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TEMPTATION TO TAMPER: THE INEFFECTIVENESS OF THE
NBA'S ANTI-TAMPERING POLICY AND WHY THE
LEAGUE MAY BE FORCED TO TAKE
DRASTIC MEASURES TO FIX IT

“You don’t get free agents without it. [Tampering] is what the whole league is built on.”¹

I. WHO CARES ABOUT TAMPERING?

While recent trends might make it seem like player tampering in professional sports is a new and emerging issue, its history can be traced all the way back to the 1870s.² Since then, anti-tampering provisions have been implemented to prevent teams from recruiting the top players on other teams while they are still under contract and currently exist in every major professional sports league.³ These early provisions arose out of frustration by owners who lost their players as a result of interference by other teams—a concern that is just as relevant now as it was in the past.⁴ In the National Basketball Association (“NBA,” or “the League”) however, player tampering is running rampant, and the League’s anti-tampering policy is not effective in preventing illegal recruiting.⁵ Ultimately, the NBA would be well within its legal rights to more strictly en-

1. See Ric Bucher, *NBA Tampering 101: If You’re Not Cheating . . . You’re Not Trying*, BLEACHER REP. (Sept. 5, 2017), <https://bleacherreport.com/articles/2731438-nba-tampering-101-if-youre-not-cheating-youre-not-trying> [<https://perma.cc/78MG-EVJC>] (quoting anonymous NBA general manager regarding state of player tampering).

2. See Roger D. Blair & John E. Lopatka, 1-2016-1 *Antitrust Report* 1–II (MB 2016) (referencing first anti-tampering rules sports league implemented after baseball club coaxed star baseball player away from his team).

3. See *id.* (tracing history of anti-tampering policies in sports from their early beginnings to present day).

4. See *id.* (listing early historical reasons for these provisions); see also Ohm Youngmisuk & Bobby Marks, *How Will Tampering Charges Against the Lakers Proceed?*, ESPN (Aug. 21, 2017), http://www.espn.com/nba/story/_/id/20402343/2017-nba-tampering-faq [<https://perma.cc/UF78-86NR>] (providing answers to frequently asked questions regarding recent and historical examples of player tampering in NBA).

5. See Dave McMenamin et al., *NBA Punishes Lakers for Tampering but Has a History of Letting Players Slide*, ESPN (Sept. 1, 2017), http://www.espn.com/nba/story/_/id/20445869/nba-player-player-tampering-new-nba [<https://perma.cc/J9QS-Z933>] (describing circumstances of Los Angeles Lakers’ fine in contrast to common types of tampering). For further discussion of several examples of illegal tampering in the NBA where the League has decided against enforcement as matter of policy, see *infra* note 111 and accompanying text.

force this policy and would have no excuses not to if it is truly as serious about preventing tampering as it claims to be.⁶ While anti-trust laws normally prohibit restrictions of trade, the NBA's anti-tampering policy fits several exceptions to these laws that would allow the League to prevent teams from negotiating with players under contract with other teams.⁷ After an examination of these exceptions through the context of the anti-tampering provisions in the NBA Constitution, it becomes clear that the League is within its legal right to regulate and prohibit tampering.⁸ However, the League's lack of enforcement and pattern of inaction coupled with emerging trends in technology and player relations have allowed tampering to become a systemic problem in the League.⁹ This Comment argues NBA Commissioner Adam Silver should use his powers to resolve these concerns.¹⁰

Anti-tampering policies in professional sports leagues are necessary for a number of reasons, such as maintaining a competitive balance among each of the teams in a league when it comes to their ability to sign players.¹¹ Without such provisions, less desirable franchises would be vulnerable to more prestigious and better positioned teams in highly marketable cities that could actively compete for the services of these teams' players while they are still under contract.¹² Allowing this to happen could be problematic in several

6. See *Why the NFL Says There's No Crying 'Antitrust!' in Football*, PEPPERLAW: COMPETITION NEWS (May 16, 2011), <https://www.pepperlaw.com/publications/why-the-nfl-says-theres-no-crying-antitrust-in-football-2011-05-16/> [<https://perma.cc/RLU6-Z8TB>] (examining antitrust in relation to NFL lockout). For further discussion of reasons why NBA's anti-tampering policy does not violate antitrust laws and thus legally allows the League to prevent teams and players from recruiting players who are under contract with other teams, see *infra* note 63 and accompanying text.

7. For further discussion of impact of antitrust laws and applicable exceptions in context of sports leagues, see *infra* notes 35–47 and accompanying text.

8. For further discussion of how antitrust laws can be applied to the NBA's anti-tampering policy, see *infra* notes 48–81 and accompanying text.

9. For further discussion of the history and prevalence of tampering in the NBA and problems it causes, see *infra* notes 138–146 and accompanying text.

10. For further discussion of how Adam Silver can use his powers as Commissioner to curtail the League's tampering problem, see *infra* notes 169–210 and accompanying text.

11. See Jack Andrade, *What Is Tampering and Why Does the NFL Care About It?*, BOSTON.COM (Mar. 25, 2015), <https://www.boston.com/sports/new-england-patriots/2015/03/25/what-is-tampering-and-why-does-the-nfl-care-about-it> (“Why does the NFL take tampering so seriously? In layman’s terms, because tampering has the potential to create an uneven playing field when it comes to acquiring players.”).

12. See Dwight Jaynes, *The Lakers Got Off Way Too Easy on That Tampering Charge*, NBC SPORTS (Sept. 1, 2017, 6:51 AM), <https://www.nbcsports.com/northwest/portland-trail-blazers/lakers-got-way-too-easy-tampering-charge> [<https://perma.cc/J6YY-HYPL>] (stating that Los Angeles Lakers have been repeat offenders of

ways.¹³ High profile examples of tampering could damage the reputation of a sports league if fans and the media are repeatedly exposed to team officials trying to coax players away from opposing teams.¹⁴ Additionally, implementing and enforcing anti-tampering provisions can act as a deterrent to teams planning on engaging in such recruiting methods.¹⁵ Adding clarity to the limitations of team's recruiting abilities can also serve to put players on notice of activities which could potentially result in sanctions.¹⁶

Another concern with allowing teams to negotiate with players under contract with other teams is that the negotiations may serve as a distraction which could negatively impact players' performances with their current teams.¹⁷ This could lead to situations where players actively playing for one team are forced to compromise their current team to get a bigger upcoming pay day or to put their future team in a better position to win.¹⁸ Though it did not involve any known tampering, Carmelo Anthony's 2011 incident when he forced his way into a trade when the Denver Nuggets sent him to the New York Knicks exemplifies a player's focus on his next

this rule to detriment of other less valuable teams); *see also* Eric Reefer, *What Will It Take For Small-Market NBA Teams to Be Heard*, SPORTS RETRIEVER (Nov. 30, 2018), <http://sportsretriever.com/basketball/will-take-small-market-nba-teams-heard/> [<https://perma.cc/PM86-LAXC>] (“[D]ue to the fact that big-market teams can offer them so much more in terms of branding, exposure, media hype, and even endorsement deals, there’s always the fear that [players from small market teams] might pack their bags and bounce to the big city when their contracts are up. It all comes down to opportunity, and if these players feel they can get a better one in a bigger market, what’s to stop them from going?”); Adrian Wojnarowski, *Small-Market GMs Upset NBA Won’t Enforce Tampering Rules*, ESPN (Dec. 21, 2018), http://www.espn.com/nba/story/_/id/25587459/small-market-gms-upset-lebron-james-pitch-anthony-davis [<https://perma.cc/KK2L-RXVQ>] (expressing concerns that League’s inaction on LeBron James’ tampering has led to “open season on small markets and [their] players”).

13. *See* James T. Gray, *Sports Law Practice* §2.13 (MB 2017) (explaining three main reasons why enforcement of anti-tampering rules is necessary).

14. *See id.* (stating that these policies help “preserve a positive public image of professional sports”).

15. *See id.* (reasoning that by clarifying type of detrimental conduct that would result in tampering violation, teams would avoid these practices to avoid punishment by League).

16. *See id.* (explaining that players may be warier of engaging with teams who could be acting in violation of these rules).

17. *See* Blair & Lopatka, *supra* note 2 (“An employee under contract may lose focus on performing his obligations to his current employer, turning his attention to discussions taking place with a prospective employer. The loss of focus at issue here is not deliberate, but the inevitable byproduct of an alternative, time-consuming activity.”).

18. *See id.* (stating that athletes may be incentivized to act to detriment of their current team for benefit of team they wish to join in future, and that risk heightened in sports leagues because one team’s failure can directly correlate to another team’s success).

contract harming his current team.¹⁹ This move ultimately left both teams worse off, in retrospect.²⁰ The same impact is evident in the most recent NBA season with the Lakers because the team's performance on the court was apparently been hindered by off-court speculation about LeBron James unsuccessfully trying to have his teammates traded for New Orleans Pelicans star Anthony Davis.²¹

With the importance of anti-tampering provisions in mind, the NBA must be aware of several legal concerns to ensure it is doing all it can to prevent tampering.²² The biggest challenge to the legality of such provisions is the Sherman Antitrust Act, which Congress enacted to prevent the restraint of trade or monopolization of commerce.²³ Any law or contract that creates an anticompetitive agreement or monopolization of a market is subject to scrutiny under the Sherman Act.²⁴

To date, courts have yet to evaluate the tampering issue in the context of antitrust law, and the overall topic remains unsettled.²⁵ However, antitrust principles and exceptions such as the "rule of

19. See Terry Pluto, *Carmelo Anthony Fiasco Could Be Worse Than What LeBron James Did to the Cleveland Cavaliers*, CLEVELAND.COM (Jan. 28, 2011), https://www.cleveland.com/pluto/blog/index.ssf/2011/01/carmelo_anthony_fiasco_could_b.html [<https://perma.cc/T74M-QEAC>] (explaining that Anthony would be better positioned if he was traded to Knicks immediately instead of waiting to sign in offseason because new CBA would lead to lower maximum salary).

20. See Harvey Araton, *Carmelo Anthony: How Much Was He to Blame for Trouble With The Knicks?*, N.Y. TIMES (Sept. 24, 2017), <https://www.nytimes.com/2017/09/24/sports/basketball/carmelo-anthony-new-york-knicks.html> [<https://perma.cc/ZFQ2-8MJL>] (evaluating Anthony trade and his disappointing impact on Knicks more than six seasons later).

21. See Des Bieler, *LeBron James Can Only Blame His Teammates So Much After Another Bad Lakers Loss*, WASH. POST (Feb. 26, 2019), https://www.washingtonpost.com/sports/2019/02/26/lebron-james-can-only-blame-teammates-so-much-after-another-bad-lakers-loss/?noredirect=on&utm_term=.b5f229d70b5a [<https://perma.cc/UUN3-TQ54>] (noting that James "killed [the Lakers] chemistry" through his attempts to acquire Davis).

22. See Blair & Lopatka, *supra* note 2, at 1–III (examining effects of antitrust laws on sports tampering provisions).

23. See 15 U.S.C. §§ 1–2 (2018) (making it illegal to restrict or monopolize or conspire to restrict or monopolize trade); see also *State of Mo. v. Nat'l Org. for Women, Inc.*, 620 F.2d 1301, 1304–05 (8th Cir. 1980) ("The 50th and 51st Congresses were primarily concerned with business trusts and the economic power which those trusts possessed. . . . Clearly, by prohibiting trusts, the Congress sought to achieve the preservation of free and fair competition.").

24. See 15 U.S.C. §§ 1–2 (forbidding anticompetitive agreements in restraint of trade).

25. See Lewis Kurlantzick, *The Tampering Prohibition and Agreements Between American and Foreign Sports Leagues*, 32 COLUM. J.L. & ARTS 271, 293 (2009) ("No American court has evaluated the antitrust status of a no tampering rule in an inquiry focusing on this practice alone.").

reason” and the “nonstatutory labor exemption” can be applied to the realm of sports leagues.²⁶ The “rule of reason” is a cornerstone of antitrust law, and stands for the principle that, in order to be illegal, a restriction must go beyond simply regulating competition and instead must “suppress” or “destroy” it.²⁷ Additionally, the “nonstatutory labor exemption” is most frequently applied to professional sports leagues, allowing leagues and players to collectively bargain free from anticompetitive guidelines that would otherwise be considered a violation of antitrust laws.²⁸

This Comment examines the NBA’s current anti-tampering policy as it is presently enforced and assesses steps the League can take to diminish the pervasiveness of tampering.²⁹ Section II provides legal background for antitrust laws concerning anti-tampering restrictions, including the Sherman Act, the rule of reason, and the nonstatutory labor exemption.³⁰ Section III explains the NBA rules regarding tampering and chronicles the League’s enforcement patterns when violations have occurred.³¹ Section IV examines the NBA’s stance on tampering and analyzes how its shortcomings in policy enforcement have led to a systemic player tampering problem throughout the League.³² Section V offers solutions for the NBA to reverse the upward trend in tampering and analyzes the legality and impact of such actions.³³ Finally, Section VI concludes the discussion by reiterating the main concerns facing the NBA and summarizing the possible solutions at its disposal.³⁴

26. For further discussion, introduction, and definition of the rule of reason and nonstatutory labor exemption for antitrust law, see *infra* notes 27 and 63 and accompanying text.

27. See *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (announcing rule of reason for first time and defining its applicability).

28. For further discussion of the nonstatutory labor exemption and its applicability in context of professional sports, see *infra* notes 63–69 and accompanying text.

29. For further discussion of the current pattern of enforcement and proposed solutions, see *infra* notes 92–133 and notes 178–189 and accompanying text.

30. For further discussion of antitrust laws and their applicability to sports anti-tampering rules, see *infra* notes 35–81 and accompanying text.

31. For further discussion of the history of tampering in the NBA and how the League has enforced the policy, see *infra* notes 82–133 and accompanying text.

32. For further discussion of the widespread permeation of tampering in the NBA, see *infra* notes 134–157 and accompanying text.

33. For further discussion of how the NBA can resolve its tampering problem and legal implications of such resolutions, see *infra* notes 158–218 and accompanying text.

34. For further discussion of the practical and legal concerns facing the League and how to resolve them, see *infra* notes 219–235 and accompanying text.

II. LEGAL RESTRICTIONS AND GUIDELINES RELATING TO SPORTS ANTI-TAMPERING PROVISIONS

A. Concerns with Antitrust Laws

The Sherman Antitrust Act makes it illegal to have laws or contracts that place restraints on competition.³⁵ Congress enacted the Sherman Act, the first and most important federal antitrust law, in 1890.³⁶

Section 1 provides “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”³⁷

Section 2 provides “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony”³⁸

There are three elements needed to prove a violation of the Sherman Act: (1) a concerted action to (2) restrain trade, that (3) affects interstate or foreign commerce.³⁹ On their faces, sports anti-tampering policies meet these criteria, as they are express agreements among the teams that prohibit players from negotiating with other teams, and the market is spread out among the states and, in some cases, countries.⁴⁰ However, Supreme Court jurisprudence indicates that only *unreasonable* restraints on trade are prohibited by the Sherman Act, leaving the door open for sports tampering policies to fit into one of several exceptions to the Act.⁴¹

One could argue that anti-tampering policies are a collective agreement to limit trade, making Section 1 of the Sherman Act ap-

35. See 15 U.S.C. §§ 1–2 (deeming it illegal to restrict or monopolize any part of trade or commerce).

36. *Id.*

37. 15 U.S.C. § 1 (laying out illegality of anticompetitive contracts).

38. 15 U.S.C. § 2 (portraying monopolies as illegal).

39. See Mark C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, 30 CAP. U. L. REV. 125, 128 (2002) (listing three elements).

40. See *id.* at 131 (explaining each individual team in sports leagues must work together to create more profitable entity, including agreeing to restrict trade for betterment of league).

41. See *id.* at 144 (“For the most part, however, the courts have recognized that the sports business is unique because of the need for off-the field cooperation to enhance on-the-field competition.”). For further discussion of the “rule of reason” and “nonstatutory labor exemption,” see *infra* notes 50 and 63 and accompanying text.

plicable.⁴² Therefore, the structure of a league must be examined to determine if it is even subject to Section 1.⁴³ If leagues were viewed as a single entity rather than a collection of individually run organizations, Section 1 would not be applicable.⁴⁴ However, under *North American Soccer League v. National Football League*,⁴⁵ sports leagues are determined to be made up of individual teams, each driven by their own independent economic goals and capable of making their own separate financial decisions, that are in direct competition with one another.⁴⁶ As such, the NBA is not seen as a single entity, but rather a collection of individual actors conspiring in the marketplace, thus taking it firmly into the realm of antitrust laws.⁴⁷

By their very nature, anti-tampering provisions restrict the ability of players to contract their labor with an organization in search of their services, which stands directly at odds with the literal language of the statute.⁴⁸ At its core, the League's decision to disallow teams from negotiating for the services of players under contract with another team amounts to a promise by competing organizations not to pursue one another's employees.⁴⁹ Under the "rule of reason," however, separate entities may be permitted to collectively determine restrictions on inter-organization competition if they are

42. See 15 U.S.C. § 1 (stating that it is illegal for actors to conspire to restrict commerce).

43. See *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 196 (2010) (examining whether NFL was to be seen as one individual league or if each individual team with independent economic motivations, noting that if League was to be seen as separate entities "capable of conspiring," it may be subject to § 1 of Sherman Act).

44. See Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 735 (2010) ("As a single entity, a professional sports league and its independently owned franchises would obtain a complete exemption from [S]ection 1.").

45. 670 F.2d 1249 (2d Cir. 1982).

46. See *id.* at 1252 ("Although NFL members thus participate jointly in many of the operations conducted by it on their behalf, each member is a separately owned, discrete legal entity which does not share its expenses, capital expenditures or profits with other members. Each also derives separate revenues from certain lesser sources . . .").

47. See *e.g.*, *Am. Needle*, 560 U.S. at 200 (declaring that actions of thirty-two individual NFL teams are covered by § 1); see also *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 837 (3d Cir. 2010) (applying *American Needle's* holding to other sports leagues including NBA).

48. See 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

49. See Blair & Lopatka, *supra* note 2, at 1–IV (stating that "an agreement among competitors not to solicit each other's employees is potentially a violation of the antitrust laws").

pursuing a collective goal.⁵⁰ Therefore, under the rule of reason, the NBA is considered a “joint venture,” where the individual teams act collectively to combine their money, skill, and knowledge for the collective benefit of the association.⁵¹

With respect to anti-tampering policies within the NBA specifically, while the provisions do regulate competition among the teams, they do not go far enough to suppress it.⁵² Rather than suppress competition, these provisions are designed to promote competitiveness and balance among the teams to give each franchise the best chance to assemble the strongest team it can, thereby giving it the best chance to win.⁵³ As such, the purpose of the policy is not only reasonable, but it is necessary.⁵⁴ Here, because each team is an individual actor pursuing its own economic and competitive success, and the teams are in a constant state of competition against one another, there are compelling reasons for the teams to prevent other teams from tampering with their players.⁵⁵ Under this theory, the NBA’s anti-tampering policy would be very likely to survive a rule of reason analysis.⁵⁶

50. See *Ariz. v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 356 (1982) (allowing separate entities to pursue joint venture when “persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market”); see also Blair & Lopatka, *supra* note 2, at 1–IV (“Restraints on competitive behavior among members of a productive joint venture that plausibly enhance its value are judged under the rule of reason.”).

51. See 46 Am. Jur. 2d Joint Ventures § 1 (2006) (“[A] joint venture has been generally defined as an association of two or more persons formed to carry out a single business enterprise for profit for which purpose they combine their property, money, efforts, skill, time, and/or knowledge.”).

52. See CONSTITUTION AND BY-LAWS OF THE NAT’L BASKETBALL ASSOCIATION, art. 35(e), 35A(e)–(f) (2012), available at <https://prawfsblawg.blogs.com/files/221035054-nba-constitution-and-by-laws.pdf> [<https://perma.cc/H4BX-7K3H>] (explaining that anyone who is charged with tampering must be provided chance to respond to charges and plead case to commissioner).

53. See Andrade, *supra* note 11 (noting that league policy for NFL rule provides justification for tampering provision, which is to protect teams during negotiation process and to fairly acquire and retain services of their players).

54. See *id.* (stating that policy “allow[s] the intra-League competitive systems devised for the acquisition and retention of player talent . . . to operate efficiently”).

55. See *Am. Needle*, 560 U.S. at 203 (stating that when restrictions on competition are necessary, rule of reason is applicable for judging restraints).

56. See *Bd. of Trade of Chi.*, 246 U.S. at 238 (“Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”).

Another potentially relevant statute is the Clayton Act, which Congress enacted in 1914 to provide further clarification on the Sherman Act of 1890.⁵⁷ The Clayton Act states:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.⁵⁸

The Clayton Act's declaration that human labor is not a commodity appears to apply specifically to the realm of professional sports.⁵⁹ Anti-tampering policies restrain the ability of teams to negotiate for the labor of players on opposing teams, thus a challenge to the legitimacy of the policy would necessarily be a challenge to the regulation of labor of human beings.⁶⁰ Such a challenge would fail under the plain language of the statute because regulation of human labor is not a commodity that can be prohibited under the Clayton Act.⁶¹ The text of the Clayton Act strongly indicates that the Sherman Act did not intend to include simple negotiations of labor, such as sports anti-tampering regulations, as part of its bar on restraint of trade.⁶²

57. See 15 U.S.C. § 17 (1914) (declaring human labor not commodity or article of commerce).

58. *Id.*

59. See Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 26–27 (1986) (arguing that while rarely considered by courts in such context, text of Clayton Act seems to be applicable to sports leagues).

60. See *id.* at 27 (“If a player practice is challenged solely on the ground that it restrains competition in the employment of players, the challenge is necessarily founded on the claim that antitrust law proscribes restraints on competition for the labor of human beings—that is, restraints on the labor market.”).

61. See 15 U.S.C. § 17 (stating that antitrust laws do not make regulation of human labor illegal).

62. See Roberts, *supra* note 59, at 27–28 (explaining that application of Clayton Act to sports leagues seems “inescapable” due to unique nature of sports and need for competitive balance, though rarely has been applied).

B. *National Basketball Ass'n v. Williams* and the Nonstatutory Labor Exemption

In addition to having a high probability of surviving rule of reason scrutiny, the NBA's anti-tampering restrictions fall under an exception that removes them from the scope of antitrust laws: the nonstatutory labor exemption.⁶³ One of the definitive cases involving this nonstatutory exemption in the world of sports is *National Basketball Ass'n v. Williams*.⁶⁴ In *Williams*, the National Basketball Players Association ("NBPA") sought relief against the NBA, arguing that three provisions in the previous collective bargaining agreement ("CBA") constituted a violation of antitrust laws.⁶⁵ In the eyes of the NBPA, these requirements amounted to "naked restraints between competitors," designed to suppress and extinguish the bargaining power of the players.⁶⁶ The NBPA premised its argument on the theory that the cartel-like actions by the teams in enforcing these rules violated the Sherman Act.⁶⁷ Conversely, the NBA maintained that the provisions at issue were not subject to antitrust scrutiny and instead were permitted based on the nonstatutory labor exemption.⁶⁸ The Second Circuit agreed with the NBA's assertion, relying on past history and congressional decisions indicative of a legislative intent to keep collective bargaining out of the scope of antitrust laws.⁶⁹

The Second Circuit explained that multiemployer bargaining has long been a staple of labor relations in the United States, even

63. See *Why the NFL Says There's No Crying 'Antitrust!' in Football*, PEPPERLAW: COMPETITION NEWS (May 16, 2011), <https://www.pepperlaw.com/publications/why-the-nfl-says-theres-no-crying-antitrust-in-football-2011-05-16/> [https://perma.cc/J35V-EFA8] (noting "nonstatutory labor exemption" is typically applied in context of sports that allows collective bargaining between players associations and leagues to negotiate mandatory terms which may limit and restrict competition for wages and other conditions).

64. See *Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684, 693 (2d Cir. 1995) (holding antitrust laws do not limit NBA's ability to jointly bargain with Players Association).

65. See *id.* at 685–86 (challenging draft system, revenue sharing and salary cap, and "Right of First Refusal").

66. See *id.* at 687 (claiming that "they prevent competition; they fix prices; they suppress salaries").

67. See *id.* (detailing concerns that any team who opposed "the cartel's rules" would be subject to potentially damaging punishment).

68. See *id.* at 688 (arguing that antitrust claim is eclipsed by rules of collective bargaining).

69. See *id.* (concluding that "[r]elevant legal authority . . . strongly suggests that the antitrust laws do not prohibit employers from acting jointly in bargaining with a common union").

dating back to the days before the Sherman Act's passage in 1890.⁷⁰ To the Second Circuit, the NBA's CBA agreement was, and still is, a form of multiemployer bargaining, in which the individual teams work in unison with one another to negotiate common terms against a union of the players.⁷¹ Collective bargaining serves a crucial role in these negotiations because it allows employers to remain united in their terms rather than allow unions to attack employers individually and take them out one by one.⁷² Collective bargaining also lowers the costs of negotiating by reducing the overall number of separate negotiations.⁷³

Further, multiemployer bargaining serves the additional role of leveling the playing field and eradicating potential competitive disadvantages from differing terms among employers, a concern that has an increased level of importance in the context of sports.⁷⁴ Without collective bargaining, each individual team would be able to negotiate under its own separate set of rules, creating a lack of uniformity that would tear at the entire fabric of the League.⁷⁵ As such, sports leagues such as the NBA have a special need for multiemployer bargaining.⁷⁶

The Second Circuit also explained that multiemployer bargaining would not succeed unless the employers were permitted to create a set of collective base of ground rules.⁷⁷ This practice has been in existence for over a century in the United States, but Congress has never taken any action to prevent multiemployer bargaining, and no challenge to its legality has ever succeeded.⁷⁸ For the afore-

70. *See id.* at 688–89 (detailing importance and longevity of multiemployer bargaining, which impacts millions of today's employees).

71. *See id.* at 688 (stating that multiemployer bargaining takes place when group of employers mutually agree to "act as a single entity" to negotiate with union or unions of their employees).

72. *See id.* (explaining tactics used by unions to coerce employers into accepting uneven terms).

73. *See id.* at 688–89 (showing that without competitive bargaining, employers would have to negotiate individually with employees, significantly multiplying cost of negotiating).

74. *See id.* at 688 (explaining that having different terms for each employer would create unbalanced competitive advantage during negotiations).

75. *See id.* at 689 (detailing unique importance of uniformity in sports industry and need for common rules throughout league).

76. *See id.* ("Unlike the industrial context in which many work rules can differ from employer to employer—even though a roughly common bottom line is desirable—sports leagues need many common rules.").

77. *See id.* (noting that "essence of multiemployer bargaining" was ability to form united front when negotiating with unions).

78. *See id.* at 689–90 (examining history of legislative action indicating congressional support for practice of multiemployer bargaining, which court relied on in determining that no violation had occurred).

mentioned reasons, the court held that multiemployer collective bargaining was not a violation of antitrust laws, thus falling under the nonstatutory labor exemption.⁷⁹ The court's holding in *Williams* makes it clear that the NBA's anti-tampering policy does not violate antitrust laws because the policy is included in the League's CBA.⁸⁰ Thus, as long as the League can show that it conducted the collective bargaining negotiations in good faith, no antitrust violation exists.⁸¹

III. THE HISTORY OF ILLEGAL TAMPERING IN THE NBA

Having determined that the League's policy does not violate any antitrust laws, it is next possible to examine the policy in its current form and dive deeper into the reasons for its perceived ineffectiveness.⁸² Player tampering has been prevalent in the NBA for a long time, but many believe that in recent years tampering has spiraled out of control.⁸³ Commissioner Adam Silver's increasingly lenient enforcement of tampering violations is a main catalyst for this rise in tampering.⁸⁴

A. What Counts as Tampering?

The NBA lays out its tampering policy in Sections 35 and 35A of the NBA Constitution.⁸⁵ An NBA player tampers when the player attempts to convince or suggest to another player (or any other League employee), who is under contract with a different

79. *See id.* at 693 (finding in favor of appellee NBA teams, holding that provisions of CBA at issue did not constitute violation of antitrust laws).

80. *See* COLLECTIVE BARGAINING AGREEMENT, art. XLII, Ex. A, §§ 5(d), (f) (2017), available at <http://3c90sm37lsaecdwtr32v9qof-wpengine.netdna-ssl.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> [<https://perma.cc/8FWE-7PZG>] (including section requiring NBA players to abide by league's tampering policy in uniform player contract, which is fundamental part of CBA).

81. *See Williams*, 45 F.3d at 691 (requiring that employer's negotiations with employees and unions take place in good faith).

82. *See id.* at 88 (concluding "[r]elevant legal authority, including importantly the lack thereof, strongly suggests that the antitrust laws do not prohibit employers from acting jointly in bargaining with a common union").

83. *See* Bucher, *supra* note 1 (showing changing attitudes about tactics utilized by some executives around NBA).

84. *See* Jaynes, *supra* note 12 (examining recent punishments imposed by NBA in comparison to harsher penalties of past).

85. *See* CONSTITUTION AND BY-LAWS OF THE NAT'L BASKETBALL ASSOCIATION, *supra* note 52, at art. 35(e), 35A(e)-(f) (governing any actions deemed to be misconduct by NBA players in art. 35A(e) and by non-players in art. 35A(e)-(f)).

NBA team, to join another team.⁸⁶ The same rules apply for coaches, general managers, owners, and any other team official.⁸⁷ In the event that an individual is found to have violated the anti-tampering restrictions, the Commissioner of the NBA has sole discretion to impose sanctions.⁸⁸ These sanctions include, but are not limited to: fines, suspension, or both if the offender is a player, or fines, suspension, the loss of future draft picks, and even forbidding the offending team from negotiating with the employee with whom illegal contact was made if the offender is a non-player.⁸⁹ Further, employees do not need to expressly try to convince another player to join the team in order for the conduct to constitute illegal tampering.⁹⁰ The League has consistently found actions such as making public comments about another team's player or mentioning players in promotional material to violate the anti-tampering policy.⁹¹

86. *See id.* at art. 35(e) (making it violation for any player to “directly or indirectly, entice[], induce[], or persuade[], any Player . . . or other person who is under contract . . . to enter into negotiations for or relating to his services”).

87. *See id.* at art. 35A(e)–(f) (restricting same type of illegal conduct, with only difference being maximum fine of \$5,000,000 for non-players as opposed to \$50,000 fine for players who violate tampering rules).

88. *See id.* at art. 35(e), 35A(e)–(f) (stating that Commissioner shall decide if violation occurred and shall hand down sanctions as they sees fit to violating employee).

89. *See id.* (naming possible penalties Commissioner could impose).

90. *See* Christopher Reina, *CBA Encyclopedia: Tampering*, REALGM (June 29, 2017, 2:39 PM), <https://basketball.realgm.com/article/246574/CBA-Encyclopedia-Tampering> [<https://perma.cc/XW62-UDCU>] (noting that tampering can take form of public or private contact with another team's player, and covers everything from more overt and blatant attempts to recruit players to seemingly innocuous comments made by team officials).

91. *See* Kurt Helin, *Adam Silver on Magic Johnson Tampering Fine: 'Stop Talking About Players on Other Teams'*, NBC SPORTS (Feb. 15, 2018, 7:23 PM), <https://nba.nbcsports.com/2018/02/15/adam-silver-on-magic-johnson-tampering-fine-stop-talking-about-players-on-other-teams/> [<https://perma.cc/CF3J-WUPN>] (reporting NBA Commissioner Adam Silver's comments following his imposition of sanctions on Lakers for violating tampering policy in which he makes it clear that teams are not permitted to publicly make comments about other teams' players); *see also* Marcel Mutoni, *Report: Bucks Owner Fined \$25K for Tampering With Anthony Davis*, SLAM (Feb. 24, 2019), <https://www.slamonline.com/nba/report-bucks-owner-fined-25k-tampering-anthony-davis/> [<https://perma.cc/XK93-WQFX>] (fining Milwaukee Bucks owner for commenting on rumors that Anthony Davis may be considering Milwaukee as destination).

B. How Prevalent is Player Tampering in the NBA?

1. *Notable Examples of Tampering in the NBA Where the League Has Imposed Sanctions*

Due to its status as one of the most prestigious franchises in the NBA, the Los Angeles Lakers have made several headlines in recent years for alleged violations of the League's anti-tampering policy.⁹² One of the most recent and high profile examples of player tampering in the NBA occurred when Magic Johnson commented that he wanted to sign Paul George on the Jimmy Kimmel show.⁹³ Magic Johnson's tampering is just an exclamation point at the end of a long line of penalties that the League has imposed onto members of teams' front offices.⁹⁴ In fact, the League fined the Lakers once again shortly after the Jimmy Kimmel incident for comments that Magic Johnson made publicly praising Giannis Antetokounmpo of the Milwaukee Bucks, and the NBA later investigated Johnson for communicating with Ben Simmons of the Philadelphia 76ers.⁹⁵ Another recent example of tampering occurred in 2014 when the New York Knicks team president, Phil Jackson, received a fine after he suggested that retiring Oklahoma City Thunder point guard Derek Fisher, a player he previously coached to five NBA championships,

92. See Dave McMenamin, *Tampering or Fair Pursuit? 'Things Get Blurry All the Time'*, ESPN (Sept. 1, 2017), http://www.espn.com/nba/story/_/id/20525040/nba-fine-tampering-fact-life-nba [https://perma.cc/K5L7-9XMC] (reporting Lakers were accused of tampering with upcoming free agent Paul George).

93. See *id.* (discussing League's \$500,000 fine on Lakers in 2017 after team executive Magic Johnson mentioned, presumably jokingly, that Paul George should "wink-wink" come and play for Lakers).

94. See Kristian Winfield, *Magic Johnson Keeps Tampering, and He's Really Bad at Hiding It*, SBINATION (Feb. 12, 2019, 1:51 PM), <https://www.sbnation.com/2019/2/11/18220842/magic-johnson-tampering-la-lakers-history-ben-simmons-paul-george-anthony-davis> [https://perma.cc/26P6-B4NJ] (listing long history of Magic Johnson's tampering); see also Royce Young, *Paul George Agrees with Thunder on 4-Year, \$137 Million Deal*, ESPN (July 1, 2018), http://www.espn.com/nba/story/_/id/23958531/paul-george-commits-re-sign-oklahoma-city-thunder [https://perma.cc/DFS8-XEZ5] (reporting that despite Lakers recruiting efforts, George agreed to re-sign with Thunder on four-year deal).

95. See Ohm Youngmisuk, *NBA Fines Lakers \$50K for Magic Johnson's Comments on Giannis Antetokounmpo*, ESPN (June 20, 2018), http://www.espn.com/nba/story/_/id/22347434/los-angeles-lakers-fined-50000-magic-johnson-violates-league-anti-tampering-rule [https://perma.cc/C349-C7U4] (fining Lakers organization after Johnson stated that he thought Antetokounmpo would be future MVP and would lead the Bucks to championship one day); see also Mike Rosenstein, *Sixers-Lakers Ben Simmons-Magic Johnson Tampering Investigation: NBA Releases Findings (UPDATE)*, NJ.COM (Feb. 12, 2019), <https://www.nj.com/sports/2019/02/new-twist-to-sixers-lakers-ben-simmons-magic-johnson-saga-thanks-to-elton-brand.html> [https://perma.cc/6GE9-DK5D] (stating NBA investigated Johnson's contact with Simmons finding no violation).

was potentially being targeted for the Knicks head coaching job.⁹⁶ The League even went as far as to fine the Toronto Raptors after rapper and team “global ambassador” Drake asked the crowd at his Toronto concert to show the then Thunder star Kevin Durant, who was in attendance, what it would be like for him to play for the Raptors.⁹⁷

Tampering is so commonplace throughout the NBA that the League handed down three different tampering sanctions in 2013, on the same day, determining that the Houston Rockets, Atlanta Hawks, and Sacramento Kings all violated League rules.⁹⁸ The Hawks sent out an email to their season ticket holders referencing the potential for the team to sign future big name free agents such as Chris Paul and Dwight Howard.⁹⁹ The Kings received a fine because head coach Mike Malone mentioned that he thought Chris Paul would look good wearing a Sacramento Kings uniform.¹⁰⁰ The Rockets’ fine resulted from a series of free agency preview articles posted on the team’s official website hinting at potential acquisitions for the upcoming free agency period.¹⁰¹ Television star and owner of the Dallas Mavericks, Mark Cuban, also received fines on two different occasions for tampering violations.¹⁰² Cuban’s first

96. See Marc Stein, *Knicks Phil Jackson Fined \$25K*, ESPN (June 4, 2014), http://www.espn.com/new-york/nba/story/_/id/11022158/phil-jackson-new-york-knicks-fined-tampering-derek-fisher-oklahoma-city-thunder [<https://perma.cc/FK7M-V3PF>] (finding Jackson’s comments to violate League’s tampering guidelines and noting that Jackson himself remained “undaunted” by fine).

97. See Marc Stein, *Sources: NBA Fines Raptors \$25K*, ABC NEWS (Aug. 17, 2014), <https://abcnews.go.com/Sports/sources-nba-fines-raptors-25k/story?id=24932731> [<https://perma.cc/9X7L-ME75>] (noting that Drake’s statement caused Toronto crowd to cheer and begin to chant Durant’s name).

98. See Sam Amick & Jeff Zillgitt, *NBA Fines Three Teams for Tampering*, USA TODAY SPORTS (June 11, 2013, 4:59 PM), <https://www.usatoday.com/story/sports/nba/2013/06/10/nba-teams-filing-tampering-charges/2409499/> [<https://perma.cc/GRB9-BR9B>] (reporting on internal memo quoting art. 35A of League Constitution and explaining why teams’ actions resulted in sanctions).

99. See Youngmisuk & Marks, *supra* note 4 (indicating in email that fans should buy their season ticket packages early because they would not be available after team made their signings).

100. See *id.* (making these comments during his introductory press conference as new coach of Sacramento Kings after having previously been assistant coach of Paul in New Orleans).

101. See Patrick Harrel, *Houston Rockets Fined by NBA for Free Agency Tampering*, THE DREAM SHAKE (June 10, 2013, 4:57 PM), <https://www.thedreamshake.com/2013/6/10/4416358/houston-rockets-tampering-fine-nba-free-agency> [<https://perma.cc/Y2S4-H3RB>] (stating that purpose of video was to highlight skills of potential players that could help team and provide scouting report for those players as opposed to attempting to persuade players listed to sign with team).

102. See Reina, *supra* note 90 (mentioning that despite these fines, Cuban has been proponent of stricter rules regarding player tampering).

fine came in 2010 for making statements about the impending free agency of superstar LeBron James, and his second violation occurred in 2015 for openly speaking about negotiations with DeAndre Jordan and Wesley Mathews during the free agent moratorium period.¹⁰³ The intent and nature of the comments are not relevant factors in determining a statement about a player is tampering, as evidenced by the League handing a fine to then Phoenix Suns general manager (“GM”), Steve Kerr, for jokingly suggesting that he would try to sign LeBron James for the League minimum salary.¹⁰⁴

While the punishments the League handed down this decade almost exclusively involve minor fines comparative to the overall wealth of the infringing team, former Commissioner David Stern imposed significantly harsher penalties on tampering violations in the early part of his tenure.¹⁰⁵ For example, in 1984, the Trailblazers received a fine of \$250,000 for tampering violations, which was a much more impactful sum for a team to pay in the 1980s when the League was not as lucrative as it is today.¹⁰⁶ An even more severe penalty occurred in 1995 when the NBA forced the Miami Heat to pay \$1,000,000 to the New York Knicks and forfeit a first round draft pick to the team for commenting on then Knicks head coach Pat Riley.¹⁰⁷ The harshest sanctions ever imposed for tampering occurred in 2000 after the Minnesota Timberwolves reached a secretive and illegal contract agreement with Joe Smith in an effort to

103. *See id.* (listing both of Cuban’s violations as well as many other violations that occurred in recent history by other team executives around League).

104. *See* Nick Greene, *The NBA Needs an Unlimited Data Plan*, SLATE (Sept. 8, 2017, 11:45 AM), http://www.slate.com/articles/sports/sports_nut/2017/09/tampering_with_nba_players_should_be_totally_legal.html [<https://perma.cc/6JHU-QG7J>] (highlighting absurd nature of Kerr’s comments, which were not intended to be taken seriously or actually entice James to sign with team).

105. *See* Jaynes, *supra* note 12 (comparing recent fine imposed on Lakers for their infraction involving Paul George with other, more severe penalties League imposed in past, as well as opining that new regime under Commissioner Silver is much more lenient than that of former Commissioner David Stern).

106. *See id.* (noting that this violation was imposed because Trailblazers explained some of League’s financial rules to prospective draft picks Patrick Ewing and Hakeem Olajuwon); *see also* Al Iannazzone, *Outgoing NBA Commissioner David Stern Transformed the League into a Powerhouse*, NEWSDAY (Jan. 25, 2014, 4:58 PM), <https://www.newsday.com/sports/basketball/outgoing-nba-commissioner-david-stern-transformed-the-league-into-a-powerhouse-1.6875661> [<https://perma.cc/E2HZ-C38L>] (showing League revenue increased from \$165 million in Stern’s first year as commissioner in 1984 to \$5.5 billion when he departed in 2014).

107. *See* Associated Press, *Knicks Get \$1 Million, No. 1 Pick for Riley*, L.A. TIMES (Sept. 2, 1995), http://articles.latimes.com/1995-09-02/sports/sp-54426_1_pat-riley [<https://perma.cc/VC4X-SBYH>] (forcing Heat to relinquish 1996 first round pick, which was subsequently awarded to Knicks as compensation for Heat’s interference).

circumvent the League's salary cap restrictions.¹⁰⁸ Commissioner Stern fined the Timberwolves organization \$3.5 million, forced them to forfeit five future first round draft picks, suspended the team's owner Glen Taylor and GM Kevin McHale, and declared Smith's contract void, making him a free agent.¹⁰⁹

2. *Player-to-Player Tampering That the League Has Permitted*

Looking at the history of NBA tampering violations, a clear trend emerges, as all of the violators were either coaches or team executives.¹¹⁰ However, a much more common, yet much less penalized, version of tampering occurs when players attempt to recruit other players to join together as teammates.¹¹¹ When the Miami Heat formed its "big three" in 2010, it was not a lucky break that happened over night; rather, it was the culmination of years of behind the scenes discussions between longtime friends LeBron James, Dwayne Wade, and Chris Bosh, who had been thinking of joining forces well before the 2010 free agency period.¹¹² Despite the League rules being quite clear in prohibiting players from attempting to recruit employees under contract with other teams, the League has essentially admitted its far more lenient stance when the violators are players.¹¹³

Unlike some of the public comments from non-players that the League has often penalized, player-to-player tampering can have an

108. See *NBA Punishes Timberwolves for Secret Deal with Smith*, NBA.COM (Oct. 25, 2000), https://www.nba.com/news/smith_wolves_001025.html [<https://perma.cc/7YXN-34P4>] (reporting on punishment of Timberwolves by League and David Stern).

109. See *id.* (noting Stern also voided Smith's previous two contracts, thereby negating his ability to sign larger contract with team in future, which arguably stretched League's authority beyond what was allowed at time).

110. See Reina, *supra* note 90 (listing several of above examples of penalized tampering, all of which were conducted by non-players).

111. See Dave McMenamin et al., *NBA Punishes Lakers for Tampering but Has a History of Letting Players Slide*, ESPN (Sept. 1, 2017), http://www.espn.com/nba/story/_/id/20445869/nba-player-player-tampering-new-nba [<https://perma.cc/NNV6-BYNL>] (explaining that players recruiting other players is most common form of tampering and has become "open secret" in today's NBA).

112. See *id.* (reporting that these three future teammates had been discussing opportunity of playing together on same team as far back as 2008 Olympics, when they played together on Team USA).

113. See *id.* ("'What we told the owners was that the three players are totally, as our system has evolved, within their rights to talk to each other,' then commissioner David Stern said. He added that players controlling their destinies by working together . . . 'is not tampering or collusion that is prohibited.'").

actual, tangible impact on the landscape of the NBA.¹¹⁴ This real life impact could be seen in full force in 2014, when LeBron James called Kevin Love to discuss the prospect of playing together in Cleveland, paving the way for the Cavaliers to make a trade to acquire Love despite the Timberwolves star having a year left on his contract.¹¹⁵ In fact, player-to-player tampering very likely changed the entire landscape of the NBA in 2016 when Draymond Green, just hours after losing in game seven of the NBA Finals, sent a text to Kevin Durant telling him, “We need you. Make it happen.”¹¹⁶ If this text from Green did, in fact, influence Durant’s decision to sign with Golden State, the message will have sent ripples throughout the entire League that will still be felt for foreseeable future.¹¹⁷ Following the signing of Durant, the Warriors won the next two consecutive NBA championships and appeared even stronger this year than ever before.¹¹⁸ Yet despite the very real impact of player-to-player tampering, and the openness in which players attempt to recruit players on other teams, the League simply stands by and allows it to continue without any repercussions.¹¹⁹ For example,

114. *See id.* (noting that lack of enforcement regarding player-to-player tampering violations has created loophole where players can openly recruit players on opposing teams, regardless of contract status).

115. *See id.* (claiming that once Cavaliers received word from James that Love was interested in playing for Cleveland, they felt comfortable enough to trade their first overall pick Andrew Wiggins to Minnesota in exchange for Love, with no sanctions imposed against LeBron for role in recruiting Love).

116. *See* Michael McCann, *The KD Text: Is Draymond Guilty of Tampering?*, SPORTS ILLUSTRATED (June 27, 2017), <https://www.si.com/nba/2017/06/27/warriors-thunder-nba-free-agency-kevin-durant-draymond-green-tampering> [<https://perma.cc/387W-CY7Q>] (explaining that for Durant to receive message from Green so soon after losing in biggest game of his life let him know that Green and Warriors were serious).

117. *See* Chris Herring, *The Warriors’ Dynasty Is Different*, FIVETHIRTYEIGHT (June 9, 2018, 10:52 AM), <https://fivethirtyeight.com/features/the-warriors-dynasty-is-different/> [<https://perma.cc/Q6HZ-UJSH>] (explaining that not only have Warriors become dynasty with signing of Durant, who has won each of last two Finals MVP awards, but also that they are possibly poised to become longest reigning dynasty in modern NBA history and have assembled arguably greatest basketball team of all time).

118. *See* Adrian Wojnarowski, *DeMarcus Cousins Says Conversations with Warriors Sealed Decision to Join*, ESPN (July 3, 2018), http://www.espn.com/nba/story/_/id/23980153/demarcus-cousins-agrees-join-golden-state-warriors-1-year-53-million-deal [<https://perma.cc/E9L3-NHBQ>] (reporting that four time All-Star center DeMarcus Cousins agreed to sign with reigning back-to-back champion Warriors following conversations with former Olympic teammates Durant, Curry, and Green, making their first team in over forty years to have five All-Stars from previous season on same team).

119. *See* McCann, *supra* note 116 (“While the league has fined teams and owners for violating the anti-tampering rule, it has usually shied away from punishing players.”).

when Isaiah Thomas was selected to play in the 2017 All-Star game, he openly admitted that he attempted to recruit other All-Stars to come to the Boston Celtics in the offseason, but he received no consequences from the League for his actions.¹²⁰ At the 2019 NBA All-Star draft, team captain LeBron James joked that “[t]ampering rules do not apply on All-Star Weekend” after selecting Anthony Davis for his team.¹²¹

The current landscape of the NBA has made player-to-player tampering an even bigger concern, as today’s players tend to be friendlier with one another, and social media and new technologies make public recruiting extremely easy.¹²² Social media recruiting has become so commonplace among players that as soon as the Cavaliers lost in the 2018 NBA finals, several players took to Twitter or Instagram to try to lure LeBron James to their teams.¹²³ Philadelphia 76ers superstar and notorious social media user Joel Embiid even went as far as to tweet at the NBA, likely jokingly, to ask if his constant recruiting was legal, and the League still did not penalize him.¹²⁴ In addition to these examples, there are many more instances in recent NBA history where a player has technically com-

120. See Adam Himmelsbach, *Isaiah Thomas Did Some Recruiting During All-Star Weekend*, BOS. GLOBE (Feb. 23, 2017), <https://www.bostonglobe.com/sports/celtics/2017/02/23/isaiah-thomas-did-some-recruiting-during-all-star-weekend/HgaNFORnlzOVpTykYFhaP/story.html> [<https://perma.cc/E4YQ-NKEC>] (reporting of Thomas’s admission that he used event to recruit players and that he received positive feedback from some players with whom he was in contact).

121. See Des Bieler, *LeBron James Jokes About ‘Tampering’ After Picking Anthony Davis in NBA All-Star Game Draft*, WASH. POST (Feb. 7, 2019), https://www.washingtonpost.com/sports/2019/02/08/lebron-james-jokes-about-tampering-after-picking-anthony-davis-nba-all-star-game-draft/?utm_term=.29833ccd7239 [<https://perma.cc/J9C4-WV7P>] (commenting on speculation that James tried to orchestrate trade to acquire Davis on Lakers).

122. See Austin, *Magic: I Wouldn’t Have Teamed up with Jordan and Bird*, UPROXX (July 21, 2010), <https://uproxx.com/dimemag/magic-i-wouldnt-have-teamed-up-with-jordan-and-bird/> [<https://perma.cc/ST5B-RRTK>] (quoting players from past generations discussing differences in today’s NBA, stating they would not have thought of trying to recruit other teams’ players to join forces).

123. See Charles Curtis, *6 NBA Players Already Recruiting LeBron James*, USA TODAY (June 11, 2018, 9:57 AM), <https://www.usatoday.com/story/sports/ftw/2018/06/11/6-nba-players-already-recruiting-lebron-james-on-social-media/111174038/> [<https://perma.cc/W4B3-9YYZ>] (listing players such as Joel Embiid and Enes Kanter, who posted tweets or photo-shopped pictures of LeBron in their teams’ jerseys in effort to make him consider their teams).

124. See Joel Embiid (@JoelEmbiid), TWITTER (July 3, 2014, 4:00 PM), <https://twitter.com/joel Embiid/status/484834174830776320?lang=en> [<https://perma.cc/2YXC-XBXX>] (“I hope i’m not gonna get fined already with those Lebron’s tweets is it legal to recruit over twitter @NBA?”).

mitted tampering under the NBA Constitution but received no penalty from the League.¹²⁵

Throughout the entire history of the League, there appears to be only one time where the NBA appears to have found a player guilty of tampering with a player on another team.¹²⁶ In 1999, Will Perdue of the Chicago Bulls suggested that his former San Antonio Spurs teammate Tim Duncan was “not married” to the Spurs.¹²⁷ However, that was nearly twenty years ago, and the NBA has since allowed similar behavior without any punishment.¹²⁸ Such League action demonstrating actual concern that Perdue’s comments could persuade Duncan to join him in Chicago sits in stark contrast with recent NBA trends.¹²⁹ Had Perdue made those comments today, the League likely would not have even batted an eye, as players routinely get away with much more direct and open recruiting practices with opposing players.¹³⁰

This season, the NBA imposed another rare penalty on a player for tampering, fining Anthony Davis \$50,000 for publicly requesting a trade through his agent.¹³¹ While still seldom punished, this situation is different than other alleged tampering by players because Davis’ comments dealt only with his own contract with the Pelicans, and he did not attempt to recruit another player to New Orleans.¹³² In light of the colossal effects that player-to-player recruiting has had on the NBA over the past decade, the League needs to take its

125. See McMenamin et al., *supra* note 111 (listing other notable times when players got away with tampering, including Chandler Parsons to DeAndre Jordan and Damian Lillard and C.J. McCollum to Carmelo Anthony).

126. See McCann, *supra* note 116 (noting that only exception occurred in 1999 when Will Perdue of Chicago Bulls made public comments about Spurs star Tim Duncan).

127. See *id.* (indicating that Perdue could have been trying to persuade Duncan to sign with Chicago and issuing warning to Perdue for remarks).

128. See *id.* (occurring in 1999, noting other subsequent actions have been widely permitted by League).

129. See McMenamin et al., *supra* note 111 (comparing NBA’s history with recent decisions and showing intent by NBA to leave loophole open allowing players to recruit one another without committing violation).

130. For further discussion of recent recruiting attempts conducted by players where the NBA has seemingly looked other way, see *supra* notes 115–125 and accompanying text.

131. See Marc Stein, *N.B.A. Fines Anthony Davis \$50,000 After Agent’s Request for a Trade*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/sports/anthony-davis-fine-trade.html> [<https://perma.cc/S7FL-9SRB>] (reporting fine after Davis’ agent went public with trade demand).

132. See *id.* (describing Davis’ agent’s comments as “intentional effort to undermine the contractual relationship between Davis and the Pelicans”).

own rules more seriously and begin to enforce them if it truly wants to maintain a competitive balance in the NBA.¹³³

IV. LEAGUE FAILURES THAT HAVE ESCALATED THE TAMPERING PROBLEM

Despite its inconsistent history of enforcement, the NBA claims to take the issue of tampering very seriously.¹³⁴ While Adam Silver may believe he is taking a hard stance and making an example out of the Lakers to try to prevent tampering, his comments actually reveal how in the dark he is about the League-wide scope of tampering throughout the NBA.¹³⁵ His belief that other teams are following the anti-tampering policy fails to recognize a simple truth that is key to solving the NBA's tampering problem: that everyone is tampering, all the time.¹³⁶ The League's anti-tampering policy as it is currently enforced is not effective, and the NBA must implement a stricter enforcement of its policy if Commissioner Silver truly wants to prevent tampering.¹³⁷

A. Tampering Has Become Just Another Part of the League: Is Adam Silver on the Wrong Side of an Uphill Battle?

Player tampering is not just a recent phenomenon that can easily be stopped; rather, it is a deeply rooted and systemic part of how the entire League operates.¹³⁸ Nearly every single person in an NBA front office will admit that the League is built on tampering and that the majority of successful player negotiations are technically violations of the anti-tampering policy.¹³⁹ When delving

133. See Herring, *supra* note 117 (discussing potential of player-to-player tampering to reroute entire trajectory of NBA).

134. See Rachel Nichols, *Adam Silver To Execs on Tampering: Stop Talking About Players on Other Teams*, REALGM (Feb. 16, 2018, 9:24 AM), <https://basketball.realgm.com/wiretap/248998/adam-silver-to-execs-on-tampering-stop-talking-about-players-on-other-teams> [<https://perma.cc/N2CJ-P3ZV>] (making it clear that team executives are not permitted to talk about other teams' players).

135. See *id.* (quoting Commissioner Silver saying "other teams seem to be able to follow these rules" while explaining his recent fine on Lakers).

136. See McMenamain, *supra* note 92 (citing assistant coach as saying "I don't know if it will ever stop" in reference to league-wide tampering).

137. See Bucher, *supra* note 1 (noting that "dirty little secret" of NBA is that "tampering occurs all the time").

138. See *id.* (quoting one unnamed general manager as saying "[y]ou don't get free agents without it. [Tampering] is what the whole league is built on. That's the only way you can get anything done").

139. See *id.* ("'If you're not cheating by the letter of the law,' says one former GM, 'you're not trying.'"); see also Kevin O'Connor, *Let's Stop Pretending the NBA Cares About Its Tampering Rules*, THE RINGER (Aug. 21, 2017, 8:33 AM), <https://www.theringer.com/nba/2017/8/21/16177684/magic-johnson-nba-tampering-paul->

deeper into the timeframe and circumstances of many free agent signings, it becomes increasingly clear that teams and players reached deals prior to the legal negotiation period.¹⁴⁰ It is quite common for reporters to announce free agency moves within mere hours of the official opening of the free agency period, making it all but impossible to realistically believe that the entirety of the contract negotiations took place within the legal timeframe allowed under League rules.¹⁴¹

It is evident that the policy as currently enforced is not effective in preventing tampering, and has, at best, a microscopic deterrence effect.¹⁴² Even after receiving two separate fines for previous transgressions, Mark Cuban recently said that tampering in the NBA is “just the way it works.”¹⁴³ The lack of deterrence and complete disregard for the rules can largely be traced back to two factors: the emergence of modern day instant communication technology as well as the League and Commissioner Silver’s insufficient enforcement.¹⁴⁴ If Silver thinks that the half a million dollar penalty he imposed on the Lakers last summer was enough to put the rest of the teams on notice not to tamper with players, he is sadly mistaken.¹⁴⁵ If anything, GMs around the League will likely see the fine as a slap on the wrist and will view it as an open invitation to reach out to players even more than they currently are.¹⁴⁶

george [<https://perma.cc/J5S8-23FR>] (“I don’t want to use the ‘T’ word—tampering—but we all don’t play by the rules when it comes to making deals”).

140. See Bucher, *supra* note 1 (emphasizing obviousness of these illegal negotiations based on short time frame between the start of free agency period and time when agreement is announced).

141. See *id.* (“‘How many names flash across the ticker two hours after midnight saying they’ve agreed to a four-year, \$64 million deal?’ he asks. ‘You think that was negotiated in 10 minutes?’”).

142. See *id.* (quoting GM as saying penalties imposed by NBA have “zero effect”).

143. See Greene, *supra* note 104 (referencing Cuban’s remarks sympathizing with Pacers after Paul George incident).

144. See Peter Sampson, *Adam Silver and the NBA Have a Tampering Problem*, BLAZERS EDGE (Aug. 21, 2017, 10:13 AM), <https://www.blazersedge.com/2017/8/21/16177284/adam-silver-and-the-nba-have-a-tampering-problem-magic-johnson-paul-george-pacers-lakers> [<https://perma.cc/6HVG-9FA9>] (discussing differences in player relationships in today’s NBA due to internet and its affect on amount of tampering occurring).

145. See Bucher, *supra* note 1 (showing dismissive attitude GMs and agents have regarding anti-tampering policy).

146. See *id.* (“One prominent agent went even further. Asked if it would serve as any kind of deterrent, he laughed. ‘Are you kidding me? It might enhance it. If it only costs \$500,000 to take a shot at getting Paul George, I’d think every team might try it.’”).

B. The Cautionary Tale of Mitch Kupchak

By now, most people around the League have realized that it is not only beneficial to break the rules, but that refusing to do so can have serious negative consequences.¹⁴⁷ An agent who waits all the way until the start of free agency to begin discussing new deals for a client would likely end up fired.¹⁴⁸ While most GMs realized a long time ago that they were subject to the same type of scrutiny, Mitch Kupchak, former GM of the Los Angeles Lakers, refused to bend the rules.¹⁴⁹ Kupchak spent over thirty years in the Lakers' front office and seventeen years as the GM with sole control over player personnel, but the organization eventually fired Kupchak after several failed attempts at attracting big name free agents in recent years.¹⁵⁰ Kupchak was unwilling to compromise his integrity, even though it resulted in free agents slipping through his, and the Laker's, fingertips.¹⁵¹

Though Kupchak's unwavering commitment to the League's rulebook may have been noble, it was ultimately naive of him to believe he could succeed while playing by the book in an era when every other GM was capitalizing on the League's leniency.¹⁵² In recent years, the Lakers found themselves watching from a distance as star after star signed elsewhere mere hours after Kupchak would even pick up the phone to begin his negotiations.¹⁵³ Not even the prestige of the Lakers franchise and the allure of playing in Los Angeles was enough to attract game changing free agents in this new era of modern tampering, and without tampering, Kupchak's methods may well have crippled a lesser organization.¹⁵⁴

147. *See id.* (explaining GMs and agents who waited to the official start of free agency were putting themselves at major disadvantage when negotiating new contracts).

148. *See id.* ("If you're an agent and you wait until July 1 to find out what your client's options are, you're going to get fired. You'll be sitting there while your client's options are falling off the table.").

149. *See* O'Connor, *supra* note 139 (revealing Ramona Shelburne report that Kupchak was only GM in entire League who waited until free agency period officially began before starting negotiations with players).

150. *See* Bucher, *supra* note 1 (noting Kupchak's long tenure with Lakers and his eventual departure from team in February of 2017).

151. *See* O'Connor, *supra* note 139 (reporting Kupchak would not start his negotiations early to recruit a franchise-changing superstar like Kevin Durant).

152. *See id.* ("When it came to free agency, Kupchak scribbled inside the lines while everyone else was spray-painting on the walls, and Los Angeles suffered.").

153. *See id.* (showing that Kupchak would wait until 12:01 AM on July 1st to even contact stars such as Kevin Durant).

154. *See id.* (noting that perks of Lakers organization were likely enough to keep Kupchak afloat much longer than he would have survived in another city).

All of this came to a head in the infamous summer of 2016, when the NBA's salary cap skyrocketed and every team suddenly was in a position to spend big on free agents.¹⁵⁵ When Kupchak began reaching out to players at 12:01 AM on July 1st he was already weeks behind every other team, leaving him with no choice but to sign aging players to large, long-term contracts that clogged up the Lakers salary cap space for the next four years.¹⁵⁶ When the Lakers eventually fired Kupchak they replaced him with Magic Johnson and Rob Pelinka to do exactly what Kupchak could not do: catch up with the rest of the NBA and get the Lakers back on track.¹⁵⁷

V. HOW THE LEAGUE CAN TAKE BACK CONTROL OVER ITS TAMPERING PROBLEM

A. Shot Clock Running Down: Are Problems Looming for the NBA?

While every GM around the League today has moved on from the failed strategy of Kupchak, some front office members feel like the cheating has gotten out of hand.¹⁵⁸ Teams have figured out that having a player act on behalf of the team to do the recruiting is an easy way to avoid punishment and circumvent the system.¹⁵⁹ Some executives are going as far as to coach players on other teams on what to say to their current employers in order to get their teams to trade or release them.¹⁶⁰ Other GMs have begun offering players additional perks beyond those provided in their contracts, such

155. See Setrige Crawford, *2016 Is a Great Summer to Be a Mediocre Free Agent*, FIVETHIRTYEIGHT (July 19, 2016, 9:11 AM), <https://fivethirtyeight.com/features/2016-is-a-great-summer-to-be-a-mediocre-nba-free-agent/> [<https://perma.cc/6CS4-UL8M>] (showing effect monumental increase in salary cap had across League).

156. See Dan Feldman, *Jeannie Buss Says She Didn't Understand Why Lakers Signed Luol Deng and Timofey Mosgov*, NBC SPORTS (July 26, 2017, 9:46 PM), <https://nba.nbcsports.com/2017/07/26/jeannie-buss-says-she-didnt-understand-why-lakers-signed-luol-deng-and-timofey-mozgov/> [<https://perma.cc/FN7R-ZN2H>] (noting Lakers' owner Jeannie Buss did not approve of Lakers giving big contracts to Luol Deng and Timofey Mosgov in 2016, eventually leading her to fire Kupchak).

157. See O'Connor, *supra* note 139 (revealing Johnson's relationship with NBA players and Pelinka's ability to "tamper without getting caught").

158. See Bucher, *supra* note 1 ("Some executives are upset that now, they say, select GMs are going directly to coveted players through their own players. It seems the unwritten rules are being rewritten.")

159. See *id.* (reporting that GMs are instructing their players to act as "partner" in recruiting process to avoid punishment from League and get around system).

160. See *id.* (discussing that teams are "basically providing them with *How To Piss Off Your General Manager for Dummies*").

as buying them cars or even places to live.¹⁶¹ Many team officials feel as though these practices are crossing a line that is harming the League.¹⁶²

Many of the same concerns that justify the legality of the anti-tampering policy under the rule of reason approach are reemerging due to the League's lack of enforcement.¹⁶³ The competitive balance throughout the League has gotten so out of hand that Adam Silver recently admitted that a better system is needed to combat the disparity.¹⁶⁴ Commissioner Silver may be mistaken in believing that the system itself is the problem; the true issue lies in the lack of enforcement.¹⁶⁵ By not implementing stronger deterrents to violating players and teams, Silver is passively allowing a system that creates the very kind of consequences it was designed to prevent.¹⁶⁶ Fans, media members, and even team owners are becoming fed up, and the time has come for Commissioner Silver and the NBA to fix the problems they have created.¹⁶⁷

B. Last Second Shot: How the League Can Get Back on Track

In theory, the NBA's anti-tampering policy is sufficient as it stands, but the problem is that the Commissioner has refused to

161. *See id.* (noting that some GMs find this practice to be "egregious" and that players are now expecting to receive these types of under the table bonuses during negotiations).

162. *See id.* (quoting a disgruntled scouting director as saying: "You can push the limits and still respect the rules and your opponents").

163. For further discussion of the rule of reason, including an explanation that under rule of reason approach, anti-tampering policies can be justified by the need to keep competitive balance among competing teams and need to maintain positive image of League, see *supra* notes 50–56 and accompanying text.

164. *See* Chris Barnewell, *Warriors' Dominance Has Adam Silver Thinking NBA's Competitive Balance Could Be Better*, CBS SPORTS (July 11, 2018), <https://www.cbssports.com/nba/news/warriors-dominance-has-adam-silver-thinking-nbas-competitive-balance-could-be-better/> [<https://perma.cc/767Q-LSQM>] (showing Silver trying to downplay disparity of talent in NBA but admitting that changes could be made in order to improve balance of power).

165. For further discussion of ineffectiveness of policy as it is currently being enforced, see *supra* notes 142–146 and accompanying text.

166. *See* Sampson, *supra* note 144 ("I wouldn't be surprised to see everything ramp up five-fold. I wouldn't expect to see the millions of small-market fans willing to stay invested in the game, when LeBron James or Steph Curry starts openly lobbying through the media for young players to abandon their current small-market teams. Doing so goes against the spirit of the new CBA rules that can keep a player locked in with their original team for the first nine years of their career.").

167. *See* Greene, *supra* note 104 (explaining extremely high frustration level required for NBA owner to complain to League office about tampering violation); *see also* Jaynes, *supra* note 12 (showing annoyance felt by NBA reporters).

adequately punish offenders.¹⁶⁸ The Joe Smith incident is the only example in the history of the NBA's policy in which the League successfully deterred teams from tampering effectively.¹⁶⁹ The League saw this as an exceptionally egregious violation and responded with a punishment that actually had teeth: voiding the contract between Smith and the Timberwolves.¹⁷⁰ This not only prevented future teams from employing similar tactics, but it also is an instance when the NBA stayed within its anti-tampering rules to do so.¹⁷¹ To truly solve the problem of tampering in the League, the NBA must confront the sources of illegal conduct head-on or risk serious consequences by kicking the can down the road and doing nothing.¹⁷²

While it is clear that simple fines are not enough of a deterrent in today's game, the NBA Constitution allows for three other solutions that would go a long way towards solving the problem: suspensions, taking away draft picks, and nullifying contracts.¹⁷³ Currently, the League is well within its legal rights to forbid tampered-with players from signing with the offending teams because it is allowed under the CBA.¹⁷⁴ If the League started implementing this practice to prevent tampering, the initial response would be heavily divisive throughout the League, and players as well as some owners may even seek to remove that allowance in the next CBA.¹⁷⁵ Under the *Williams* approach, the anti-tampering policy is legally permitted mainly because both owners and players agreed on it

168. For further discussion of the problem of enforcement, see *supra* note 165 and accompanying text.

169. For further discussion of the Joe Smith incident, see *supra* note 108–109 and accompanying text.

170. For further discussion of the agreement, which was nullified, see *supra* note 108–109 and accompanying text.

171. See Tim Bontemps, *Tampering is the Norm in the NBA, and the League Is Virtually Powerless to Stop It*, WASH. POST (Aug. 24, 2017), https://www.washingtonpost.com/news/sports/wp/2017/08/24/tampering-is-the-norm-in-the-nba-and-the-league-is-virtually-powerless-to-stop-it/?noredirect=on&utm_term=.27974837a034 [<https://perma.cc/C7PP-2GQK>] (noting that this punishment “likely deterred other potential tampering cases”). For further discussion of the Commissioner's ability to forbid teams from signing tampered with players under NBA Constitution, see *supra* notes 85–88 and accompanying text.

172. See Sampson, *supra* note 144 (explaining that Commissioner Silver has three choices: start enforcing NBA Constitution's rules, modify agreement, or ignore it completely).

173. For further discussion of possible punishments that the Commissioner can impose under NBA Constitution, see *supra* note 88 and accompanying text.

174. For further discussion of the Commissioner's potential actions, see *supra* note 88 and accompanying text.

175. See Bucher, *supra* note 1 (explaining most owners would rather take risk of losing player to tampering than have League begin to enforce its policy).

during collective bargaining negotiations.¹⁷⁶ Without the nonstatutory labor exception in play, the practice would need to pass the rule of reason analysis for the League to prevent players from signing with teams who have tampered with them.¹⁷⁷

1. *Best to Start Slow*

Given how deeply rooted player tampering is in the NBA landscape, by suddenly coming out and nullifying agreements reached through tampering, the League would create an unwanted culture shock that would almost certainly lead to a revolt.¹⁷⁸ A better solution to ease into the transition while still putting GMs on notice would be for the Commissioner to use his Article 35A power to enforce maximum fines rather than relatively insignificant ones and to suspend violating executors.¹⁷⁹ At the very least, this would get the attention of frequent offenders around the League, and if that still did not improve the situation, Silver could bring back a practice occasionally employed by David Stern: taking away draft picks.¹⁸⁰ Deterring players would be even easier because they currently receive no punishments, so any type of fine would serve as a dissuading factor, especially considering that the players do not have nearly the amount of income that the franchises themselves have.¹⁸¹ The final step, as a more extreme method than imposing harsher fines and suspensions, would be nullifying any contacts resulting from impermissible contact with a player and barring that team from signing them in the future.¹⁸² While it is impossible to prevent all

176. For further discussion of how multiemployer bargaining is a longstanding method of labor relations and provisions collectively bargained for that fall under exception of antitrust laws, see *supra* note 80 and accompanying text.

177. For further discussion of restrictions on competition, see *supra* notes 48–56.

178. See Bucher, *supra* note 1 (revealing that most executives around League do not blow whistle on other executives because they do not want to be met with same kind of scrutiny).

179. See CONSTITUTION AND BY-LAWS OF THE NAT'L BASKETBALL ASSOCIATION, *supra* note 52, at art. 35A(e) (granting Commissioner power to impose fine up to \$5,000,000 or suspend members who violate policy for definite or indefinite time).

180. See *id.* (allowing Commissioner to take away draft picks from violating teams). For further discussion of past examples where teams were forced to forfeit draft picks due to tampering violations, see *supra* notes 105–107 and accompanying text.

181. See CONSTITUTION AND BY-LAWS OF THE NAT'L BASKETBALL ASSOCIATION, *supra* note 52, at art. 35(e) (giving Commissioner power to impose fines on players who attempt to recruit players under contract with other teams).

182. See *NBA Fines T-Wolves for Secret Deal*, *supra* note 108 (discussing Joe Smith incident as example of successfully dissuading teams from trying to reach illegal contracts by nullifying agreement).

tampering because teams and agents will always attempt to find ways around the restrictions, implementing these tactics would hopefully at least curtail enough of the tampering to keep it from spinning out of control.¹⁸³

2. *Time for Adam Silver to Take Matters into His Own Hands?*

While the gradual move towards stricter enforcement represents a best case scenario for the League, Adam Silver may need to prepare for the worst if he truly wants to solve the problem of player tampering.¹⁸⁴ Even though some owners would likely support Silver's decision, other disgruntled owners and players may make it a point of emphasis to eliminate the provision in Article 35A that gives the Commissioner the authority to prevent tampered-with players from signing with the offending team.¹⁸⁵ If enough of the owners and players agreed during their CBA negotiations to remove that power from the list of possible sanctions under 35A, it would remove the protections of the nonstatutory labor exemption.¹⁸⁶ Without the backdrop of *Williams* and the nonstatutory labor exemption, any actions the Commissioner takes to prevent teams from signing players that have been tampered with will be evaluated under the rule of reason.¹⁸⁷ Even without Article 35A expressly providing for the nullification of contracts reached by illegal tampering, the Commissioner still is provided the broad power to declare void transactions as he sees fit under Article 24(i) (i).¹⁸⁸ Under that provision, Silver would still have the discretion to prevent players from signing with a team when there is evidence of illegal contact.¹⁸⁹

183. See Jaynes, *supra* note 12 (explaining why current penalties are not succeeding in solving issue and that harsher penalties have been successful in past).

184. See Sampson, *supra* note 144 (stating that tampering is serious problem that Adam Silver and League must address).

185. See Bucher, *supra* note 1 (showing anger felt by several executives around League at investigation into Lakers tampering during Paul George incident).

186. For further discussion of the permissibility of anti-tampering provisions, see *supra* note 80 and accompanying text.

187. See *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (providing rule of reason standard and defining its applicability).

188. See CONSTITUTION AND BY-LAWS OF THE NAT'L BASKETBALL ASSOCIATION, *supra* note 52, at art. 24(i) (i) ("The Commissioner shall have the power to declare null and void any Player transaction made by and between Members of the Association or by and between Members of the Association and any organization outside of the Association.").

189. See *id.* (allowing Commissioner to void any transaction made by any team).

As controversial as it would be, there is recent precedent in the NBA where the Commissioner voided a transaction under Article 24(i)(i): the infamous Chris Paul trade to the Lakers that David Stern voided in 2011.¹⁹⁰ Had the trade gone through, it would have drastically altered the balance of power in the NBA and significantly benefitted the Lakers.¹⁹¹ Several factors were involved in the League's decision, including the unique circumstance of the NBA temporarily owning the Hornets at the time, but a major concern was preventing a trade that would alter the League's competitive balance.¹⁹²

If the Commissioner began strategically nullifying mutually agreed upon contracts to prevent an imbalance resulting from tampering, such tactics would pose a more serious question of legitimacy under the rule of reason than simply prohibiting teams from negotiating with players on other teams.¹⁹³ The key question for rule of reason analysis in this situation would be: does such a tactic "suppress" or "destroy" competition?¹⁹⁴ Here, the purpose remains the same: to maintain a competitive balance of power throughout the League by preventing better positioned teams from poaching players from smaller market franchises through illegal recruiting tactics.¹⁹⁵

Opponents of this enforcement strategy would have to show that, in light of nature of the business and the reasons justifying it, the restriction is "significantly anticompetitive in purpose or effect."¹⁹⁶ This anticompetitive purpose or effect would then be balanced against any pro-competitive purposes to determine if there is

190. See Howard Beck, *N.B.A. Rejects Trade Sending Paul to Lakers*, N.Y. TIMES (Dec. 8, 2011), <https://www.nytimes.com/2011/12/09/sports/basketball/paul-set-to-join-lakers-as-part-of-3-team-deal.html> [<https://perma.cc/E3U7-UQ45>] (noting Hornets and Lakers had trade in place that would have sent Chris Paul to Los Angeles, but David Stern rejected trade).

191. See *id.* (quoting letter by Cleveland Cavaliers owner Dan Gilbert where he wrote: "I cannot remember ever seeing a trade where a team got by far the best player in the trade and saved over \$40 million in the process").

192. See *id.* (noting that Lakers had won five championships in previous decade and citing "basketball reasons" as main factor in nullifying trade).

193. See O'Connor, *supra* note 139 (saying taking David Stern's approach of voiding contracts is "last thing Adam Silver should do").

194. See *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (defining rule of reason as permitting regulations in restraint of trade as long as restriction does not suppress or destroy competition).

195. See Andrade, *supra* note 11 (explaining interest that professional sports leagues have in preventing teams from luring players under contract with different team through use of anti-tampering provisions).

196. See *Smith v. Pro Football Inc.*, 593 F.2d 1173, 1183 (D.C. Cir. 1978) (setting parameters for rule of reason analysis).

a “net effect” of suppressing competition.¹⁹⁷ Undoubtedly, there are anticompetitive effects to this plan, as it is a clear restriction on the player-service market.¹⁹⁸ This restraint must be measured against the many pro-competitive effects of maintaining a balance of power throughout the League.¹⁹⁹ Whereas the affect of nullifying a transaction resulting from tampering would only have a restrictive effect on the individual violating team or player, the pro-competitive benefits of preventing tampering protects the level of competition throughout the entirety of the League.²⁰⁰ Because each individual team is a separate entity pursuing its own economic success, which directly corresponds to its performance and popularity on the court, there is a strong interest in taking action to keep the level of competition as balanced as possible.²⁰¹

Arguments exist on both sides regarding the necessity of anti-tampering provisions.²⁰² However, due to the unique nature and interdependence of sports leagues, trade restraints in the context of sports leagues have typically been given greater leniency for potentially antitrust actions than in other realms.²⁰³ Even regulations that would likely be impermissible in other areas may be found to be reasonable when applied to sports leagues due to the nature of

197. *See id.* In its discussion on the parameters of the rule of reason analysis, the court also provided:

If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the “anticompetitive evils” of the challenged practice must be carefully balanced against its “procompetitive virtues” to ascertain whether the former outweigh the latter. A restraint is unreasonable if it has the “net effect” of substantially impeding competition.

Id. (citing Milton Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term 1977*, 77 COLUM. L. REV. 979, 983 (1977)).

198. *See id.* at 1185 (conducting same analysis as applied to legitimacy of player drafts).

199. For further discussion of pro-competitive justifications, see *supra* notes 11–18 and accompanying text (detailing need and justification for anti-tampering rules in professional sports which serve to promote competition within League).

200. For further discussion of effects of these provisions, see *supra* notes 11–18 and accompanying text (explaining how such provisions guard against small percentage of teams predominating over control of majority of top players).

201. For further discussion of each team as a separate entity for antitrust analysis purposes, see *supra* notes 46–47 and accompanying text.

202. *See* Sampson, *supra* note 144 (noting different options that League can take in response to player tampering issue).

203. *See* Tim Hance, *Threading American Needle: Defining a Narrow Relevant Market for Rule of Reason Analysis in Sports Antitrust Cases*, 11 VA. SPORTS & ENT. L.J. 247, 258 (2011) (“Rules involving limitations on competition for players and sharing revenue between rival clubs, as well as restrictions on entry into the league joint venture, on the sale of broadcast rights, and on the internal business structure of member clubs, are all tolerated unless demonstrably unreasonable in the sports context.”).

the industry.²⁰⁴ Further, the rule of reason requires courts to examine the “degree of collusion” associated with the restraint as well as the rationale and impact.²⁰⁵

Typically, courts find that joint ventures satisfy the rule of reason because of their positive effect on consumers.²⁰⁶ This determination is made by weighing the pro-competitive and anticompetitive values of the restriction to determine whether the overall impact is beneficial to trade.²⁰⁷ To demonstrate that its actions promote an efficiency in the League that would otherwise not exist, the NBA will point to the uneven playing field that would result from allowing unrestricted access to players contracted to other teams.²⁰⁸ Conversely, opponents would argue these efficiencies are outweighed by the fact that this strategy of enforcement takes away independent decision making of the individual players and teams.²⁰⁹ Considering the level of deference courts have given to joint ventures under the rule of reason analysis, especially in regards to sports leagues, the NBA would likely prevail due to the collective positive impact such actions would have on the competitive balance throughout the League.²¹⁰

204. See Stephen F. Ross, & Stefan Szymanski, *Open Competition in League Sports*, 2002 WIS. L. REV. 625, 627 (2002) (“[T]he particular interdependence that sports teams have with other economically separate firms within the same league has led courts to be much more permissive in their antitrust scrutiny of trade restraints among members of sports leagues than in the case of most businesses.”).

205. See McCann, *supra* note 44, at 737 (stating that fact-intensive inquiry is required to balance relevant factors for and against restriction).

206. See *id.* at 738 (“Courts usually have found joint ventures to satisfy rule of reason analysis on the basis that rather than harming consumers’ interests, joint ventures often provide consumers with new product offerings that otherwise would not have been produced or would not have been produced as efficiently.”)

207. See Hance, *supra* note 203, at 252–53 (explaining that anticompetitive agreements are only illegal via rule of reason under Sherman Act when anticompetitive effects outweigh procompetitive impact); see also *See Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 203 (2010) (stating that when restraints are essential for a product to exist, agreements are likely to survive the rule of reason); *Texaco Inc. v. Dagher*, 547 U.S. 1, 3 (2006) (holding economically integrated joint ventures are not barred from setting prices at which to sell products under Sherman Act); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) (holding that joint ventures and other similar agreements are not illegal when they are necessary to market).

208. See Andrade, *supra* note 11 (explaining problematic realities that can take shape in absence of anti-tampering guidelines).

209. See McCann, *supra* note 44, at 738 (“In applying rule of reason to a joint venture, courts typically assess the extent to which the joint venture deprives the marketplace of the independent decisionmaking normally demanded by competition and, conversely, the extent to which the joint venture improves market efficiencies.”).

210. See *id.* at 737 (noting rule of reason analysis tends to favor professional sports league defendants).

3. *Learning from Other Leagues?*

Tampering exists in every sport and anti-tampering rules are in place in all of the major sports leagues, but it appears to be a problem that is most prevalent in the NBA.²¹¹ The NBA may be better served by following the examples set by other leagues that have been more effective at deterring illegal recruiting.²¹² While the NBA has shied away from imposing strict penalties and removing draft picks, other leagues such as the NFL have effectively done so to prevent teams from tampering with other players.²¹³ For example, in 2016, the NFL fined the Kansas City Chiefs \$350,000 and forfeited a future third and sixth round pick in upcoming drafts due to the team's illegal contact with Jeremy Maclin outside of the league's legal free agency window.²¹⁴ Across the ocean, the English Premier League ("EPL"), the biggest football (soccer) league in the world, has been able to dissuade tampering by the mere threat of penalties.²¹⁵ Southampton FC complained to the EPL about Liverpool's alleged tampering (called "tapping up" in England) of defender Virgil van Dijk.²¹⁶ Though no allegations were proven, the complaint was enough of a deterrent to make Liverpool issue an apology and withdraw its interest in Dijk in order to avoid league sanctions.²¹⁷ If the NBA wants to be more effective at preventing player tampering, a necessary step may be to follow the example of

211. For further discussion of how tampering has become a systemic problem in the NBA, see *supra* note 138–141 and accompanying text; see also Sheryl Ring, Aaron Judge, Manny Machado, and the Law of Tampering, FANGRAPHS (Mar. 21, 2018), <https://www.fangraphs.com/blogs/aaron-judge-manny-machado-and-the-law-of-tampering/> [<https://perma.cc/24AN-663B>] (noting tampering is more common in basketball than other sports).

212. See John Breech, *NFL Hammers Chiefs for Tampering with Huge Fine, Loss of Two Draft Picks*, CBS SPORTS (Mar. 9, 2016), <https://www.cbssports.com/nfl/news/nfl-hammers-chiefs-for-tampering-with-huge-fine-loss-of-two-draft-picks/> (showing enforcement examples in NFL); see also Sean O'Toole, *Tapping-Up (Tampering) of Sports Players: How the NBA Rules Compare to the English Premier League*, LAWINSPORTS (Oct. 3, 2017), <https://www.lawinsport.com/topics/articles/item/tapping-up-tampering-of-sports-players-how-the-nba-rules-compare-to-the-english-premier-league> [<https://perma.cc/8SNB-GYQF>] (comparing NBA to English Premier League).

213. See Breech, *supra* note 212 (imposing strict penalty on Kansas City Chiefs for player tampering).

214. See *id.* (quoting NFL executive Vice President as saying "[t]he discipline should be sufficient both to deter future violations and encourage cooperation in future investigations").

215. See O'Toole, *supra* note 212 (detailing recent tampering case of Virgil van Dijk).

216. See *id.* (alleging Liverpool manager illegally contacted Dijk who was interested in signing with team).

217. See *id.* ("Liverpool FC's apology came in the wake of an EPL investigation; it clearly took the matter seriously enough to back down. It is believed that Liverpool has escaped punishment.").

these other leagues and issue punishments that truly deter tampering.²¹⁸

VI. THE BALL IS IN THE NBA'S COURT

Tampering has been a concern in sports dating back as long as professional leagues have existed, and the NBA is reaching a point where it must change the way it addresses it if it wants to curtail the tampering issue before it is too late.²¹⁹ Anti-tampering rules technically meet the criteria for traditional antitrust violations under the Sherman Act.²²⁰ However, the rule of reason and the nonstatutory labor exemption carve out avenues for its legitimacy due to the unique necessity for competitive parity in sports leagues and the longstanding validity of collective bargaining as a tool in labor negotiations.²²¹ Despite the NBA's legal authority to regulate tampering and the rules it has in place in the NBA Constitution, tampering is a bigger issue than ever in today's NBA.²²² One of the biggest catalysts for the rise in player tampering is the failure of Adam Silver and the League to adequately enforce the safeguards the League has in place to discourage tampering, opting instead for minor penalties that amount to a mere slap on the wrist in the grand scheme of things, or worse yet, ignoring the problem altogether.²²³

While there are certainly risks involved, and while some proposed solutions may seem like drastic measures, the NBA must address the issue of player tampering.²²⁴ The concern surrounding player tampering in the NBA is reaching an all time high, and it is the inaction of Commissioner Silver and Commissioner Stern

218. For further discussion of possible enforcement strategies the League could employ to lessen tampering, see *supra* notes 178–183 and accompanying text.

219. See Blair & Lopatka, *supra* note 2 (tracing history of tampering from 1800s to modern day).

220. See 15 U.S.C. § 1 (making it illegal for actors to conspire to restrict trade).

221. For further discussion of the relevance of rule of reason and nonstatutory labor exemption to antitrust law in sports leagues, see *supra* notes 52–56 and accompanying text and *supra* notes 63–69 and accompanying text.

222. For further discussion of the heightened regularity of tampering in NBA and its impact on League, see *supra* note 83 and accompanying text.

223. For further discussion of the inconsistency between League's public stance regarding player tampering compared to actual steps taken to find solutions to problem, see *supra* notes 134–137 and accompanying text.

224. For further discussion of the necessity of League action to resolve tampering issue in the NBA, see *supra* note 184 and accompanying text.

before him that have allowed the tension to build.²²⁵ Due to the intense and delicate nature of the predicament, any enforcement would need to be gradual and applied impartially and consistently throughout the League.²²⁶ Player tampering can have a devastating effect on the competitive balance of a professional sports league.²²⁷ In the NBA particularly, the reliance on illegal player tampering has been entrenched throughout the foundation of the League.²²⁸

Further, new technology and closer player relationships have made the possibility of player-to-player tampering more accessible and prevalent in the modern era of the NBA.²²⁹ The NBA has policies regulating tampering in place, but these guidelines have been ineffective due to lack of enforcement, which is a problem that the League needs to correct.²³⁰ As it currently stands, the NBA would be well within its legal rights to enforce stricter penalties for tampering violations due to the nonstatutory labor exemption of anti-trust laws.²³¹ Moreover, even without the protection of the nonstatutory labor exemption, anti-tampering measures would likely not violate antitrust laws under the rule of reason analysis.²³²

To take control of its tampering problem, the NBA needs to start issuing stricter penalties, including harsher fines, suspensions of violating players and executives, forfeiture of draft picks, and nullification of contracts derived from illegal tampering.²³³ En-

225. For further discussion of the lack of enforcement by the League as a driving force in rise of player tampering, see *supra* notes 165–168 and accompanying text.

226. See Sampson, *supra* note 144 (comparing situation to that of controversy surrounding NFL Commissioner Roger Goodell and his perceived “arbitrary disciplinary decisions”).

227. See Andrade, *supra* note 11 (demonstrating need for anti-tampering rules in professional sports).

228. See Bucher, *supra* note 1 (noting that tampering has become such commonplace in NBA that every GM takes part in some manner and most transactions are result of tampering).

229. For further discussion of the increasing role that social media and interpersonal relationships between players on different teams has had on player tampering, see *supra* notes 122–125 and accompanying text.

230. See Sampson, *supra* note 144 (discussing need for NBA to quickly resolve tampering problem).

231. See *Williams*, 45 F.3d at 691 (holding no antitrust violation for good faith collective bargaining agreements).

232. See McCann, *supra* note 44, at 737 (“Courts usually have found joint ventures to satisfy rule of reason analysis on the basis that rather than harming consumers’ interests, joint ventures often provide consumers with new product offerings that otherwise would not have been produced or would not have been produced as efficiently.”).

233. For further discussion of potential solutions for League to limit tampering, see *supra* notes 179–183 and accompanying text.

forcement strategies such as these have proven effective in other professional leagues, and would very likely be successful in the NBA as well.²³⁴ Ultimately, the law is in the NBA's favor regarding enforcement of its anti-tampering policy, and if the League is serious about solving its player tampering problem, the ball is in Adam Silver's court.²³⁵

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234. For further discussion of NBA's enforcement of tampering violations compared with other sports leagues' enforcement, see *supra* notes 211–218 and accompanying text.

235. For further discussion of how antitrust laws cannot prevent League from addressing its tampering problem, see *supra* note 63 and accompanying text.

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