gonna crumble. Inch by inch, play by play, till we’re finished. We’re in hell right now, gentlemen. Believe me. And we can stay here, get the shit kicked out of us, or we can fight our way back into the light. We can climb out of hell . . . one inch at a time I’ll tell you this. In any fight it’s the guy who’s willing to die who’s gonna win that inch. And I know if I’m gonna have any life anymore it’s because I’m still willing to fight and die for that inch. Because that’s what living is! The six inches in front of your face! Now, I can’t make you do it! You gotta look at the guy next to you! Look into his eyes! I think you’re gonna see a guy who’ll go that inch with you! You’re gonna see a guy who will sacrifice himself for this team because he knows, when it comes down to it you’re gonna do the same for him! That’s a team, gentlemen! And either we heal now, as a team

560. Matt Harmon, *The Commodification of NFL Players*, BACKYARD BANTER (Oct. 17, 2013), <https://www.thebackyardbanter.com/the-commodification-of-nfl-players.html>.

561. *Id.*

562. ANY GIVEN SUNDAY (Warner Bros. 1999); Oriard, *supra* note 523.

563. *Id.*

or we will die as individuals. That's football, guys. That's all it is. Now . . . what are you gonna do?⁵⁶⁴

In addition to brilliant cinematography, the film was prescient in a number of ways. Long before the release of *League of Denial*⁵⁶⁵ or *Concussion*,⁵⁶⁶ *Any Given Sunday* exposed the risks of the game.

In a poignant scene, the aging, injured first string quarterback for the Miami Sharks, Cap Rooney (Dennis Quaid), expresses his fears to Coach Tony D'Amato that he is afraid to come back in and play after his most recent injury that required a microdiscectomy.

Ext. VERANDA of Cap's house - TWILIGHT

D'AMATO:

I seen you in practice, Cap. You're ready now. What is it?
*Cap doesn't respond or look at him. He sits on a swing.
Tony is stunned as the realization hits him.*

D'AMATO:

Cap, you don't want to go in? What is it?

ROONEY:

Tony, its not that, it's that . . . You don't know how much I wanted to come back , Tony. You have no idea. This is all I have in my life. Everything. It's not fun anymore. I'm not what I was. Tony, the first time I got hit in the pros I thought my heart was going to stop. You're never the same after that. After all the hits and concussions, I have these blank spots in my memory. I haven't been able to straighten my good leg for years, even on a good day I shake . . . Sometimes I can't even hold a spoon right. And I'm on pain killers all the time 'cause of my elbow and my ribs and my neck and my torn thigh and now my ruptured disc. But even now, with all that, I'd go back in a second . . . if I could only be what I was.⁵⁶⁷

A final scene demonstrates that players are simply soldiers who can be sacrificed for the good of the team and discarded when they are no longer useful.

564. *Any Given Sunday* (1999) *Movie Script*, SPRINGFIELD! SPRINGFIELD!, https://www.springfield-springfield.co.uk/movie_script.php?movie=any-given-sunday (last visited Dec. 13, 2018).

565. FAINARU-WADA & FAINARU, *supra* note 106.

566. *CONCUSSION*, *supra* note 264.

567. *ANY GIVEN SUNDAY*, *supra* note 562.

The final scene occurs between the team's owner, Christina Pagniacchi (Cameron Diaz), and the team's doctor, Dr. Harvey Mandrake (James Woods).

[discussing whether one of the players, Shark, should start in the play-off game]

PAGNIACCHI:

What about Shark?

MANDRAKE:

He's woozy still. He's got bad migraines, postconcussive syndrome.

PAGNIACCHI:

Can you clear him?

MANDRAKE *(almost laughs):*

. . . you mean which shell is the real peanut under?

(hesitates) Three concussions the last five months? There's no way to predict what another head-hit would do, Christina . . .

PAGNIACCHI:

How come Dallas had their quarterback practically in a coma last month just before he played one of the greatest games of his life . . . ?

MANDRAKE *(backtracking):*

. . . . Well no question he wants his tackle and sack bonus bad. Theoretically, his brain's at increased risk, but it's theoretical, and I can pump him full of cortisone to catch the swelling and let him finish out the season . . . without a malpractice suit of course . . . *(off her look)* I'm joking. I don't really think anything's gonna happen . . . but I'm not a complete prick, you know, Christina, I do have some kind of conscience.

(If she thinks so, Christina stays cool-eyed about it.)

PAGNIACCHI:

I'm not looking to screw him, Harvey. But I gotta have him in the playoffs -- and he wants to play for chrissake, so everyone comes out

MANDRAKE:

. . . long term? . . . What are you thinking?

PAGNIACCI (*a beat, eye to eye*):

I'm thinking we'll probably cut him in the off-season. the word's already out there, everyone's seen him take the hits. No one's gonna take him at his price I think he'll be happy just to have his old job back at 30 percent of what he makes. That's *if* we want him back.⁵⁶⁸

III. CONCLUSION: FOURTH AND GOAL

Clearly, popular culture has played a significant role in educating and instilling certain perspectives in football's fan base. From broadcaster input during live games, which often highlights and glorifies the brutality of the game, to films which portray the drama and heroism of the players, especially the beloved underdog, to television series and Fantasy Football leagues which objectify players and turn them into commodities to be bought sold, traded, or even discarded, popular culture has created a climate where fans are essentially de-sensitized to the inherently violent nature of the game. Arguably, most fans today would agree with the view expressed by the co-author of *League of Denial*, Steve Fainaru, in a 2013 interview:

I'll be perfectly honest: I don't want the game to change. I like the sport, in all its brutality. That's just the way it is. But at the same time, I can hold two thoughts in my mind. I love football, but I recognize now -- as a journalist and as a fan -- that these are real problems, that many of the people who built the league have suffered grotesque and horrible deaths, or have gone through terrible diseases along with those who love them, and that the sport is behind some of these things. The sport has to face that. We all have to face it. To ignore it would be wrong. But part of facing it is to acknowledge that it's real, and for people to know that it's real, and for the scientists to be able to do what they do. And then people can make their own decisions about whether they want to play or not.⁵⁶⁹

However, it is no longer 2013, when facts about the NFL Concussion Crises first entered mainstream popular culture. Today, in light of (1) the new medical evidence of the danger of sub-concussive hits, in addition to (2) the prevalence of CTE being diagnosed in professional football players, and (3) the risk posed

⁵⁶⁸. *Id.*

⁵⁶⁹. Roth, *supra* note 297.

by repeated concussions to both college⁵⁷⁰ and junior athletes,⁵⁷¹ there can be no denying that the game of football is a brutal collision sport that takes a heavy toll not only on the body, but the minds of players as well. Unfortunately, if the bottom line for the League remains profit, it is highly unlikely that the NFL will “pursue an ethical solution to the human costs” of the game due to the costs it would have to incur to make truly meaningful changes.⁵⁷² Instead, it will be up to each player to decide whether their love of the game is worth the risk of playing and up to each fan to decide whether to continue watching without the implementation of new safety rules and procedure. At least such decisions are now informed.

Certainly, NFL players have always accepted a certain level risk when they signed on to play the game. But the full extent of that risk couldn’t really be fully grasped until the discoveries of Dr. Bennet Omalu were finally allowed to surface. However, it is questionable whether a young player dreaming of playing in the NFL or one on the cusp of starting a new and exciting career will be able to cancel out the lessons of *Knute Rockne*, and *The Replacements* with the hard facts of *Concussion*.⁵⁷³ There is also a concern that due to the risks of concussions and sub-concussive hits, football will ultimately become a “ghettoized spot, not a Mainstream American sport.”⁵⁷⁴ Such ghettoization will occur as more affluent “suburban white kids or their parents . . . opt out” of playing the game due to the risks posed by head injuries. Only those from lower income families will find the risks of playing acceptable.⁵⁷⁵ Sean Pamphilon, the creator of the 2013 documentary *United States of Football*,⁵⁷⁶ explained that “in places where football isn’t the only thing to do, those fans are going to opt out first Certain colleges are going to follow and there will be a steady

570. Evan Grossman, *The NCAA’s Concussion Problem: Former Players Say League Hid Dangers of Playing Football*, N. Y. DAILY NEWS, Mar. 25, 2018, <http://www.nydailynews.com/sports/college/ncaa-players-league-hid-dangers-playing-football-article-1.3894488>.

571. Michael A. Galgano et al., *Chronic Traumatic Encephalopathy: The Impact on Athletes*, 8 CUREUS 1, 1 (Mar. 2016) (“A study of high school athletes found that all sports carried the risk for concussions with boys’ football being the highest at 63% of the total . . .”).

572. Roth, *supra* note 297.

573. See, e.g., Jeff Eisenberg, *College Players Undeterred by Grim CTE Study: ‘You Have to Accept the Good and Bad’*, YAHOO! SPORTS (July 26, 2017), <https://sports.yahoo.com/college-players-undeterred-grim-cte-study-accept-good-bad-013310982.html>.

574. Dennis Dodd, *Author Malcolm Gladwell Says Football Will Become ‘Ghettoized’*, CBS SPORTS (Aug. 29, 2013), <https://www.cbssports.com/college-football/news/author-malcolm-gladwell-says-football-will-become-ghettoized/>.

575. *Id.*

576. UNITED STATES OF FOOTBALL (Gaia Indie Films 2013) (This film is written and directed by journalist Sean Pamphilon and follows Pamphilon’s two-year journey as he travels the United States examining the risks of brain injury from youth leagues to the NFL).

decline in the participation of the game.”⁵⁷⁷ Consequently, “the future of football is going to become very much in line with the military. We’re going to have to own the fact that we’re putting people in certain situations and it’s going to be less glorified, there’s less of that glamorous veneer.”⁵⁷⁸

Concussions also continue to occur despite significant advancements in helmet design, which is geared to increase brain safety. From the exterior, the helmet, known as the VICIS Zero 1, appears “almost identical to the standard football helmet.”⁵⁷⁹ The difference is that the new design “has a soft shell that crumples on contact—similar to an automobile bumper—reducing impact against the brain.”⁵⁸⁰ It is true that this new helmet is “the most substantial innovation in the construction of helmets in decades.”⁵⁸¹ In fact, “it may be the most significant breakthrough in brain safety for a sport that over the last ten years has been all but definitively proven to pose significant long term neurological risks.”⁵⁸² This new technology is even more a godsend for players “at the youth and high school levels, where concern over neurological health is greatest.”⁵⁸³ The VICIS Zero1 is arguably the “safest football helmet” ever produced and “has the potential to save lives.”⁵⁸⁴ The on-going problem is that it still can’t prevent concussions. Even “[t]he scientists, neurosurgeons and engineers who designed the helmet make clear that it won’t prevent concussions. No helmet will.”⁵⁸⁵ For example, even though he was wearing the VICIS Zero1, linebacker Brian Cushing was one of the five concussed Houston Texans in the 2017 season opener.⁵⁸⁶ This doesn’t mean that the helmet is not a great advancement in safety. However, the concussion suffered by Cushing does “underscore the reality that no helmet can ever fully prevent concussions”⁵⁸⁷

577. Dodd, *supra* note 574.

578. *Id.*

579. Alexander Aciman, *The NFL’s New Helmet is Supposed to Make Players Safer from Brain Injuries. It’ll Almost Certainly Do the Opposite*, QUARTZ (Sept. 22, 2017), <https://qz.com/1084348/the-nfls-new-helmet-is-supposed-to-make-players-safer-from-brain-injuries-itll-almost-certainly-do-the-opposite/>.

580. *Id.*

581. *Id.*

582. *Id.*

583. *Id.*

584. *Id.*

585. Ahiza Garcia, *Vicis Zero1 NFL Helmet Aims to Reduce Head Injuries*, CNNMONEY SPORT (Sept. 18), <http://money.cnn.com/2017/09/16/news/companies/vicis-nfl-helmet-concussions-safety/index.html>.

586. ProFootballDoc, *New Helmet Technology Did Not Prevent Cushing Concussion*, SAN DIEGO UNION-TRIB., Sept. 14, 2017, <http://www.sandiegouniontribune.com/sports/profootballdoc/sd-sp-pfd-vicis-helmet-concussions-nfl-0914-story.html>.

587. *Id.*

Perhaps the answer is to have no helmets at all. While this suggestion may seem sacrilegious to die-hard fans, even co-chair of the 49ers and chairman of the NFL's health and safety advisory committee, Dr. John York, can envision a helmetless future for the football.⁵⁸⁸ "Can I see a time without helmets? Yes," York told the BBC. "It's not around the corner, but I can see it."⁵⁸⁹ While certainly a drastic move, such a decision would reduce the number of concussions that result from players using their helmets as weapons. Originally, there were no helmets.⁵⁹⁰ They entered the game as a piece of the safety equipment to prevent injuries, not to deliver concussions.⁵⁹¹ The reasoning underlying a return to a helmetless game is that although helmets clearly provide protection for a player's head and neck, they also encourage players to use their heads to make hits on opponents.⁵⁹² Obviously, "[a] player without a plastic shell surrounding his skull, meanwhile, would be far less inclined to launch himself headfirst into an opponent."⁵⁹³

There are a number of problems with such a solution. If players were not wearing helmets, they would be more susceptible to skull fractures as a result of inadvertent collisions at high speeds. And skull fractures are far more likely to cause death than concussions. And more deaths result from fractures than concussions.⁵⁹⁴ It might also be quite a challenge for current players. One obstacle to implementing a "helmetless" game is that it would require the NFL to completely revamp a number of rules, including eliminating "the three-point stance" and linemen would be required to be "upright at the snap."⁵⁹⁵ Perhaps the wiser course of action would be to keep helmets to provide protection from "the inevitable elbows and knees and feet that routinely strike heads currently protected from being split open," while reducing "opportunities for head involvement" in the game.⁵⁹⁶ This could be achieved by changing to "the

588. Mike Florio, *NFL Healthy and Safety Chair Sees a Future Without Helmets*, NBC SPORTS (June 18, 2015), <http://profootballtalk.nbcsports.com/2015/06/18/nfl-health-and-safety-chair-sees-a-future-without-helmets/>.

589. *Id.*

590. Amy Daughters, *The Evolution of Football Equipment*, BLEACHER REPORT (May 16, 2013), <http://bleacherreport.com/articles/1642538-the-evolution-of-football-equipment#slide0>.

591. *Id.*

592. Nesn-staff, *NFL Safety Chairman: 'I Can See' League Doing Away with Helmets in Future*, NESN (June 19, 2015), <https://nesn.com/2015/06/nfl-safety-chairman-i-can-see-league-doing-away-with-helmets-in-future/>.

593. *Id.*

594. Florio, *supra* note 588.

595. *Id.*

596. *Id.*

two-point stance,” prohibiting “all helmet-to-helmet hits,” and banning “players from launching in all situations.”⁵⁹⁷

In addition to prohibiting head targeting, an efficacious place for the NFL to start in terms of continuing efforts to prevent brain injury in players, the league should eliminate kickoff returns.⁵⁹⁸ Due to the “high-speed collisions” during a kick-off, statistics have shown “that kick-offs were five times more likely than other plays to produce concussions.”⁵⁹⁹ According to both Giants co-owner, John Mara,⁶⁰⁰ and Green Bay Packers President and a member of the Competition Committee, Mark Murphy, the kickoff return remains the “most dangerous play” in the game.⁶⁰¹ Removing the kickoff return from the play book would also be an intelligent move on the part of the leagues from both a moral and public relations perception.

At the time of this writing, in an effort to keep the kickoff, in particularly the on-side kick, in the game, the NFL is currently considering a proposal to change that rule so that “bans players on the kicking team from getting a running start on their way downfield.”⁶⁰² In addition, the proposal “eliminates all forms of ‘wedge’ blocking” which occurs when “multiple blockers” on the receiving team “link together.”⁶⁰³ The proposal also “requires eight out of the 11 members of the receiving team to line up within 15 yards of the spot of the kickoff and bars hitting within those 15 yards.”⁶⁰⁴ The goal is to prevent “players on the kicking team from going in motion pre-kick.”⁶⁰⁵

597. *Id.*

598. Dr. David Geier, *Geir Column: NFL Should Eliminate Kickoffs to Protect Players*, POST & COURIER, Oct. 19, 2017, https://www.postandcourier.com/sports/geier-column-nfl-should-eliminate-kickoffs-to-protect-players/article_07f9d404-b4d8-11e7-a02b-13ab31e23418.html.

599. Des Bieler, *Could the NFL Ban Kickoffs? Concussion Concerns Have Idea Moving Closer to Reality*, WASH. POST, Mar. 28, 2018, https://www.washingtonpost.com/news/early-lead/wp/2018/03/28/could-the-nfl-ban-kickoffs-concussion-concerns-have-idea-moving-closer-to-reality/?utm_term=.1cbd72c48ee2.

600. Mike Florio, *NFL Should Just Get Rid of the “Most Dangerous Play”*, NBC SPORTS (Apr. 20, 2016), <http://profootballtalk.nbcsports.com/2016/04/20/nfl-should-just-get-rid-of-the-most-dangerous-play/>.

601. Bieler, *supra* note 599.

602. Mark Maske, *The NFL Is Going to Change its Kickoff Rules to Try to Keep the Play in the Game*, WASH. POST, May 2, 2018, https://www.washingtonpost.com/news/sports/wp/2018/05/02/the-nfl-is-going-to-change-its-kickoff-rules-to-try-to-keep-the-play-in-the-game/?utm_term=.2b349c845db2. Currently, “members of the kicking team can get a five-yard running start, and blockers can line up far enough away to turn and retreat before moving forward into their blocks.” *Id.* The goal of the proposal “is to eliminate the violent collisions that take place with would-be-tacklers getting a running start before crashing into blockers far downfield.” *Id.*

603. *Id.*

604. *Id.*

605. *Id.*

While a step in the right direction, arguably, this proposal which simply modifies and does not eliminate kick-off returns is still playing Russian Roulette with player health.⁶⁰⁶ In the future, there will be more bullets in the gun as every season, the professional players “tend to be taller, heavier and faster than those who played before them.”⁶⁰⁷ 2013 NFL data found a weight “range from 193 pounds for cornerbacks to 315 for offensive guards” and average heights “ranged from 5 foot 11 inches for running backs and cornerbacks to 6 foot 5 inches for offensive tackles.”⁶⁰⁸ Researchers have found that “the average professional football player is between one-quarter and three-quarters pounds heavier each year.”⁶⁰⁹ For example, consider Joe Jacoby, a 6 foot 7 inch, 305-pound member of the Washington Redskins “Hogs” players, which made up one of “the most the famous and dominant offensive lines in NFL history.”⁶¹⁰ However, “in terms of size, the “Hogs” wouldn’t look that imposing today.”⁶¹¹ As of 2013, “the median weight for NFL guards and tackles had reached 310 pounds,” which means over half of these players outweigh Jacoby.⁶¹² Russ Grimm, a member of the NFL Hall of Fame, was one of the smallest Hogs, standing at 6 feet 3 inches, with a weight of 273-pounds.⁶¹³ Compared to today’s players, he would be one of the smallest guards in the league.⁶¹⁴ While quarterbacks may not be taller, their body mass has increased over the years, with an average weight increase to around 224 pounds, which is more than “20 pounds above the playing weights of [Sammy] Baugh, [Bart] Starr [or] [Joe] Montana.”⁶¹⁵

It does not take a physicist to figure out the consequences of this increase in player weight and body mass—each year the risk of brain injury and/or damages to other parts of the body from collisions is increasing.⁶¹⁶ Clearly, changes to the way the game is played must be made if fans truly wish to keep the players safe from brain injuries.⁶¹⁷ The current NFL Concussion Protocol

606. Florio, *supra* note 600.

607. McCann, *supra* note 45.

608. *Evolution of the NFL Player*, NFL FOOTBALL OPERATIONS, <https://operations.nfl.com/the-players/evolution-of-the-nfl-player/> (last visited Dec. 13, 2018).

609. McCann, *supra* note 45.

610. *Evolution of the NFL Player*, *supra* note 608.

611. *Id.*

612. *Id.*

613. *Id.*

614. *Id.*

615. *Id.*

616. McCann, *supra* note 45.

617. Daniel Rapaport, *CTE: New Study Links Subconcussive Head Hits to Brain Disease*, SPORTS ILLUSTRATED, Jan. 18, 2018, <https://www.si.com/nfl/2018/01/18/study-repeated-head-hits-concussions-cte>.

simply deals with symptoms after the hit, it “does not address the root of the problem, the hits themselves.”⁶¹⁸ According to Ann McKee, one of the foremost experts in the area of CTE, “[t]here must be a reduction in the number of head impacts” and simply continuing to focus “on concussion and symptomatic recovery does not address the fundamental dangers these activities pose to human health.”⁶¹⁹ Eliminating the kickoff would address McKee’s concerns by reducing the number of sub-concussive hits players experience. There would no longer be any reasons for teams to practice the play, thereby “ending all the collisions from blocking and tackling” in order to master the play.⁶²⁰

For those of us who are die-hard fans, which includes both authors of this Article, the key question is how much risk is too much risk. Even if the risk of CTE is slight, the dilemma is whether football fans should continue to rally around a sport where substantial damage could be happening to the brains of not only professional players, but to high school and college students. As Dr. Omalu has noted, fans must get over their “intoxication with football” that has resulted in some type of “delusional denial” of the risks actually posed by playing the game.⁶²¹ This issue is one that must be addressed by each and every fan. An excellent place to start in answering this conundrum is to simply to watch Josh Begley’s five-and-a-half-minute short “Concussion Protocol” in which every concussion in the NFL during this past season’s regular games is documented. This is a “stunning, dizzying, devastating” film.⁶²²

It is also important to remember that changes to the game affect not only the NFL, but also those younger players who look to the NFL players as role models. The Director of Officiating for the NFL, Mike Pereira, has recognized that:

It’s incumbent on the NFL and everybody else (at the pro level) to assume responsibility, to work on our games, to work on those individuals who are creating those highlight clips on ESPN, and try to discourage [aggression and violence] . . . so

618. *Id.*

619. *Id.*

620. Geier, *supra* note 598.

621. ESPN.com News Services, *Dr. Bennet Omalu ‘Would Bet My Medical License’ That O.J. Simpson Has CTE*, ESPN (Jan. 30, 2016), http://www.espn.com/nfl/story/_/id/14677428/dr-bennet-omalu-bet-my-medical-license-oj-simpson-cte.

622. Daniel Engber, *Concussion Protocol Will Change the Way You Watch Football Forever*, SLATE (Feb. 4, 2018), <https://slate.com/culture/2018/02/concussion-protocol-will-change-the-way-you-watch-football-forever.html>; “Every Concussion in the NFL This Year” Documented in a Chilling Five Minute Video, OPEN CULTURE (Feb. 2, 2018), <http://www.openculture.com/2018/02/every-concussion-in-the-nfl-this-year-documented-in-a-chilling-five-minute-video.html> (full video).

that they emulate a positive role model for young people involved in the game.⁶²³

In addition, a “[r]eduction of aggression on the field can lead to a reduction off the field.”⁶²⁴ So, “[p]roviding young athletes with non-aggressive but assertive role models, rewarding restraint[,] patience[,] and promoting athletic events as family affairs can also reduce the negative psychological effect of sport violence.”⁶²⁵

As Dr. Bennett Omalu has queried in an interview with *Time Magazine*:

Our children are the most vulnerable in our society. You wouldn’t hire children to become fighters. You wouldn’t let children jump from a plane to skydive. You wouldn’t let children smoke. You wouldn’t let children drink alcohol. You wouldn’t even let children have sex. Why would we then put a helmet on a child, and tell the child to slam his head against another child’s head?⁶²⁶

Fans whom take the position that changes to the game to make it safer have resulted in “disappointingly watered-down product,”⁶²⁷ need to rethink their stance. Arguably changes to the game—in order to make it safer—will never result in football becoming flagball. By its very nature, football is a violent game. “No other sport requires a player be wrestled to the ground on every unit of play, and certainly no sport comes remotely close to the level of physical contact and aggression in football.”⁶²⁸ Plus, while change may be disconcerting for some fans, it is important to recall that the game of football has undergone many changes in its history.

At the end of the day, the only way the league and the teams will have an incentive to significantly change the way the game is played is if the fans and the media, which influences the fans, takes a stand demanding that the current football culture of violence needs to change. For this transformation to occur, the impetus must come from those who watch and support. It cannot be left up to those who control the league, and who will simply slowly continue implementing piecemeal solutions, because it is caught between a rock and a

623. Sacks et al., *supra* note 397.

624. Anthony Portolese, *Psychological Impact of Violence in Sports*, HOW TO ADULT (Sept. 11, 2017), <https://www.livestrong.com/article/543363-psychological-impact-of-violence-in-sports/>.

625. *Id.*

626. Sean Gregory, *Concussion Doctor: Over 90% of NFL Players Have CTE*, TIME, Dec. 22, 2015, <http://time.com/4158140/concussion-film-bennet-omalu-cte-nfl/>.

627. Bieler, *supra* note 599.

628. CJ Stephens, *Does Football Fuel a Culture of Violence? (And Do We Care?)*, RELEVANT, Sept. 23, 2013, <https://relevantmagazine.com/culture/does-football-fuel-culture-violence-and-do-we-care>.

hard place—how to change the game to make it safer while basically trying to keep it the same. It is key to remember that fans “are the life blood of professional sports and the only reason why anybody in the industry receives a paycheck.”⁶²⁹ It is only the fans who have the power to evoke the radical changes that need to be implemented so that the great game of football can continue.

IV. AFTERWARD

While rife with dark humor, the following piece of popular culture embodies the truth that the authors of this Article believe fans must confront.

*Autopsy Shows that Deceased Fox NFL Robot Had Concussion Disease: R.I.P. Cleatus, another fallen soldier in the NFL's mental health war*⁶³⁰

Cleatus, the recently deceased robot mascot for *Fox NFL Sunday*, was suffering from the concussion-related, degenerative brain disease chronic traumatic encephalopathy when he took his own life late last year. Dr. Wilson Anderson, who performed the autopsy that confirmed the CTE diagnosis, said, “I honestly didn’t even know what to expect. I wasn’t sure if Cleatus, being a robot, would even have a brain. But sure enough, he did and it showed the same signs of CTE consistent with other former football players.”

Dr. Anderson conjectured that Cleatus’s CTE likely resulted from the countless blows to the head that he suffered in the course of his performances on *Fox NFL Sunday*, which often involved him playing football against other animated robots and fighting CGI characters in promotional animations. Anderson estimated that Cleatus may have suffered from dozens of undiagnosed concussions during his decade on Fox. Network assistants consistently failed to report the occasions on which extended bodily stress sent sparks flying from his cranium, instead welding those wounds so to cover things up.

Cleatus’s wife, Jeanne, was dismayed to learn that his death may have come as the direct result of the job that, until

629. Schaik, *supra* note 425. For example, declining attendance by fans, “who were frustrated with the aggression, violence, and foulplay,” i.e., play not sanctioned by the rules and unjustified, changed the culture of Rugby Union in Australia. Sacks et al., *supra* note 397.

630. Chris Alarie, *Autopsy Shows That Deceased Fox NFL Robot Had Concussion Disease*, MEDIUM (Jan. 8, 2017), <https://medium.com/the-shocker/autopsy-shows-that-deceased-fox-nfl-robot-had-concussion-disease-696f42532918>.

recently, he performed with devotion and aplomb. She recounted, “He loved that job. He loved entertaining. He loved the violence. [sobbing] He loved interacting with the brands.” But the CTE diagnosis explains the behavioral changes she and her 16-year-old son, Alfie, had noticed in Cleatus in the months leading up to his death.

According to his wife, Cleatus had always been a fairly happy robot until he began complaining of frequent headaches last year. Shortly thereafter, Cleatus experienced tremors, mood swings, and episodes of confusion and paranoia. His entire character changed, as he began abusing prescription drugs, alcohol, and malware. According to Alfie, he was like a completely different robot: “He wasn’t my dad any more. Not the dad I’d always known, at least. He’d drink and take pills, and put mysterious drives into his USB ports, and just scare the hell out of us. Back in April, he disappeared for two weeks and came back with a broken nose and a bunch of guns. I didn’t know what to do whenever he’d go after my mom.”

The police were called to their home several times to respond to domestic violence complaints. Cleatus was fired by Fox during the preseason after an incident on set where, drunk and disoriented, he attacked a production assistant. Fearing for the safety of her son and herself, Jeanne kicked Cleatus out of the house. He moved in with his friend Digger, an animated gopher that Fox occasionally used on their NASCAR telecasts. It was Digger who found Cleatus’ body on the day after Thanksgiving. Although there was no suicide note, a long, rambling, distraught voicemail that he left his son on the holiday made his intentions clear. Alfie regrets not answering the call or calling his father back before he ended his life: “I thought he was just doing more of the same stuff he’d been doing for months: making threats, trying to manipulate us, you know.”

Police determined that Cleatus died of a self-inflicted gunshot wound to the chest, similar to former NFL players and CTE sufferers Dave Duerson and Junior Seau. In fact, it was this method of suicide that first tipped off Jeanne to the possibility of a CTE diagnosis: “I’d seen that Will Smith movie [*Concussion*, released in 2015]. Once they told me that was how he did it, I just knew it. I told them to do an autopsy.”

Jeanne said that the CTE diagnosis has actually given her some comfort: “At first I thought it was my fault. I thought I must have been doing something wrong to make him act that way. That I’d maybe forgotten to defrag him correctly. It was so hard to see him like that and to force him to leave. But now I know it was the concussions, that it was football, that it was Fox and the NFL. They did this to him. They did this to my husband, to my son’s father. And they knew they were doing it.”

Alfie shares neither his mother’s anger at the network and NFL nor her perverse sense of closure due to the diagnosis. Instead, he blames himself: “I should have answered his call [on Thanksgiving]. I think about that every day. I wish I had seen that it was a cry for help. I wish I hadn’t just let my father die.”⁶³¹

*Representatives from Fox and the NFL did not respond to our request for comment.*⁶³²

631. *Id.*

632. *Id.*