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Getting Open

A study of homosexuality in men's professional team sports in North America.

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Preface

On Monday, April 29, National Basketball Association (NBA) veteran center Jason Collins became the first active player in North America's four major men's professional team sports to publicly disclose his homosexuality.¹ Collins did so on his own terms, penning his own announcement for the May 6 issue of *Sports Illustrated*. He began, "I'm a 34-year-old NBA center. I'm black. And I'm gay."

I didn't set out to be the first openly gay athlete playing in a major American team sport. But since I am, I'm happy to start the conversation. I wish I wasn't the kid in the classroom raising his hand and saying, "I'm different." If I had my way, someone else would have already done this. Nobody has, which is why I'm raising my hand.²

Collins is a journeyman; he has played for six teams in 12 seasons, most recently as a reserve with the Washington Wizards after a midseason trade from the Boston Celtics. His announcement came days after his team was eliminated from playoff contention. Collins is now a free agent, looking for a new contract to finish out his career. Assuming Collins lands on a roster and steps on the court for the 2013-14 NBA regular season, his career will be forever remembered as a milestone in sports.

Within his announcement, Collins acknowledged critical events over the last year that brought him to the tipping point: the Boston bombings, the U.S. Supreme Court arguments for same-sex marriage, and the support received from family and friends, including college roommate Rep. Joe Kennedy III (D-Mass.).³ At the time of the announcement, however, Collins

¹ Jason Collins, *Why NBA center Jason Collins is coming out now*, SPORTS ILLUSTRATED (Apr. 29, 2013 11:01 AM), <http://sportsillustrated.cnn.com/magazine/news/20130429/jason-collins-gay-nba-player/#ixzz2RtvcK0Jd>.

² *Id.*

³ *Id.*

had not come out to anyone in the NBA and thus had received no prior support from within the institution.⁴

Loyalty to my team is the real reason I didn't come out sooner. When I signed a free-agent contract with Boston last July, I decided to commit myself to the Celtics and not let my personal life become a distraction. When I was traded to the Wizards, the political significance of coming out sunk in. I was ready to open up to the press, but I had to wait until the season was over.⁵

Collins also noted that he was comforted by the shift in public opinion on gay rights issues over the last ten years, but cautiously warned, “We still have so much father to go.”⁶

This paper was written at a time before Jason Collins bravely stepped forward. Yet, while men’s professional team sport in North America now has an openly gay player, the institution of sport still has a long way to go in terms of fostering an environment that welcomes and protects this minority. I argue that many, if not all of the principles set forth below are still applicable in some way. Collins’s announcement touches on many of the issues and challenges raised in this paper, many which validate and enlighten our theories, and some which ask us to consider others. As an example, Collins’s age and status (a 34-year-old veteran) falls within the projected zone of comfort thought to be necessary to overcome certain fears (financial, social, etc.) and become the first player to come out. Interestingly though, Collins seemingly did not collect support from the coach, general manager, owner and league prior to the announcement. As Collins is currently an unrestricted free agent, executives are now likely to monitor how players around the league react to the disclosure before engaging in negotiations and

⁴ *Id.*

⁵ *Id.*

⁶ Collins, *supra* note 1

offering Collins (or, on the other hand, highly homophobic players) a contract to play on their team.

Collins spoke to a number of issues within his statement, such as the conflict between homosexuality and masculinity, and what it takes to be accepted in sport:

I go against the gay stereotype, which is why I think a lot of players will be shocked: That guy is gay? But I've always been an aggressive player, even in high school. Am I so physical to prove that being gay doesn't make you soft? Who knows? That's something for a psychologist to unravel. My motivations, like my contributions, don't show up in box scores, and frankly I don't care about stats. Winning is what counts. I want to be evaluated as a team player.⁷

Collins talked about his fears, and covering his tracks for the majority of his career:

By its nature, my double life has kept me from getting close to any of my teammates. Early in my career I worked hard at acting straight, but as I got more comfortable in my straight mask it required less effort.... When I was younger I dated women. I even got engaged. I thought I had to live a certain way. I thought I needed to marry a woman and raise kids with her. I kept telling myself the sky was red, but I always knew it was blue.⁸

He anticipated the response from fellow players, and went so far as to attempt to quell fears about sharing the highly homoerotic locker room space, stating, "I've taken plenty of showers in 12 seasons. My behavior wasn't an issue before, and it won't be one now. My conduct won't change."⁹

Moments after the announcement went live, Collins received support from much of his NBA brethren, as well as Wizards' management and NBA Commissioner David Stern. From outside the NBA world, support came from all directions, including President Bill Clinton, Martina Navratilova, Spike Lee, Michael Strahan and many

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

others.¹⁰ The vast majority of Twitter users supported Collins, according to data pulled by the social media analytics firm Topsy around 1:30 p.m. EDT on the day of the announcement.¹¹ For the specific term "Jason Collins," there were 36,967 tweets expressing explicitly positive sentiment, while 8,942 tweets were negative.¹² Meanwhile, Collins's follower count climbed from less than 4,000 followers before the announcement to over 35,000 in under four hours. And that is not a meaningless number — it speaks to the support he's receiving and grants him a much larger platform in the new role he has accepted. However, this unique platform is available only under the circumstance that his career continues.

One N.B.A. scout estimated that Collins had a 25 percent chance of making an opening-night roster next season, based solely on his basketball skills. But a general manager for another team predicted that Collins would be back in the league because of his reputation as a solid teammate and leader. That general manager said that Collins's disclosure of his sexuality could even appeal to a forward-thinking owner.¹³

Collins's future will also lead to a new understanding of a gay athlete's marketability, as well as how an organization might fair, from a sponsorship perspective, with a gay athlete on the roster.

¹⁰ Benjamin Hoffman, *Players Voice Support of Collins on Twitter*, N.Y. TIMES (Apr. 29, 2013), http://www.nytimes.com/2013/04/30/sports/basketball/players-voice-support-of-jason-collins-on-twitter.html?_r=0.

¹¹ Sam Laird, *Jason Collins Is the Toast of Twitter After Coming Out*, MASHABLE.COM (Apr. 29, 2013 4:30 PM), <http://mashable.com/2013/04/29/jason-collins-twitter> (the numbers reported illustrate a four to one ratio in favor of positive comments).

¹² *Id.*; see also Hoffman, *supra* note 10 (One of the few negative messages from professional athletes came from Mike Wallace, a Miami Dolphins wide receiver, who said, "All these beautiful women in the world and guys wanna mess with other guys." Wallace has since deleted the message.).

¹³ Howard Beck & John Branch, *With the Words 'I'm Gay,' an N.B.A. Center Breaks a Barrier*, N.Y. TIMES, Apr. 29, 2013, available at http://www.nytimes.com/2013/04/30/sports/basketball/nba-center-jason-collins-comes-out-as-gay.html?_r=0.

According to Baker Street Advertising Executive Bob Dorfman, the LGBT market is “close to a \$1 trillion market in buying power” and “there is a lot of opportunity there.”¹⁴

Though Collins has put the wheels in motion to begin tearing the seams of this barrier down, his experience this off-season as a free agent and the potential continuation of his professional career this fall will be extremely telling. The world waits to see how Collins is received and treated by executives, teammates, opponents, fans, sponsors and other stakeholders. An entirely new paper could be written analyzing Jason Collins and his effect on sport and society one year from now. Without dismissing the great importance of this announcement in any way, or the next few that may imminently follow, I suggest that the institution of sport as a whole still needs to address underlying issues of homophobia, its views and portrayals of masculinity and the policies and enforcement mechanisms available to assist all gay athletes in coming out, on their own terms, regardless of who they are, what sport they play, their age or career statistics. The archaic model of masculinity within the institution of sport must be broken.

I. Introduction

Sport, particularly professional men’s team sport, remains one of the last bastions of cultural and institutional homophobia in North America.¹⁵ The institution produces an orthodox form of masculinity that is rigid and exclusive for many types of men.¹⁶ Scholars such as Eric Anderson and Brian Pronger believe that sport is predicated upon homophobia, so much so that many (ostensibly heterosexual) athletes maintain that the hyper-masculinity exhibited in sports nullifies the possibility of gays even existing in their space, even though they are well aware that

¹⁴ Rachel Brady, *Can an openly-gay athlete help Nike sell shoes?*, THE GLOBE AND MAIL (Apr. 29, 2013), <http://www.theglobeandmail.com/life/can-an-openly-gay-athlete-help-nike-sell-shoes-a-marketing-expert-dishes-on-jason-collins-future-endorsement-prospects/article11616065/?cmpid=rss1>.

¹⁵ ERIC ANDERSON, *IN THE GAME* 13 (2005).

¹⁶ BRIAN PRONGER, *THE ARENA OF MASCULINITY* 181 (1990).

gay men exist in large numbers in the culture at large. To these athletes, homosexuality is synonymous with physical weakness and emotional frailty.¹⁷ Therefore, to them, the term “gay athlete” remains an oxymoron.

In many important respects, the difference between an athlete who is homosexual and one who is heterosexual is nonexistent. Sexuality has no bearing on the hitting of tennis balls, speed of skating, height of jumping, precision on gymnastic apparatus, or any other strictly athletic phenomenon. But in our culture athletics has more than purely athletic significance. And sexuality is not just a matter of the pleasure of flesh meeting flesh. Both sexuality and athletics draw meaning from our culture’s myths of sexuality and gender. Because homosexuality and athletics express contradictory attitudes to masculinity, violation and compliance respectively, their coexistence in one person is a paradox, the stuff of irony.¹⁸

It should be noted that this paper addresses the issue of gay men in professional team sports. This is not to say, however, that the examination of bisexuals, lesbians and the transgendered in sport is of any less importance. One question this paper does not address, however, is whether gay athletes at this elite level of sport exist or not; it assumes they do, as a number of closeted professional athletes have taken part in interviews and,¹⁹ in recent years, more athletes have emerged as homosexual upon retirement.²⁰

About 4,000 players spent time on active rosters in the National Basketball Association (NBA), National Hockey League (NHL), National Football League (NFL) and Major League Baseball (MLB) in 2012. Crude estimates of the percentage of the general population that identifies as being gay have varied greatly. Perhaps the most recent and acknowledged survey came from the Williams Institute (UCLA), which estimated that 3.5 percent of adults in the

¹⁷ ANDERSON, *supra* note 15, at 13.

¹⁸ PRONGER, *supra* note 16, at 3.

¹⁹ See ANDERSON, *supra* note 15, at 18 (documenting interviews with active, gay professional athletes).

²⁰ The most well-known, openly gay, male professional athletes in team sports include John Amaechi (NBA), Wade Davis (NFL), Kwame Harris (NFL), David Kopay (NFL), Robbie Rogers (USA Soccer), Esera Tuaolo (NFL). All came out after retirement.

United States identify as lesbian, gay, or bisexual.²¹ “The question of whether gay athletes are overrepresented or underrepresented in team sports is theoretically unanswerable because the question is too vague and definitions of sexuality are simply too fluid.”²² Regardless, the statistics make it a near certainty that there are at least a few homosexuals among the thousands of athletes playing in the four major professional sports leagues today. Yet not one is openly gay. Not this year, not last year, not ever.²³

The weight of empirical evidence suggests that gay athletes are exceedingly underrepresented in sports at the professional level. This conclusion rests on various reasoning. One theory is that, at an earlier point in their career, the hostility of sport and the homophobic environment of the locker room forces homosexual athletes out.²⁴ A second theory is that gay athletes typically experience an estrangement from sport before the pros, alienation that logically leads them to quit.²⁵ A third, less common theory is that once closeted gay men come out, they no longer need a façade of sport to prove to themselves or others that they are a true man, in the macho sense of the word.²⁶

Other research suggests, however, that gay athletes may actually be overrepresented in team sports. This theory holds that that gay males who feel motivated to conceal their gay identity from others may actually be attracted to team sports and remain within them for longer

²¹ GARY J. GATES, Willams Inst., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER, (Apr. 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>.

²² ANDERSON, *supra* note 15, at 51.

²³ Collins, *supra* note 1 (As noted above, NBA center Jason Collins, on April 29, 2013, became the first active player in men’s professional team sports in North America to publicly disclose his homosexuality.).

²⁴ ANDERSON, *supra* note 15, at 53.

²⁵ *Id.* at 96.

²⁶ *Id.* at 53.

periods of time.²⁷ From the outset, gay males who recognized their same-sex attractions early may have joined team sports with the hope that the masculinity embedded in sport would protect them from suspicion of their true orientation. Possibly, these gay athletes may have even hoped that the masculine enterprise might actually alter their sexual desires. In addition, adolescent males unaware of their same-sex desires might find themselves attracted to team sports without consciously recognizing the homoeroticism within the game.²⁸

Although conventional wisdom might suggest that gay men would be repelled by the homophobia within sports, some gay men might actually be desperate both to prove their masculinity (to self or others) and to hide their sexuality. The use of violent language and behaviors of masculinity found within the gridiron, ball-field or on the ice effectively do this. Supporting this contention, retired professional gay NFL player David Kopay told Eric Anderson that he was particularly intense on the field as a way of proving that he was in no way less of a man because he was gay.²⁹ At bottom, though, there is, of course, no reputable study that would suggest gay male athletes enjoy their sport any less than their heterosexual teammates. Thus, gay male athletes may not need an ulterior motive for becoming involved in and continuing to play professional team sports.

Adding weight to the notion that gay players most definitely exist in men's team professional sports today, Michael Messner's 1998 anonymous survey of 175 NFL first-year players found that players are not resolute that their teams are entirely heterosexual.³⁰ While none of the 175 players admitted to being, 43.4% believed that there are at least some gay players on their teams, and 8.3% claimed to be aware (or reasonably sure) of gay players on their

²⁷ *Id.* at 53.

²⁸ *Id.* at 54.

²⁹ ANDERSON, *supra* note 15, at 43.

³⁰ *Id.* at 15.

team. All players believed less than 7% of the NFL was gay, at the time. Most interestingly, however, five of the 175 first-year players indicated that they were “friends with a homosexual player,” a surprisingly high number when one considers that these were players who had only been in the league for a year and, therefore, had yet to truly develop social networks of trust.

Anderson believes there is a major cultural shift occurring that is just now reaching the industry:

Our culture seems to be in the beginning of a surge in which gay athletes are increasingly coming out of the closet. This is not surprising because research shows that as cultural homophobia declines, people increasingly come out of the closet. This is perhaps due to a nexus of factors that include the increased networking of gay youth via the Internet, improved legislation for the protection of gay and lesbian citizens, and the dramatic reduction in cultural and institutional homophobia that has occurred in the United States since 1993.³¹

Sport, for better or for worse, is a major driver of social influence today. It has the ability to lead policy, but it also has shown the tendency, especially in the realm of masculinity and homophobia, to lag behind. If everything changes around sport, the industry will either have to alter its behavior or it will lose its social significance and be viewed as a vestige of an archaic model of masculinity.

This paper explores why, even though public opposition to same-sex marriage and gay rights is rapidly eroding in the United States and Canada,³² the locker rooms and clubhouses of North America’s four major sports leagues (NBA, NFL, NHL and MLB) remain among the last bastions of homophobia. It explores the culture of masculinity in the locker room; documents the opposition to homosexuality in sports; questions what true hurdles, mental or otherwise, exist

³¹ *Id.* at 44.

³² Press Release, Quinnipiac University, *American Catholics Support Same-Sex Marriage* (Mar. 8, 2013) (“American voter support for same-sex marriage is inching up and now stands at 47 - 43 percent.... This compares to a 48 - 46 percent statistical tie among all voters on same-sex marriage December 5 and reverses the 55 - 36 percent opposition in a July, 2008, survey by the independent Quinnipiac University.”).

for homosexual professional athletes; examines current trends and abilities to discipline in light of First Amendment concerns; and suggests what legal and private contracting protections exist for homosexual athletes.

II. Background: Why Sports Matter

Sport – leagues, teams and the athletes that comprise them – has a profound ability to influence. Hundreds of millions of people watch sporting events each year and identify themselves as passionate fans of leagues, teams and players.

No one can explain this emotional connection to sports teams, which causes many to act irrationally. Attorneys and executives in Washington, D.C. wear pig snouts and wigs in public and without shame. Young men who are supposed to be love-stricken choose the fundamentally unromantic locale of a ballpark to propose marriage. And neighbors across thin state lines—who share upbringing, basic values, occupations, religion, and even hobbies—form Hatfield-McCoy battle-lines against each other for decades, based solely on allegiance to professional sports teams. The natural public pull to professional sports cannot be explained, but it plainly exists. Professional sports have real power to motivate, to inspire, and to form public opinion.³³

The strongest influence within sport on American culture is found in the individual athlete at the top of his or her game. Athletes who excel in sport receive unparalleled social prestige; they are given cultural power and are publicly lauded. A recent study from the Barna Group found that, by more than a three-to-one margin, Americans believe professional athletes have more influence on society than do faith leaders.³⁴

These athletes understand that, because of their public stature, the consequences flow naturally from their actions even if they cannot see the consequences. Consequences of being a role model and leader. Consequences for young children and adults who mimic our behavior when they interact with other children and

³³ Brief for Chris Kluwe et al. as Amici Curiae Supporting Respondents at 3, *Hollingsworth v. Perry*, 704 F. Supp. 2d 921 (N.D.Cal. 2010) (No. 12-144).

³⁴ Press Release, Barna Group, *Two-Thirds of Americans Say Pro Athletes Have More Influence on Society than Faith Leaders* (Feb. 1, 2013), <http://www.barna.org/culture-articles/603-two-thirds-of-americans-say-pro-athletes-have-more-influence-on-society-than-faith-leaders>.

adults. Those consequences flow because children and adults want to “Be Like [insert athlete name here].” Athletes are learning that they can no longer say “I am not a role model”— that they are forced to be a role model and privileged to be a role model, and that their words and actions, no matter how innocently intended, are magnified for both good and bad.³⁵

Athletes, within the last century, have been one of the most powerful forces driving social and cultural change, particularly in the United States. In the 1936 Olympics, Jesse Owens, the African-American son of a sharecropper and the grandson of slaves, single-handedly crushed Hitler's myth of Aryan supremacy. In 1967, boxing champion Muhammad Ali objected to the Vietnam War (a year before Martin Luther King did) and sacrificed his career, as he was stripped of all his titles after he refused to compromise his beliefs at a time when many dissenters of the war did so. In 1973, Billie Jean King defeated Bobby Riggs in the famous “Battle of the Sexes” tennis challenge match making it acceptable for American women to exert themselves in pursuits other than childbirth. In 1991, Magic Johnson revealed his HIV/AIDS diagnosis, and in the decades following has helped de-stigmatize the illness.

Arguably, the single-most important triumph of the civil rights movement came not in a courtroom, but on a ball field. While some people may be able to name the first African-American congressperson or physician, so many more know about, and will never forget, Jackie Robinson – what he achieved and the significance of his career. When Jackie Robinson took the field for the Brooklyn Dodgers in 1947, it “trigger[ed] a revolution that altered the sociopolitical landscape in America.”³⁶ Robinson's triumphs on the field of play, in the face of bigotry, evoked a sense of pride among black people and forced the rest of America to consider anew the doctrine of white supremacy.

³⁵ Brief for the Respondents at 8, *Hollingsworth v. Perry*, 704 F. Supp. 2d 921 (N.D.Cal. 2010) (No. 12-144).

³⁶ Justice B. Hill, *One Meeting, Two Men, a Changed World*, MLB.COM (Apr. 15, 2008 12:11 PM), <http://atmlb.com/UKbl6L> (last visited April 24, 2013).

When professional leagues, teams and athletes do the right thing, their efforts are magnified, sometimes in truly astounding ways. Unfortunately, the same hyper-focus on professional sports follows equally for negative influences. The most frequently reported instances of poor behavior include crimes committed, bad sportsmanship and marital infidelity. Unsurprisingly, as one national survey concluded, “American kids are mirroring the behavior of famous athletes—the good and bad—both on and off the field.”³⁷

If a professional basketball or football player says something is “gay,” young boys on the playground will copy and magnify the statement. If a hockey player says homosexuals are not welcome in the locker room, a young girl will shun a teammate who she thinks may be gay—where that teammate was until then a bright, happy, smart, and promising kid. After, she will be afraid of being who she is, and will take steps, even dire steps, to avoid it.”³⁸

Some institutions and organizations are generally slower to change than individual attitudes. The institution of sport, however, may be even slower to change because it represents what Anderson calls “a closed-loop system.” “It is important to remember that those who run the institution of sport (coaches, managers and administrators) were at once athletes themselves, schooled in the language of violent, homophobic masculinity, and they tend to reproduce themselves.”³⁹ Leaders within sport almost always ascribe themselves to the previous cohort’s ideals, keeping in mind that most American coaching positions require no training in sport psychology or even physical education. And, in order to attain such a leadership position in sport – and to want such a position – the athlete must be devoted enough to survive the sport’s unique environment, and elite enough, athletically, to be deemed worthy to preside over others. Conversely, the majority of athletes who were marginalized by the sport do not go on to coach;

³⁷ Henry J. Kaiser Family Found., *Children Get Mixed Messages from Famous Athletes, Both On and Off the Field*, Oct. 12, 2000, available at <http://bit.ly/W4V6mz>.

³⁸ Brief for the Respondents at 8, *Hollingsworth v. Perry*, 704 F. Supp. 2d 921 (N.D.Cal. 2010) (No. 12-144).

³⁹ ANDERSON, *supra* note 15, at 8.

they do not share their experiences; they do not exert time and energy in later years to reform the sport. When athletes leave the arena, their beliefs about how a sport should operate leave with them,⁴⁰ and those who survive are promoted to leadership positions, where they reproduce and inspire a generation in their own image.

The institution of sport can only be changed from the inside, from within the loop. To understand why men's professional team sports have yet to see an openly gay athlete, we must first discuss what is occurring within the loop in regard to the relationship sport has with masculinity and homophobia.

III. Background: Masculinity and Sports

Sport has become the great masculine secular religion of our era.⁴¹ The locker room is the physical home of the team, the place where interpersonal relationships are built and the spirit of the team is formed. The locker room can be a scary place, with unwritten rules and power rankings. There are cliques, hazing, pranks and exaggerated expectations of toughness.⁴² More so than the actual field of play, it is the ultimate site where the stereotypes of what it means to be a man are on display.

Men's professional team sports provide an overwhelmingly homosocial environment, where men, in groups of 13 to 90 (depending on league roster size and stage of the season), live,

⁴⁰ *Id.* at 74.

⁴¹ See VARDA BURSTYN, *THE RITES OF MEN: MANHOOD, POLITICS, AND THE CULTURE OF SPORT* (1999).

⁴² NADINE C. HOOVER, *INITIATION RITES AND ATHLETICS FOR NCAA SPORTS TEAMS* (Alfred University) (Aug. 30, 1999) (revealing that eight out of ten athletes have been hazed during college; more than five out of every ten athletes has been subjected to some form of hazing during high school; 40% of athletes report that a coach or club advisor was aware of the hazing and 22% report that the coach or advisor was involved in the hazing. Hazing is defined as a process, based on a tradition that is used by groups to discipline and to maintain a hierarchy (i.e., a pecking order). These activities can be humiliating, demeaning, intimidating, and exhausting, all of which results in physical and/or emotional discomfort. Hazing is about group dynamics and proving one's worthiness to become a member of the specific group.).

eat, train (and, yes, sometimes shower) near one another. Homosociality, by definition, implies neither heterosexuality nor homosexuality, but is used to emphasize aspects of solidarity between males.⁴³ However, the unique environment of men's professional sport is arguably the most forced homosocial environment in existence today and carries unique challenges for young athletes, regardless of their sexual orientation. The institutional ordering of tight bonds among groups of heterosexual men, whether in militaries, workplaces or locker rooms, often is accomplished through the exclusion of women and homosexual men, and an ideological emphasis on men's difference from, and superiority to, them.

Male homosociality is implicated too in men's use of interpersonal violence, a phenomenon that both expresses and maintains inter- and intra-gender hierarchies of power. Solidarity between men informs men's sexual violence against women; violence against gay, lesbian, bisexual, and transgender persons in public spaces; and military combat.⁴⁴

From an early age, boys are taught that maleness equates with competitiveness, dominance over others, self-reliance, toughness, and abstract thinking.⁴⁵ The easiest way to prove masculinity, then, is through athletics. Athletics is traditionally understood as a masculine pursuit. Masculinity and sports have interwoven since the advent of athletic games. Teams covet, and attempt to build, ironclad relationships between players and cohesive brotherhoods of trusts that defend each member. Today, sports remain combative and aggressive in nature. The term "athlete" is defined as one who is "trained or skilled in exercises, games or sports requiring

⁴³ See Michael Flood, *Men, Sex, and Homosociality*, 10 MEN AND MASCULINITIES 339, 339-59 (2008) (discussing homosociality and the powerful influence of male-male social bonds on the sexual relations of young men. Men's practice of gender has been theorized as a homosocial enactment, in which the performance of manhood is in front of, and granted by, other men. Males seek the approval of other males, both identifying with and competing against them. They attempt to improve their position in masculine social hierarchies, using such "markers of man-hood" as occupational achievement, wealth, power and status, physical prowess, and sexual achievement.).

⁴⁴ *Id.* at 342.

⁴⁵ Anne Gregory, *Rethinking Homophobia in Sports: Legal Protections for Gay and Lesbian Athletes and Coaches*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 264 (2004).

physical strength, agility, or stamina.”⁴⁶ While the dictionary definition of the word athlete is apparently gender neutral, as it does not explicitly reference gender (male or female), models of athletic behavior are based on qualities traditionally associated with men – combativeness, competitiveness, and aggression. The ideal athlete is someone (male or female) who exhibits those characteristics.

Historically, the public considered these athletic traits as exclusively masculine.⁴⁷ The rise of organized sport during the nineteenth century was a way to affirm the superiority of American male masculinity. Psychologist Robert Brannon has developed four rules that have influenced, but not limited, the definition of hegemonic masculinity that can be applied to professional team athletes: (1) no sissy stuff; (2) be a big wheel; (3) be a sturdy oak; and (4) give ‘em hell.⁴⁸ In order to ascend the masculine hierarchy, one must maintain these ascribed variables. To “be a big wheel,” a man must be better than, or in charge of, other men. Sport provides the perfect venue for attaining this variable, where men can literally battle for supremacy. Brannon’s other attributes (“be a sturdy oak” and “give ‘em hell”) are also reflected in the sporting culture. Athletes are taught from a very young age to never show fear or weakness. They are told – in nearly every game-time motivational speech – to epitomize the fighting attitude of “give ‘em hell,” which evokes the violent nature of sport. As Anderson explains:

Sports, especially contact team sports, teach boys that it is okay to commit violence against another. Violence, in the name of victory, is acceptable because victory is the symbolic method by which masculinity is distributed in a postindustrial culture. Sport essentially institutionalizes, sanctions and normalizes

⁴⁶ “athlete.” Merriam-Webster Online Dictionary (Apr. 24, 2013), www.merriam-webster.com/dictionary/athlete.

⁴⁷ Robert Sirabian, *Gender, Cross-dressing and Sport, in* SEXUAL SPORTS RHETORIC 115, 115 (Linda K. Fuller, ed., 2010).

⁴⁸ DEBORAH S. DAVID & ROBERT BRANNON, THE FORTY-NINE PERCENT MAJORITY: THE MALE SEX ROLE 12 (1976).

violence against other boys and men, something that is perhaps made more visible in the employment of so-called goons in hockey, or the brush-back pitch in baseball. Each is acceptable in the sport as it is naturalized as ‘just part of the game,’ even though one in tantamount to hiring a thug to commit a violent crime for you, and the other amounts to an intentional assault with a deadly weapon. Put into these contexts, we are more able to see the absurdity of the acceptance of brush-back pitches and our revelry for goons and team fights.”⁴⁹

Brannon’s definitions, simplified, describe masculinity in a way that surely keeps the stereotypical acts or behaviors attributed to gay men as inconsistent with those of the truly masculine man. In order to constantly prove one’s heterosexual desires, especially in a homophobic environment, men may use the sexual objectification of women and the public discussing of heterosexual ‘conquests’ (something often exemplified in locker-room talk). Sociologist Tim Curry maintains that it is often not enough for heterosexual men to simply say they are not gay; he posits that they must also behave in “vehemently homophobic ways” if they desire to cast off homosexual suspicion.⁵⁰ “In this way homophobia can be used as a vessel toward the continual maintenance of a defensive heterosexual identity in an attempt to prove that the speaker is not gay.”⁵¹ This is also accomplished through the use of homophobic discourse. Frequent use of the words “fag” and “faggot,” as well as the expression “that’s so gay” are used to disassociate oneself from homosexuality and, if thought of on a spectrum, to associate oneself with masculinity.

The nature of masculinity in sport continues to be an interesting paradigm. Male athletes consistently evaluate and judge themselves – their bodies, performance and abilities – against their teammates and opposition. Take, for example, the NFL Combine. Melissa Harris-Perry,

⁴⁹ ANDERSON, *supra* note 15, at 34.

⁵⁰ See Timothy J. Curry, *Fraternal Bonding in the Locker Room: A Profeminist Analysis of Talk about Competition and Women*, in *SPORT IN CONTEMPORARY SOCIETY* 60, 60-78 (D. Stanley Eitzen ed. 2001).

⁵¹ ANDERSON, *supra* note 15, at 22.

host of a self-titled weekend MSNBC show, effectively captures the masculine nature of this event:

This week, the National Football League is looking for a few good men. On Wednesday, the League kicked off its very own version of a beauty pageant, otherwise known as the 2013 Scouting Combine. More than 300 of college football's best players descended upon Indianapolis to showcase their assets and skills before scouts, coaches and managers, all of them hoping to secure a spot on Draft day in April and launch a career playing in the pros. There's a swimsuit contest – which in the Combine means players stripping down to their skivvies to have their physiques evaluated, poked and prodded. There is the interview – which gives team officials and media a chance to know the players, and they will undergo medical testing and psychological evaluations. In the talent portion of the Combine, they will run, jump, drill, shuttle and dash – hoping to get good numbers from the judges. This is how the NFL, a platform for one of our culture's most visible displays of masculinity, takes the measure of their men.⁵²

Men who rely on the masculine stereotypes of combativeness, competitiveness and aggression often use them to assert and preserve their superiority over men who show stereotypically feminine stereotypes. “Gay male athletes are assumed not to exist. Part of the reason for this is because our society views gay men as “weak” and “effeminate,” and therefore non-masculine. Accordingly, athletes in sports such as football, basketball, hockey, and baseball – where athletes have to display masculine traits to be successful – are assumed to be heterosexual.”⁵³

From an organizational or managerial perspective, the best athletes are those who reflect the values and ethics of that particular organization – they are “team players.” In the instance where certain players do not reflect team norms, they can be labeled as “loose cannons” and are subject to scrutiny from the organization that consistently measures the team's chemistry. “In this regard, any variance from orthodox masculinity is viewed as subversive and is therefore likely to result in decreased opportunity for promotion to the next level. This virtually

⁵² Melissa Harris-Perry, *The NFL and measuring male masculinity*, NBCNEWS.COM (Feb. 2013), <http://video.msnbc.msn.com/melissa-harris-perry/50919119> (last visited April 24, 2013).

⁵³ GREGORY, *supra* note 44, at 270.

necessitates that those who aspire to the next level (or even the next game) must disengage with any public notion of a gay identity.”⁵⁴

IV. Background: Homophobia in Sports

For much of the past century, homosexuality was defined by the medical and scientific community as a psychiatric disorder.⁵⁵ In the last several decades, however, "homosexuality" has been removed from the diagnostic manual of disorders, and research emphasis has shifted to the other side of the problem: the study of the negative, sometimes pathological, reactions to homosexuals by heterosexuals. The term "homophobia" has gained currency as a one-word summary of this widespread problem. In sport, homophobia is expressed in ways ranging from telling jokes directed against homosexual activity, through harassment to physical violence against homosexual athletes. “Sport remains an arena that reproduces a desire for the toughest form of masculinity, an attitude in which ‘men are men;’ an arena in which homosexuality, femininity, and other assumed “weaknesses” are not perceived as being conducive to the ultimate quest for victory.”⁵⁶

There is no shortage of publicized homophobic comments from professional athletes within MLB, the NFL, the NBA and the NHL. One of the most infamous comments came in a December 1999 rant, when baseball pitcher John Rocker included homophobia alongside a litany of other prejudices in a *Sports Illustrated* interview:

I would venture to say the Mets fans aren't even humans. There are some, uh, you know, 80 percent are some kind of Neanderthals.... Imagine having to take the 7 train to the ballpark looking like you're riding through Beirut, sitting next to some kid with purple hair, next to some queer with AIDS, right next to some dude

⁵⁴ ANDERSON, *supra* note 15, at 69.

⁵⁵ *Facts About Homosexuality and Mental Health*, UCDAVIS.EDU, http://psychology.ucdavis.edu/rainbow/html/facts_mental_health.html (last visited Apr. 24, 2013).

⁵⁶ ANDERSON, *supra* note 15, at 7.

who just got out of jail for the fourth time, right next to some 20-year-old mom with four kids. It's depressing.⁵⁷

In 2002, NFL tight-end Jeremy Shockey made an appearance on the *Howard Stern Show*. There he stated, "If I knew there was a gay guy on my college football team, I probably wouldn't, you know, stand for it." He added, "I think, you know, they're going to be in the shower with us and stuff, so I don't think that is going to work."⁵⁸

Interestingly, the city of San Francisco, with the largest gay population of any major American city,⁵⁹ has seen a number of sports figures on their teams make homophobic comments. There are various possible reasons as to why this is so; anti-gay comments could be a backlash to the general acceptance of the gay community within the city or, perhaps, anti-gay comments made in San Francisco are more magnified and, possibly, provoked by the questioning (or prodding) of the interviewer. In 2002, Garrison Hearst of the San Francisco 49ers said, "Aww, hell no! I don't want any faggots on my team. I know this might not be what people want to hear, but that's a punk. I don't want any faggots in this locker room."⁶⁰ When interviewed by the *Sacramento Bee*, one anonymous San Francisco Giants player said, "If I found out someone is gay in here, I'd run (him) out. It would be uncomfortable for me and for him in the shower. It would be ugly."⁶¹

⁵⁷ Interview by *Sports Illustrated* with John Rocker, former pitcher, Atlanta Braves (Dec. 1999), http://sportsillustrated.cnn.com/more/turkeys_2000.

⁵⁸ Interview by Howard Stern with Jeremy Shockey, former tight end, New York Giants (Sept. 10, 2002), <http://www.outsports.com/2013/2/20/4009672/jeremy-shockeys-gay-problem>.

⁵⁹ GARY J. GATES, SAME-SEX COUPLES AND THE GAY, LESBIAN, BISEXUAL POPULATION: NEW ESTIMATES FROM THE AMERICAN COMMUNITY SURVEY (Williams Institute, UCLA School of Law), Oct. 2006, <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Same-Sex-Couples-GLB-Pop-ACS-Oct-2006.pdf> (stating one is more likely to encounter a gay resident in San Francisco than any other major U.S. city; finding San Francisco's gay residents make up 15.4 percent of city population).

⁶⁰ Joe Eskenazi, *Chris Culliver's Anti-Gay Rant Eerily Reminiscent of Garrison Hearst's Anti-Gay Rant*, SFWEEKLY.COM (Jan. 30, 2013, 3:20 PM), http://blogs.sfweekly.com/thesnitch/2013/01/chris_cullivers_anti-gay_rant.php.

⁶¹ Nick Peters, *San Francisco may be a liberal city, but players say a clubhouse is far from open-minded*, SACBEE.COM (May 28, 2002), <http://groups.yahoo.com/group/newsclippings/message/1666>.

Most recently, Chris Culliver (cornerback, San Francisco 49ers) in an interview during “Media Day” prior to the 2013 NFL Superbowl, stated, "I don't do the gay guys, man. I don't do that. Ain't got no gay people on the team. They gotta get up outta here if they do. Can't be with that sweet stuff ... Can't be ... in the locker room, nah," he said. "You've gotta come out 10 years later after that."⁶²

In a 1998 episode of ESPN's *Outside the Lines*, several professional athletes were asked about their views on gays in professional sports. Tre' Johnson, NFL offensive guard, said, “It would put everybody on edge. Everybody would ostracize that person. Everybody's fears and insecurities would come to the forefront, and being in this testosterone-ego environment that we are in, that person would get hammered.”⁶³ Similarly, Minnesota's Chris Carter (now a prominent NFL TV analyst) said, “I think it would be tough for a lot of the athletes that I play with to think that, ‘Wow, I am showering, I am performing on the field, I am bleeding, I am fighting with a person that is a homosexual... I know there would be people definitely taking shots at him. I feel very confident that would happen.’”⁶⁴

A number of comments have been penned either through newspaper op-eds or, more prevalently, through social media. On Twitter, Brandon Spikes (linebacker, New England Patriots) said, “Just like I'm arachnophobic. I have nothing against homosexuals or spiders but I'd still scream if I found one in my bathtub.”⁶⁵ Matt Birk (center, Baltimore Ravens) wrote an

⁶² Gary Myers, *Backup cornerback Chris Culliver makes anti-gay comments, issues half-hearted apology through San Francisco 49ers*, NYDAILYNEWS.COM (Jan. 30, 2013 10:20 PM), <http://www.nydailynews.com/sports/football/culliver-anti-gay-remarks-issues-apology-49ers-article-1.1251764>.

⁶³ ANDERSON, *supra* note 15, at 138.

⁶⁴ *Id.*

⁶⁵ Cavan Sieczkowski, *Brandon Spikes Homophobic Tweet Causes Stir, But Patriots Player Says 'It's A Joke'*, HUFFINGTONPOST.COM (Oct. 11, 2012 1:30 PM), http://www.huffingtonpost.com/2012/10/11/brandon-spikes-homophobic-tweet-gay-joke-controversy_n_1957989.html.

opinion in the *Minneapolis Star-Tribune* opposing gay marriage.⁶⁶ Mark Knudson (former MLB pitcher) penned an opinion in *Mile High Sports* blog in which he argues that gay athletes should keep their “agenda” away from the locker room and should stay in the closet.⁶⁷

Managers and coaches have also weighed in with homophobic statements (illustrating the closed loop system of sports). In 2000, Ozzie Guillen (former manager, Chicago White Sox), angered by a critical column written by *Chicago Sun-Times* columnist Jay Mariotti, referred to the columnist as a “fucking fag.”⁶⁸ NFL running-back coach Johnny Roland told ESPN on *Outside the Lines*, “You try to sell your team on being a rough, tough, and hard-nosed football team... and I would assume if that person was of that persuasion, I am not sure of the quality of his toughness.”⁶⁹

Other players have not waited for the post-game interview and have commented on the subject, whether voluntarily or involuntarily, during the contest. Yunel Escobar (shortstop, Toronto Blue Jays) thought it was a joke to write, "TU ERES MARICON" (or, “You're a faggot”) on his eye-black stickers,⁷⁰ which are sometimes worn under the eyes to reduce the sun's glare. On the same day the NBA shot a public service announcement for the *It Gets Better Think B4 You Speak Campaign*, documenting players speaking out against the term “gay” as a

⁶⁶ Matt Birk, *NFL's Matt Birk: Let's protect marriage -- and speech*, STARTRIBUNE.COM (Oct. 2, 2012 11:10 AM) <http://www.startribune.com/opinion/commentaries/171850721.html>.

⁶⁷ Mark Knudson, *Knudson: It's about what's best for the team*, MILEHIGHSPORTS.COM (Feb 8, 2013), <http://milehighsports.com/2013/02/28/knudson-its-about-whats-best-for-the-team>.

⁶⁸ *Guillen fined, ordered to take sensitivity training for slur*, ESPN.COM, <http://sports.espn.go.com/mlb/news/story?id=2496753> (last visited Apr. 25, 2013).

⁶⁹ Bob Ley, *Outside the Lines: The World of the Gay Athlete*, ESPN.COM (Dec. 16, 1988), http://espn.go.com/page2/tvlistings/otl1998_gay_athletes.html.

⁷⁰ Julio Pabon, *Was it Lost In Translation? Blue Jays, Yunel Escobar Will Learn the Hard Way*, HUFFINGTONPOST.COM (Sept. 20, 2012 5:43 PM), http://www.huffingtonpost.com/julio-pabon/blue-jays-yunel-escobar_b_1895530.html.

general put-down, TV cameras caught NBA All-Star Kobe Bryant mouthing "fucking faggot" at a referee.⁷¹ The Chicago Bulls' Joakim Noah hurled the same epithet at a fan a few weeks later.⁷²

In September 2011, Wayne Simmonds of the Philadelphia Flyers (NHL) allegedly used a gay slur against Sean Avery of the New York Rangers during a preseason game.⁷³ Cameras picked up Simmonds mouthing the word; the NHL felt there wasn't ample evidence to punish Simmonds for it.⁷⁴ The response to that inaction was overwhelming, as fans and media were outraged about double-standards — had this been a racial epithet, there would have been a suspension, went the thinking.

Some comments have been more principled, including those that take a religious stance. Torii Hunter (outfielder, Los Angeles Angels), among baseball's most thoughtful and intelligent players, said an "out" teammate could divide a team. "For me, as a Christian ... I will be uncomfortable because in all my teachings and all my learning, biblically, it's not right," he says. "It will be difficult and uncomfortable."⁷⁵

It is important to remember that these comments are examples of extremely publicized views of a certain few individuals and are no way representative of all players. Homophobic comments are certainly more likely to be reported and scrutinized by the media than homo-

⁷¹ Julie Gerstein, *Kobe Bryant Fined for Homophobic Slur*, NYMAG.COM (Apr. 13, 2011 8:07 PM), http://nymag.com/daily/intelligencer/2011/04/kobe_bryant_fined_for_homophob.html.

⁷² Joanna Zelman, *Joakim Noah Apparently Says 'F--k You Faggot' To Fan*, HUFFINGTONPOST.COM (May 22, 2011 11:59 PM), http://www.huffingtonpost.com/2011/05/22/joakim-noah-gay-slur_n_865348.html.

⁷³ Katie Strang, *Sean Avery called homophobic slur*, ESPN.COM (Sept. 28, 2011 11:58 AM), http://espn.go.com/new-york/nhl/story/_/id/7024659/new-york-rangers-sean-avery-says-wayne-simmonds-philadelphia-flyers-called-homophobic-slur.

⁷⁴ Katie Strang, *NHL doesn't penalize Wayne Simmonds*, ESPN.COM (Sept. 28, 2011 12:47 PM), http://espn.go.com/new-york/nhl/story/_/id/7028524/no-penalty-wayne-simmonds-philadelphia-flyers-nhl-lacks-evidence.

⁷⁵ Kevin Baxter, *In pro sports, gay athletes still feel unwelcome*, LATIMES.COM (Dec. 29, 2012), <http://articles.latimes.com/2012/dec/29/sports/la-sp-sports-homophobia-20121230>.

positive comments. While the above comments prove homophobia exists within men's profession team sports, they may not accurately reflect the degree of the homophobia.

Michael Messner's survey of NFL rookies found that attitudes in the NFL are *not* monolithically homophobic.⁷⁶ The survey reported that 76.4 percent of first-year NFL players would have no problem playing next to a gay teammate. That number decreased the more intimate shared space became (58 percent indicated that they would be comfortable sharing a locker next to a gay teammate, and 42.7 percent indicated that they would be comfortable sharing a hotel room with a known gay player). These statistics suggest that homophobia in the NFL is on the same declining trajectory as in the culture at large.

Perhaps a more accurate assessment of the attitudes regarding homophobia in professional sports – at least by 1998 standards – was conducted by sports agent Ralph Cindrich. The survey, quantitative and unpublished until Anderson's *In the Game*,⁷⁷ was done anonymously over the telephone and all 175 of Cindrich's athletes were interviewed: 63 percent of his respondents said that it does not matter to them what the sexual preference of their teammates are, and 76 percent said they would be comfortable playing next to a gay teammate. In addition, 58 percent said they would even be comfortable having a locker next to a gay teammate, and 50 percent would be uncomfortable calling gay men "faggots" or other derogatory terms. However, 16 percent said that if a gay man propositioned him, he would react with a physical assault.

More recently, there has been an uprising of strong public support for gay athleticism voiced by heterosexual team sport athletes either on their own, or through organizations such as

⁷⁶ ANDERSON, *supra* note 15, at 14.

⁷⁷*Id.* at 140.

You Can Play,⁷⁸ *It Gets Better Project*,⁷⁹ and *GLAAD*.⁸⁰ A number of these individual and organizational efforts support the gay community in team professional sports deserve great recognition for engaging in, and raising the level of attention and thoughtfulness this topic is receiving today.

Leading the dialogue from “within the loop” of sport has been Brian Burke, and son Patrick.⁸¹ Brendan Burke (son of Brian and brother to Patrick) came out publicly in November 2009, two years after he told his father he was gay. The admission sparked a widespread conversation about LGBT issues in sports and turned Brian Burke — the gruff, no-nonsense promoter of "truculent" hockey — into the leading voice for acceptance in the NHL. In February 2010, Brendan Burke died suddenly and tragically in a car accident in Indiana.

You Can Play carries on the mission of Brendan Burke, who was student manager for the Miami University hockey team, the Redhawks. Patrick Burke says his brother’s sexuality was a non-issue for both his teammates and their sports-oriented family. Since that time, Patrick Burke has gained a reputation as the go-to-voice to respond to an anti-gay incident in sports. When the

⁷⁸ YOU CAN PLAY, <http://youcanplayproject.org> (last visited Apr. 29, 2013) (*You Can Play* is dedicated to ensuring equality, respect and safety for all athletes, without regard to sexual orientation. *You Can Play* works to guarantee that athletes are given a fair opportunity to compete, judged by other athletes and fans alike, only by what they contribute to the sport or their team’s success. *You Can Play* seeks to challenge the culture of locker rooms and spectator areas by focusing only on an athlete’s skills, work ethic and competitive spirit.).

⁷⁹ IT GETS BETTER PROJECT, <http://www.itgetsbetter.org> (last visited Apr. 29, 2013) (The *It Gets Better Project's* mission is to communicate to lesbian, gay, bisexual and transgender youth around the world that it gets better, and to create and inspire the changes needed to make it better for them.).

⁸⁰ GLAAD, <http://www.glaad.org> (last visited Apr. 29, 2013) (*GLAAD* amplifies the voice of the LGBT community by empowering real people to share their stories, holding the media accountable for the words and images they present, and helping grassroots organizations communicate effectively. By ensuring that the stories of LGBT people are heard through the media, *GLAAD* promotes understanding, increases acceptance, and advances equality.).

⁸¹ Brian Burke is one of hockey's most prominent executives. A former college player at Providence, he has served as an NHL general manager for the Hartford Whalers, Vancouver Canucks, Anaheim Ducks and, until recently, the Toronto Maple Leafs. In between, he also spent four years as the NHL’s head of hockey operations and was GM for the 2010 U.S. Olympic men's hockey team, which won the silver medal in Vancouver. Together with son Patrick, a 29-year-old player scout for the Philadelphia Flyers, the Burke’s are carrying the torch to end bigotry in sports.

Toronto Blue Jays suspended Yunel Escobar for writing an anti-gay slur in his eye black (described above), Burke was brought in to speak with him.

While the attitudes of athletes seemed to be undergoing a shift, a 2005 NBC/USA Network poll on "Homosexuality in Sports" conducted by Penn, Schoen & Berland, found that sports fans may not be as accepting, contrary to conventional wisdom.⁸² Among the most telling statistics: 24% agreed with the statement, "Having an openly gay player hurts the entire team"; 24% agreed with the statement, "I would be less of fan of a particular athlete if I knew that he or she was openly gay"; 23% agreed with the statement, "Having an openly gay athlete hurts the entire sport"; and 14% agreed with the statement, "Openly gay athletes should be excluded from playing team sports." The poll was released in *Sports Illustrated* and shows there are very strongly held beliefs among Americans regarding the impact of gay athletes on professional sports. "I now understand why gay athletes would choose to stay in the closet," said Doug Schoen of Penn, Schoen & Berland. "The poll shows us that we still have a long way to go in this country before homosexuality is accepted in sports."⁸³

V. The Relationship Between Masculinity, Homophobia and Homosexuality

In his influential book *The Arena of Masculinity*, Brian Pronger states, "Not all homosexual men and boys avoid athletics because of its masculine significance."⁸⁴ Pronger theorizes that gay men might actually be drawn to sport because of the veneer of heterosexuality it provides gay males. Competitive team sports, he argues, are a great place to hide one's sexual orientation. Athletes within this space are shrouded in a cloud of scripted heterosexuality. He even maintains that some gay athletes might be inclined to continue with sport in an attempt to

⁸² L. Jon Wertheim, *Gays In Sports: A Poll*, SPORTSILLUSTRATED.COM (Apr. 18, 2005), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1110762/index.htm>.

⁸³ *Id.*

⁸⁴ PRONGER, *supra* note 16, at 4.

resist the feeling of femininity that comes with the stigma of homosexuality. Anderson, analyzing Pronger's work in his own book, *In the Game*, concludes that homosexual men might become involved in competitive athletics due to the allure of its environment, one which is gender-segregated and homosocietal.

Men's sporting teams beam with young, toned, sexualized, and highly masculinized bodies. These bodies serve as a homoerotic enticement for gay boys and men, and Pronger suggests that they bring out latent homosexual desires from heterosexual men as well. He suggests that, as an artifact of this extreme homogenization, homophobia may appear as a way to nullify the homoeroticism of the sporting arena. Extreme homophobia prevents men from acting upon their stigmatized desires.⁸⁵

The relationship between sport, masculinity and homosexuality is perhaps most analogous to the issue of gays in the military. Particularly since the 1990s, Americans have become increasingly aware that gay men do exist in the highly masculinized arena of war-making, comprised of institutions traditionally known to be highly homophobic. The Office of the Secretary of Defense shows that since 1990, discharges for homosexuality have ranged anywhere from four to seven per ten thousand service members. They also report that two to eight percent of military men acknowledge engaging in same-sex sexual behavior. Furthermore, research on homosexual men indicates that they are at least as likely as heterosexual men to have served in the military.⁸⁶ In this respect, evidence clearly suggests that the existence of gay men in the U.S. military at least mirrors their representation in the population at large.

Brian Pronger maintains that coming out in sport is acknowledging an identity that challenges the nature of heterosexual masculinity and therefore challenges the masculinizing institution of sport as a whole, as it would in the military.⁸⁷ Theoretically, if a gay athlete can

⁸⁵ ANDERSON, *supra* note 15, at 14.

⁸⁶ See LOIS SHAWVER, *AND THE FLAG WAS STILL THERE: STRAIGHT PEOPLE, GAY PEOPLE, AND SEXUALITY IN THE U.S. MILITARY* (1995).

⁸⁷ PRONGER, *supra* note 16, at 82.

excel at the highest level of sport, then he threatens to expose the fallacy upon which heterosexual masculinity is built. As stated above, professional athletes (particularly in team sports) are shrouded in a cloud of heterosexual assumption. This is true, ironically, while simultaneously engaging in a highly charged, homoerotic environment.

John Amaechi, a former NBA player, publicly announced his homosexuality after retirement in his book *Man in the Middle*.⁸⁸ Amaechi discussed his reluctance to disclose his sexuality in the homophobic culture of sports, writing:

Homosexuality is an obsession among ballplayers, trailing only wealth and women. The guys I played with just didn't like "fags"--or so they insisted over and over again.... Most were convinced, even as they sat next to me on the plane or threw me the ball in the post, that they had never met one.⁸⁹

Amaechi went on to say:

The NBA locker room was the most flamboyant place I'd ever been. Guys flaunted their perfect bodies. They bragged about sexual exploits. They primped in front of the mirror, applying cologne and hair gel by the bucketful.... Surveying the room, I couldn't help chuckling to myself: And I'm the gay one.⁹⁰

The hyper-homophobia exists then, not only as a guise against homosexual suspicion, but also serves to nullify the homoeroticism of sport. Pronger suggests that both gay and straight men find the locker room sexually stimulating and that this homoerotic atmosphere is sublimated through the aggressive, homophobic, and sexist humor and discourse found in sport.⁹¹

Michael Irvin (NFL Hall of Famer), whose unparalleled on-field performance was accompanied by off-the-field drug use and womanizing, discovered, quite early on, that the older brother he idolized growing up was homosexual. Throughout his career, he overcompensated his masculine nature in order to illustrate that he was not his brother, and not homosexual.

⁸⁸ JOHN AMAECHI WITH CHRIS BULL, *MAN IN THE MIDDLE* (2007).

⁸⁹ *Id.* at 268.

⁹⁰ *Id.* at 140.

⁹¹ PRONGER, *supra* note 16, at 209.

Through it all, we (Irvin and his psychologist) realized maybe some of the issues I've had with so many women—just bringing women around so everybody can see—maybe that's residual of the fear I had that, if my brother is wearing ladies' clothes, am I going to be doing that? Is it genetic? I'm certainly not making excuses for my bad decisions. But I had to dive inside of me to find out why I was making these decisions, and that came up. I'm not gay, but I was afraid to even let anyone have the thought. I can only imagine the agony—being a prisoner in your own mind -- for someone who wants to come out. If I'm not gay and I am afraid to mention it, I can only imagine what an athlete must be going through if he is gay.⁹²

The progress being made today, expressed in the homo-positive views of some individual athletes and organizations, is of assimilation. Increasingly, supporters of homosexual athletes state that the sexual orientation of a teammate does not matter as long as he can help the team win. Supportive heterosexual men are increasingly willing to accept gay men into their terrain so long as gay athletes do not play up their “gayness” or differentness. Qualitative data in Anderson's book *In the Game* suggests that heterosexual athletes are increasingly willing to accept gay athletes so long as they adopt the other aspects of orthodox masculinity. Anderson found:

In an attempt to assimilate to the dominant structure, gay men are eager to adopt all other attributes of orthodox masculinity. They attempt to manage their identities, to keep pace with the construct of being masculine, by acting tough, competing well, and (often) partaking in sexist discourse alongside their heterosexual teammates – even partaking in discussions of the sexual objectification of women. Gay men go to great lengths to downplay their differentness by covering their sexual desires, assuring their teammates that they are not checking them out in the locker rooms, and self-silencing talk of their sexuality under a policy of don't ask, don't tell.⁹³

The conclusion here is that gay closeted male athletes may perpetuate the overly masculinized, homophobic environment of the locker room by overcompensating in an attempt to prove their manliness.

⁹² Cyd Zeigler, *Michael Irvin: The Playmaker Preaches*, OUT.COM (July 11, 2011), <http://www.out.com/entertainment/sports/2011/07/10/michael-irvin-playmaker-preaches>.

⁹³ ANDERSON, *supra* note 15, at 50.

The vast majority of tolerant heterosexual athletes have alluded to a certain degree of openness they would accept. There is a difference between tolerance and acceptance. Even if the gay athlete “can play,” and his skill and work ethic is recognized by heterosexual teammates, coaches and general managers, it remains to be seen just how much openness the institution of sport could tolerate immediately. Seemingly, the softest entrance of a gay athlete into this space would be made by an elite player, who comes out as gay late in his career and is otherwise unrevealing of sexual exploits or romantic life. If he is able to help the team win games and, perhaps, championships, a heterosexual teammate may be at the highest level of acceptance. However, it is an entirely different circumstance if an average, young and unproven homosexual athlete brings their male partner to a team function, or affectionately kisses him after a win. A legitimate question remains as to the degree of openness even the tolerant professional athletes could handle. Though public service announcements continue to be produced depicting heterosexual athletes’ acceptance of gay athletes, homophobia within men’s professional team sport will not be accurately recalibrated until an active athlete comes out.

Perspective: The Role of the Media

The national media loves a negative story. America loves a villain, in most cases more than they love a hero. In the last year, *Outsports.com* has written about three-dozen current and former NFL players who have come out in support of same-sex marriage or would support a gay teammate. These stories, however, garner very little attention by the national media. Patrick Burke, NHL scout and co-founder of *You Can Play*, believes “the media likes to perpetuate this belief that... sports is this barbaric place full of dumb meathead jocks who are just waiting to

jump on the first gay athlete they find.”⁹⁴ Over the years, the media has found itself (or perhaps purposely positioned itself) in the middle of this issue, many times attempting to “out” premiere athletes in the style of a witch-hunt.

In 2002, *Details* magazine spoke with then New York Mets manager Bobby Valentine, who was quoted as saying that professional baseball was “probably ready for an openly gay player” and that “the players are diverse enough now that I think they could handle it.”⁹⁵ Immediately after these comments, *New York Post* gossip columnist Neal Travis speculated that Valentine’s comments were a “pre-emptory strike” designed to clear the way for the outing of a Mets’ player.⁹⁶ At the time, there had been persistent rumors about the sexual orientation of Mike Piazza (one of the greatest, if not the greatest, hitting catcher of all time). Piazza took the unusual step of holding a press conference at the time to declare his heterosexuality: “I’m not gay. I’m heterosexual. I can’t control what people think. That’s obvious. And I can’t convince people what to think. I can only say what I know and what the truth is and that’s I’m heterosexual and I date women. That’s it. End of story.”⁹⁷

The precedent of a press conference to announce sexual orientation is interesting to note, as the media will likely expect any future athlete coming out to fully open himself up to media availability on the subject. Piazza recently released a memoir and in it found it necessary to reiterate what he said publicly in 2002 — he is not gay. “I found it hugely insulting that people believed I’d go so far out of my way — living with Playmates, vacationing with actresses,

⁹⁴ Baxter, *supra* note 74.

⁹⁵ Interview by *Details* Magazine with Bobby Valentine, Manager, New York Mets (June 2003), <http://www.outsports.com/2011/9/9/4051804/moment-25-mike-piazza-announces-im-not-gay-im-heterosexual>.

⁹⁶ Sridhar Pappu, *Wally’s World: Ex-Post Sports Guy Explains Fiery Exit*, OBSERVER.COM (June 3, 2002 12:00 AM), <http://observer.com/2002/06/wallys-world-expost-sports-guy-explains-fiery-exit>.

⁹⁷ Rafael Hermoso, *Piazza Responds to Gossip Column*, NYTIMES.COM (May 22, 2002), <http://www.nytimes.com/2002/05/22/sports/baseball-piazza-responds-to-gossip-column.html>.

showing up at nightclubs — to act out a lifestyle that would amount to a charade,” he writes. “If I was gay, I’d be gay all the way.”⁹⁸

The Piazza saga was perhaps the most renowned media-inspired “outing” attempt, but it certainly was not the only one. The media, which remains eager to break the news of the first gay professional athlete in men’s team sports, has been on the case for decades. Troy Aikman (Hall of Fame NFL quarterback, divorced, with children) was infamously “outed” by sportswriter Skip Bayless in his 1996 book, *Hell-Bent*. Aikman, in an interview 16 years later, still held a grudge, slipping in, “I’m not so sure Skip’s not gay.”⁹⁹

The latest attempted outing occurred in March of 2013, when rumors swirled (over the internet) about a Montreal Canadiens (NHL) player about to come out. Said Cyd Zeigler of *Outsports.com*:

One of the problems with social media is the complete lack of gatekeeper. Take the latest ‘Gay athlete is coming out this week’ rumor started by a small-time Tweeter and propagated by Queerty. The Tweeter, whom I won't promote here with a link, claimed the Montreal Canadien locker room is abuzz because one of their players is planning on coming out this week. The Tweeter said "it is unconfirmed, but speculation is that it may be @jgorges26" -- That's the Twitter handle for Josh Gorges.¹⁰⁰

Gorges, not necessarily a well-known name – even within circles of hockey fans – is not gay. In fact, he's engaged to marry his girlfriend. Zeigler added:

The biggest problem with these baseless rumors is the position it puts straight athletes in. As we saw with Mike Piazza a dozen years ago, it puts the athlete in an impossible position: If he denies it, he's attacked for being anti-gay; If he

⁹⁸ MIKE PIAZZA, LONG SHOT 268 (2013).

⁹⁹ Michael David Smith, *Troy Aikman wonders what he'd do if he saw Skip Bayless*, NBCSPORTS.COM (Aug. 31, 2011 7:30 PM), <http://profootballtalk.nbcsports.com/2011/08/31/troy-aikman-wonders-what-hed-do-if-he-saw-skip-bayless>.

¹⁰⁰ Cyd Zeigler, *Rumors of Montreal Canadien Josh Gorges Coming Out Not True*, OUTSPORTS.COM (Mar. 6, 2013 2:09 PM), <http://www.outsports.com/2013/3/6/4072008/rumors-of-montreal-canadien-josh-gorges-coming-out-not-true>.

doesn't deny it, then there's a lie out there about him (and I don't know about you, but I don't want anyone thinking I'm straight!)¹⁰¹

Billy Bean, retired gay professional baseball player, believes that while society has become more accepting of openly gay and lesbian people, the media landscape of the moment is in some ways a more forbidding one. “If you’re a baseball player right now and you’re in the big leagues, you see the way Twitter, Facebook or whatever social media works and the pace of news and how quickly one distraction can alter the course of an athlete’s career,” he observed.¹⁰² “Unless your primary goal as an athlete is to be an ambassador for gay rights,” he said, “you’re bound to pause before creating such a distraction.”¹⁰³ Thinking back to his own career, he added: “I was Billy Bean, a baseball player, and the moment when I realized or finally understood or accepted that I was gay, that didn’t make me a gay person ahead of a baseball player.”¹⁰⁴

Journalists and bloggers are not the only segments of media to wade into the topic of homosexuals in sports. Concerned about harming its business relationship with the NFL, ESPN called an audible in 2003 and announced it was canceling "Playmakers,"¹⁰⁵ its seamy pro football drama. The NFL's complaints were voiced by Steve Bornstein, NFL executive vice president of media and a former ESPN president, and Roger Goodell, then NFL executive vice president and chief operating officer (and current Commissioner). Former NFL Commissioner Paul Tagliabue also had publicly criticized the show, which focused on a fictional pro football team and included plots about drug use, marital infidelity, racism and homophobia. The series

¹⁰¹ *Id.*

¹⁰² Frank Bruni, *The Barriers to Openness*, NYTIMES.COM (Sept. 22, 2012 7:48 AM), <http://bruni.blogs.nytimes.com/2012/09/22/the-barriers-to-openness>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ An audible is a term used in football to describe the situation where a new or substitute play (typically called by the quarterback at the line of scrimmage) adjusts the original play to adapt to the opposing side's formation.

included a key storyline in which a closeted player living a double-life was forced to fake an injury and leave the team when rumors of his sexuality began to leak publicly.¹⁰⁶

Though the wildly popular show (which drew an average audience of about 2 million viewers, five times as many for the time slot the previous year) was canceled for more reasons than just the portrayal of a NFL-like player as homosexual, it would be hard to refute that such things as drug use, marital infidelity, racism, and homophobia do not exist within the sport. Given the ESPN-NFL contract (where, at the time, ESPN paid an average of \$600 million a year to the NFL for television rights), ESPN shut down the show, which had the potential to be a groundbreaking series to change perception of homosexuals in men's professional team sports.

The League was undoubtedly pushing back against a number of stereotypes. However, it is not absurd to believe that professional sports leagues (more specifically, the teams) are quite content with the status quo, don't ask, don't tell policies. The media, on the other hand, is, and has been, hungry to break the story of the first gay male professional team sport athlete. All of this adds to the anxiety and fears of the closeted homosexual athlete.

VI. Getting Open: Fears of Coming Out

“Fear is the hallmark of closeted gay athletes.”¹⁰⁷

Though gay men may be drawn to sport in order to prove their masculinity or to cast off homosexual suspicion, this does not mean that they desire to come out. They may simply want to play; coming out might defeat the purpose of why they play sport in the first place – for the love of the game. Coming out, of course, is also a difficult thing to do in a homophobic environment and will ultimately lead to, as Billy Bean alluded to, a new type of identity entirely.

¹⁰⁶ Richard Sandomir, *Citing N.F.L., ESPN Cancels 'Playmakers'*, N.Y. TIMES, Feb. 5, 2004, <http://www.nytimes.com/2004/02/05/sports/pro-football-citing-nfl-espn-cancels-playmakers.html>.

¹⁰⁷ ANDERSON, *supra* note 15, at 81.

Anderson declares that, when considering that the average career in professional sports is about three years, it seems remarkable that no active, openly gay professional athlete from a team sport in the United States or Canada has yet to emerge.¹⁰⁸ This conclusion, however, is not in line with the reasonable fears that closeted gay professional athletes face. The fears outlined below instead suggest good reason for why a professional athlete – who acknowledges the uniqueness of the environment and the narrow window in which he will be paid for athletic performance – would remain closeted throughout the duration of his career.

A. Fear of ‘lost ice time’

The coach is a decisive element in shaping social attitudes on the team. It is important to remember that many professional athletes become professional while still teenagers, entering the industry without higher education, making them extremely impressionable young men. Athletes are dependent upon their club and, more directly, their coach and general management, for contract renewals, playing positions and a host of variables that shape their career.

Furthermore, the coach represents the man with the most masculine capital on athletic teams. The coach is inundated with legitimate, authoritative, expert, and often referent power, making him a highly influential factor in the lives of young athletes who desire to be promoted within the masculine hierarchy. Finally, to some degree a coach is also able to structurally shape a team closer to his social desires. He is able to drop and promote athletes at will, to assign ideologically similar kids to be team captain, and to provide those with whom he is more aligned with other avenues to empower them in peer culture.”¹⁰⁹

The fear of “lost ice time” – or lost time on the field of play – for a closeted gay athlete considering coming out, is legitimate. In most organizations, the coach has sole authority to determine who plays when. Every athlete, regardless of sexual orientation, works hard to never give the coach an excuse to show him to the bench. As unfair as it may be, a closeted athlete

¹⁰⁸ *Id.* at 136.

¹⁰⁹ *Id.* at 122.

would have to fully assess the perspective and beliefs of the coach (as well as that coach's potential length of tenure at the organization, which is always indefinite and often tenuous) before deciding to come out.

The attitudes of the club owner and player's agent are also vital to the decision. They amount to two additional stars that need to be aligned in order for the player to reach a level of acceptable comfort before coming out. As leading sports agent Leigh Steinberg, on whom the movie *Jerry Maguire* is based, said, "There is a broad continuum in the respect of ownership and management of individuals who own teams. They run the gamut from politically progressive individuals with fairly high degrees of sensitivity with social issues to political troglodytes that are extremely reactionary."¹¹⁰ On the topic of agents, Steinberg believes "most agents would probably calculate the downside to their own practice of representing and being associated with a gay athlete. And the publicity that might come to their practice, and the potential negative within their own client base, and the public antipathy that might be engendered through the proceeding brouhaha."¹¹¹

In baseball, organizations speak of "strength up the middle."¹¹² In this context, it seems analogous; without the support of the coach, general manager and owner, coming out seems to be an insurmountable hurdle to expect a closeted gay athlete to clear. Even if the attitudes of the people in these positions are progressive and accepting, players must contemplate their length of tenure on the team and assess the likelihood that the environment changes, either by trade, free agency or the departure and replacement of the coach, general manager or owner within that particular organization.

¹¹⁰ *Id.* at 153.

¹¹¹ *Id.*

¹¹² Baseball executives use this phrase to capture the importance of completing a roster with a solid catcher, shortstop, second baseman, centerfielder and, of course, pitcher.

B. Fear of physical violence

Gay athletes may also fear coming out because contact sports are intrinsically violent; Pronger stresses that these sports are about the violent acquisition of territory, taking, and hurting of other men's space and bodies.¹¹³ Anderson doubts a heightened physical violence against homosexual athletes would result, but understands the perceived fear:

Representation of hyper-masculine athletes in the media, on television, screen and print, often portrays athletes as being inclined to solve issues through violence, covertly (and often overtly) suggesting that gay men should fear homophobic athletes who are trained in violence and who use homophobic language to indicate their potential violence. It is this language that athletes use to judge their sport as being highly homophobic. It is the unbridled use of homophobic discourse that leads them to fear violence should their sexuality be revealed. In this respect homophobic discourse is *symbolic violence*. While it does not leave bruises on the skin, it imprints fear on the mind, particularly if you are harboring a gay identity.¹¹⁴

Many sports, particularly contact sports such as hockey, are self-policing in nature. This means, simply, that each team has one or more "enforcers" who are expected to retaliate, on the ice, in response to an action from the opposition.¹¹⁵ The fear of retribution for coming out in sport may also be heightened because athletes are often the unofficial rule enforcers of hegemonic masculinity, and not just in hockey. Therefore, fear of increased violence toward one particular player on the field of play is real – because it is accepted and happens almost every night. A homosexual athlete may fear that an openly gay identity could be reason enough to place a target upon his back.

Homosexual athletes have communicated a fear of heightened and targeted physical violence on the field of play. Anderson, in speaking with "Chris" (a college hockey player) about his fears of coming out, was told "hockey is a very only-tough-guys-play-it kind of sport and

¹¹³ PRONGER, *supra* note 16, at 22.

¹¹⁴ ANDERSON, *supra* note 15, at 82.

¹¹⁵ Here, perhaps the enforcer took notice of a border-line illegal hit made on his team's top player.

who knows how violent some of these guys might get.”¹¹⁶ In the professional world, retired football player Esera Tuaolo was quoted saying: “The one thing I could never do was talk about it. Never. No one in the NFL wanted to hear it, and if anyone did hear it, that would be the end for me. I’d wind up cut or injured. I was sure that if a GM didn’t get rid of me for the sake of team chemistry, another player would intentionally hurt me, to keep up the image.”¹¹⁷ However, Anderson’s research suggests “athletes’ fears of physical reprisal, of being beaten up for coming out publicly to their teammates, may actually be unfounded.” Still, he finds, “the fear of potential violence remains.”¹¹⁸

C. Fear of reduced athletic earning potential

As noted above, the average professional career spans about three to five years.¹¹⁹ Given all that the athlete has sacrificed, perhaps most importantly a college education, the athlete is attempting to earn a living. Any one off-the-field misstep could literally send the athlete packing, or prevent him from securing the most lucrative deal his on-the-field performance is worth. As Anderson describes below, the majority of professional athletes avoid situations which could negatively impact their leverage in negotiating contracts.

In professional sports, careers are made and destroyed by a finite number of chances. Gay athletes who have come out after retiring and those who are still closeted both express that coming out would have a significant effect toward bringing unwanted pressure to their athletic experience. They suggest that the stress of coming out, combined with the already exacting pressures to perform at

¹¹⁶ ANDERSON, *supra* note 15, at 83.

¹¹⁷ Interview by ESPN Magazine with Esera Tuaolo, former NFL Player (Oct. 30, 2002), <http://espn.go.com/magazine/vol5no23tuaolo.html>.

¹¹⁸ ANDERSON, *supra* note 15, at 84.

¹¹⁹ According to RAM Financial Group, given the narrow window the majority of professional players are active, players must plan for almost 50 years of retirement. The challenge is making the earnings of a relatively short career last a lifetime. Recent studies have shown the average career length for the NFL is 3.5 years; NBA is 4.8 years; MLB is 5.6 years; NHL is 5.5 years.

the world-class level, would make coming out highly distracting to a team that is ‘playing’ for million dollar contracts.¹²⁰

Theoretically, a shortened professional playing career could result from coming out in two ways: due to employer discrimination (i.e. being forced out) or due to the player’s weakened mental state (i.e. losing the concentration and desire needed to perform at the professional level).

i. Employer Discrimination

From an employment perspective, all professional athlete contracts include a clause disallowing the player to act in a way that causes damage to the reputation of the organization.¹²¹

A homosexual athlete, given the broad language of most league policies, could potentially violate this clause if his sexuality is deemed threatening to other players, league or team employees. Uncertain (and perhaps unlikely), homosexuality could be found to be conduct – though most scholars would argue homosexuality is not “conduct” – that undermines or puts at risk the integrity and reputation of the league, club or players.¹²²

In an interview conducted by Mike Freeman with Steve Thompson, Freeman uncovered signs of clandestine discrimination against gays in the NFL. He quoted a football coach who

¹²⁰ ANDERSON, *supra* note 15, at 146.

¹²¹ For example, all persons associated with the NFL are required to avoid “conduct detrimental to the integrity of and public confidence in the National Football League.” While criminal activity is clearly outside the scope of permissible conduct, and persons who engage in criminal activity will be subject to discipline, the standard of conduct for persons employed in the NFL is considerably higher. It is not enough simply to avoid being found guilty of a crime. Instead, as an employee of the NFL or a member club, you are held to a higher standard and expected to conduct yourself in a way that is responsible, promotes the values upon which the League is based, and is lawful. Persons who fail to live up to this standard of conduct are guilty of conduct detrimental and subject to discipline, even where the conduct itself does not result in conviction of a crime. Discipline may be imposed in a number of broad circumstances, including: “Threatening behavior among employees, whether in or outside the workplace”; “Conduct that imposes inherent danger to the safety and well being of another person”; and “Conduct that undermines or puts at risk the integrity and reputation of the NFL, NFL clubs, or NFL players.”

¹²² Individual contracts between a team/club and a player are not the same as the collective bargaining agreement signed between each league and the corresponding players union; CBA agreements now included protections against discrimination based on sexual orientation and are described in more detail below.

claims to have nearly signed a talented player, but recoiled when the franchise's security personnel revealed that the player was gay. The coach, his general manager, and team owner decided not to offer the player a contract:

Basically, this player was not being covert about it. It was pretty well known, I was told by our security people, that he was very visible at these gay bars, and we were worried that it would get out, end up on ESPN, and ruin the guy, and then just like that there goes all that money you invested.¹²³

One NFL coach told Freeman, "Call me prejudiced or whatever, but I have to look out for the morale of the team, and a known gay man could destroy it."¹²⁴ In an interview with another NFL coach, Freeman was informed that, "if he (the player) kept the fact that he was gay quiet and didn't flaunt it, and he was good, I'd sign him. But he'd have to stay in the closet, and he'd have to be real good to counter the risk of signing him."¹²⁵ *OutSports.com*'s Jim Buzinski told Anderson that teams have been known to hire secret investigators to look out for and report on gay players. "It's not that a club would come right out and say, 'We are firing you for being gay,' but one might imagine that a gay player could face covert action."¹²⁶

In the early part of 2013, the issue of homosexuality in professional sports exploded as a subject of debate, this time amidst speculation that former Notre Dame star linebacker Manti Te'o – who had been duped by another man, pretending to be Te'o's long-distance girlfriend – was gay.¹²⁷ Though Te'o denied being gay, the hoax still appeared to be an issue for the NFL. At the NFL Combine in Indianapolis, which was held in February, Mike Florio of NBC News

¹²³ MIKE FREEMAN, *BLOODY SUNDAYS* 144 (2003).

¹²⁴ *Id.* at 145.

¹²⁵ *Id.* at 144.

¹²⁶ ANDERSON, *supra* note 15, at 153.

¹²⁷ Greg Hernandez, *Man who duped Manti Te'o was 'deeply in love' with Notre Dame football star*, GAYSTARNEWS.COM (Jan. 31, 2013), (describing the relationship between college football star Manti Te'o and Ronaiah Tuiasopo, the man behind the elaborate online hoax who later admitted that he is gay and was in love with Te'o. Te'o thought Tuiasopo was a woman.).

reported that the "elephant in the room" for NFL general managers is that they "want to know whether Manti Te'o is gay."¹²⁸

Still today, as in 2003 when Freeman conducted his interviews, the instant media blitz on the Manti Te'o saga illustrated that the issue remains quite polarized. Bill Simmons, respected sports journalist of online magazine *Grantland*, wrote:

I hate speculating on someone's sexuality, but you can't deny the following point: Only by admitting he's gay (if that were true) could everything that just happened to Manti Te'o seem, for lack of a better word, a little more normal ... We wouldn't dwell on the details of the hoax itself as much as on someone being so desperate to remain in the closet that he did whatever it took to stay there. And going forward, we'd always remember him as the guy who broke down that final barrier — the first active, famous sports star who admitted he was gay, then tried to enjoy a prosperous career in our most popular team sport.¹²⁹

Bryan Fischer, a spokesman for the American Family Association thinks gays should not be in the NFL because the sexual tension would cause a “grenade-like explosion” in the locker room. On Fischer’s radio show “Focal Point,” Fischer addressed the news that NFL teams are questioning Manti Te'o's sexual orientation leading up the NFL Draft. Fischer stated:

The NFL is not going to put up with that non-sense (referring to homosexuality). They know that if you get sexual tension in a locker room, it affects unit cohesion – that is an important part of success. You are a team; you need to function as a team. Guys have to be pulling together. You have to avoid divisive things coming in to the locker room, and they (the NFL) know the grenade-like explosion that will go off in an NFL locker room. They can't afford to have that, so they are naturally concerned about that. They are concerned about the same thing the military is concerned about: morale...unit cohesion... readiness – are these guys ready to take the field – and they've got to be concerned about retention. If an NFL team says, 'we are going to be completely okay with open gays in the locker room, we want to hire them, we want to recruit them, we'd love to find every gay football player in the United States of America and offer them

¹²⁸ Interview by Dan Patrick with Mike Florio, Founder and Contributor, DANPATRICK.COM (Feb. 25, 2013), <http://www.danpatrick.com/2013/02/25/mike-florio-says-teams-want-to-know-if-teo-is-gay-49ers-cardinals-may-be-trying-to-fool-teams>.

¹²⁹ Bill Simmons, *The All-Te'o Mailbag*, GRANTLAND.COM (Jan. 18, 2013), http://www.grantland.com/story/_/id/8856794/the-all-teo-mailbag.

the best contract we can,' they (the NFL) know that other players are going to stay away from that team in droves; they won't be able to complete a roster.¹³⁰

As noted above, however, Te'o has denied being gay. And he did so emphatically: "No, far from it. Far from it," Te'o told Katie Couric. The rest of the interview saw Couric calling Te'o naïve and gullible, with Te'o in agreement.¹³¹ Sportswriter Michael David Smith points out, "The bad news is that Te'o seems to think that if you're an aspiring professional football player, you're better off being labeled naive and stupid than gay. The awful news is that he might be right."¹³² Here, Smith is referring to sport's overall acceptance, or forgiveness, of 'naïve' and 'stupid' acts of professional athletes, whereas the acceptance of homosexuality is much less certain.

ii. Player's Mental State

Billy Bean told *Sports Illustrated* in 2001:

It would be very difficult for a player to come out today. This guy has to play in stadiums with 40,000 people. What's he going to hear if he strikes out? Overnight this guy's career will have nothing to do with his athletic ability. It's not a safe time to do it.¹³³

In the October 2002 issue of *Out*, he added:

To put your sexuality at the forefront of your life when you're a professional athlete, that's really hard. The sport has to be at the forefront. To sacrifice that, that's a huge thing. When you are at the top of your game you do realize how hard it was to get there, and you do know how short-lived that can be. And

¹³⁰ See Joe Levine, *American Family Association's Bryan Fischer: Openly Gay Players In The NFL Would Cause "Grenade-Like Explosion"*, SPORTSGRID.COM (Mar. 2, 2013 3:14 PM), <http://www.sportsgrid.com/nfl/bryan-fischer-gay-nfl-players>.

¹³¹ Interview by Katie Couric with Manti Te'o, former Notre Dame football player (Jan. 24, 2013), <http://www.katiecouric.com/on-the-show/2013/01/24/manti-teo-and-his-parents-to-appear-on-katie-in-first-on-camera-interview>.

¹³² Michael David Smith, *Katie Couric asks Manti Te'o if he's gay, his answer speaks volumes*, NBCSPORTS.COM (Jan. 24, 2013 4:36 PM), <http://profootballtalk.nbcsports.com/2013/01/24/katie-couric-asks-manti-teo-if-hes-gay-his-answer-speaks-volumes>.

¹³³ Gene Menez, *The Toughest Out*, SPORTS ILLUSTRATED, May 28, 2001, <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1022592/index.htm>.

overnight you are changing the focus of your game. It doesn't take a long time to slide off that scale.¹³⁴

Bean makes the point that coming out while active presents a near impossible challenge – a player, whose mental focus needs to solely be on the game in order to excel, will be forced to continually give time and energy to deal with all the public attention that will inevitably follow the first gay professional athlete in each respective sport.¹³⁵ He later countered his own argument, saying that being closeted brought “emotional turmoil” which “was obviously contributing to my inability to concentrate on the field. My self-confidence, the foundation of any player, was shot.”¹³⁶ Thus, harmful effects can be anticipated for gay athletes, regardless of their choice to stay closeted or come out. Today, we are only truly familiar with the plight of the closeted athlete who, as Bean explain, fights constant distractions, depression, anxiety and fear of being outed against one's will.

D. Fear of lost or ability to obtain endorsements

In the 1998 issue of ESPN's *Outside the Lines*, sports agent Leigh Steinberg stated, “A gay team sport athlete would have a harder time finding sponsors than a convicted felon.”¹³⁷ He continued:

I think it would have a devastating effect in terms of the marketability of any athlete to come out and talk about gayness. The whole concept of endorsements is an attempt by a company to appeal to the broadest possible audience. The thought that a company would want to step in the middle of that controversy, especially with the very heavy fundamentalist Christians who are making this a public issue, is just not there.¹³⁸

¹³⁴ Bill Konigsberg, *Billy Bean*, *OUT*, Oct. 2002, at 79-81.

¹³⁵ It is of interest to note that Billy Bean, who lived in such fear and adhered so closely to the expectations of his teammates, went to such extreme lengths as to miss the funeral of his lover in order to play in a game.

¹³⁶ BILLY BEAN, *GOING THE OTHER WAY* 110 (2003).

¹³⁷ Ley, *supra* note 68.

¹³⁸ *Id.*

However, the shift in public opinion on gay rights is one of the biggest and most rapid of any issue over the last decade. As an example, nationwide, in the 18 to 32 age bracket, support for same-sex marriage now stands at 70 percent in the Pew poll.¹³⁹ Ten years ago, among members of the same generation, it was 51 percent.¹⁴⁰ Support for same-sex marriage has also increased among those over 65; in 2003, just 17 percent were in favor, and today the poll found that figure is 31 percent.¹⁴¹ In 2000, Vermont became the first state in the country to recognize civil unions between gay or lesbian couples.¹⁴² In 2003, the U.S. Supreme Court ruled in *Lawrence v. Texas* that sodomy laws in the U.S. are unconstitutional. Later that year, the Massachusetts Supreme Judicial Court ruled that barring gays and lesbians from marrying violates the state constitution; same-sex marriages became legal in the state in 2004.¹⁴³ As of January 2013, nine states—Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington – as well as the District of Columbia and three Native American tribes – have legalized same-sex marriage,¹⁴⁴ representing 15.7 percent of the U.S. population.

Over the last decade in the sports industry, many heterosexual athletes have joined retired homosexual professionals, like Billy Bean and John Amaechi, to support homosexual athletes.¹⁴⁵ However, the fear that Steinberg presents – losing or not gaining product endorsements –

¹³⁹ *Growing Support for Gay Marriage: Changed Minds and Changing Demographics*, Pew Research Center (Mar. 20, 2013), <http://www.people-press.org/files/legacy-pdf/3-20-13%20Gay%20Marriage%20Release.pdf>.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Carey Goldberg, *Gay Couples Are Welcoming Vermont Measure on Civil Union*, N.Y. TIMES, Mar. 18, 2000, <http://www.nytimes.com/2000/03/18/us/gay-couples-are-welcoming-vermont-measure-on-civil-union.html>.

¹⁴³ Rose Arce, *Massachusetts court upholds same-sex marriage*, CNN.COM (Feb. 6, 2004 5:57 PM), <http://www.cnn.com/2004/LAW/02/04/gay.marriage>.

¹⁴⁴ *Rhode Island on track to be 10th state to allow gay marriage*, ASSOCIATED PRESS (Apr. 24, 2013 6:22 PM), <http://www.usatoday.com/story/news/nation/2013/04/24/rhode-island-gay-marriage/2110905/>

¹⁴⁵ See youcanplayproject.org; see also outsports.com (documenting prominent heterosexual athletes supporting gay athletes or gay causes more generally).

remains a legitimate concern. He is also correct in pointing out that other stigmas continue to be less of a challenge:

Ray Lewis was involved with a potential attempted murder charge, yet he has come back from that to do a large number of national ads. Jason Kidd was involved with domestic violence, and he has come back to be a very popular national figure. Clearly there are athletes who are involved with domestic violence, murder, drunk driving and an array of scrapes with the law, and they have been able to assume the mantle of popular endorsers, and we have yet to see an out-of-the-closet gay team sport athlete. Much less someone involved with the endorsement of product.¹⁴⁶

However, what corporate sponsors were comfortable with in 1998 has, too, likely changed with the public's position. First, the corporate sponsor is interested in the culture and view of homosexuals in the world – or at least their audience or marketplace – and not necessarily that of the sports team locker room. Dallas Mavericks owner and entrepreneur Mark Cuban believes that, "from a marketing perspective, if you're a player who happens to be gay and you want to be incredibly rich, then you should come out, because it would be the best thing that ever happened to you from a marketing and an endorsement perspective."¹⁴⁷ Given the dramatic shift in public opinion and overall acceptance, as well as proven case studies of homosexual entertainers receiving handsome endorsements, the corporate sponsor is likely to invest in an athlete regardless of their sexual orientation, or – as Cuban suggests – because of their sexual orientation.

Second, the corporate sponsor is most interested in the view of the fan, not the player. In a 2001 poll conducted by ESPN, the sports media conglomerate asked: "If a player on your favorite professional sports team announced he or she was gay or lesbian, how would this affect your attitude towards that player?" 17 percent of respondents said they would turn against the

¹⁴⁶ ANDERSON, *supra* note 15, at 149.

¹⁴⁷ Dwain Price, *Mark Cuban says gay player would be wealthy hero*, FORT WORTH STAR-TELEGRAM, Feb. 12, 2007, http://miamiherald.typepad.com/gaysouthflorida/2007/02/mark_cuban_says.html.

player; 63 percent of respondents said it would make no difference; and 20 percent of respondents said they would become a bigger fan.¹⁴⁸ Coming out would, theoretically, help the athlete gain three percent of fan support. The broader conclusion would be to say that today, the loss or inability to gain endorsements should no longer be a major cause of fear or anxiety in closeted professional team sport athletes contemplating whether to come out. In fact, for closeted athletes not visible enough to currently gain endorsements, or for those nearing the end of their career, coming out may actually work in their favor, as Cuban suggests endorsement dollars await them.

E. Fear of media scrutiny

Famed sports agent Leigh Steinberg is frequently quoted as saying that it would take a gay athlete who was better than all the others to withstand the blast and resultant media fury, and possible hostility that would come to a gay professional team sport athlete after coming out of the closet.¹⁴⁹

Anderson suggests being ‘good’ mitigates all types of stigmatized behaviors or attributes in sport and should help quell fears for top athletes. He insists there is great value in being an elite athlete within the team itself when coming out in sport. “That change is most easily made when the athlete who comes out is otherwise highly valuable to the team.... If an athlete is vital to the success of his team, his heterosexual teammates might be willing to overlook a gay athlete’s stigmatized sexuality.”¹⁵⁰

It is difficult to rebut such a claim. In the world of professional sports, premiere athletes who become drug addicts, or domestic abusers, or even commit serious felonies are presented second and third and sometimes fourth chances to play the game (and get paid for it). Their

¹⁴⁸ Peter Dreier, *Is Baseball Ready for a Gay Jackie Robinson?*, INTHESETIMES.COM (Aug. 15, 2003), <http://inthesetimes.com/article/611>.

¹⁴⁹ ANDERSON, *supra* note 15, at 100.

¹⁵⁰ *Id.* at 99.

transgressions are overshadowed by the organization's belief that their abilities on the field of play outweigh their negative history, potential future distractions or current disruption of team chemistry.

This theory that premiere athletic ability allows for acceptance is best seen in the breaking of the color barrier in baseball, when Jackie Robinson was signed to the Brooklyn Dodgers in 1945.

It would be hard to say that he [Jackie Robinson], or any other trailblazing black athlete, was permitted to play because society demanded racial equality on the playing field or because club owners came to their senses on racial issues. A more appropriate analysis is that black athletes were levied into sport against the overwhelming desire of a racist population because franchise owners perceived a profit to be made from their inclusion if their teams could perform better because of them. Arthur Ashe maintains that Jackie Robinson, Joe Louis, and Jesse Owens were such athletes. He says that each was substantially better than his white counterparts, thus the stigma of being black (which was largely viewed as a detriment to team cohesion and spectator support) was nullified by the fact that their sheer athleticism would help the club win meets.¹⁵¹

However, there are two major points of difference that need to be noted with analogizing breaking the color barrier with the sexual orientation barrier in sports. First, the decision to break the color-barrier was made (primarily) not by the player but by the owner, who did so (again, primarily) due to its positive financial implications. Though not definitive, the first openly homosexual athlete in professional sports could certainly be an existing closeted homosexual athlete. If the athlete is openly gay prior to becoming a professional, he would then need to be selected by a general manager and owner and could be brought into a more controlled environment, similar to the Jackie Robinson experience. Second, public opinion in 1945 was comparatively more opposed to blacks in sport than today's public is against homosexuals. Even with these points of difference, Anderson suggests:

¹⁵¹ *Id.* at 100.

In contemporary professional team sports the symbolic challenge an openly gay athlete represents to the hyper-masculine arena of sport (the supposed ‘distraction’ a gay athlete might have on his ostensibly heterosexual team) might only be tolerated by owners, players and coaches if those detriments were negated by the potential superstardom and the resultant financial gain that athlete might make for the club... While we have no examples of this in American professional team sports (because nobody has come out), we find when examining just who has come out in the world of professional individual sports that the trailblazers were most often athletes who were unbeatable. In fact, of the few openly gay athletes who have come out in professional American sport while actively competing, all have been national or world champions.¹⁵²

According to Anderson, only athletes who are an extremely valuable commodity to their organization can overcome stigma and fears, because “the better the athlete is, the more social currency he may have to purchase social acceptance, and (perhaps) change homophobic attitudes on his team.”¹⁵³ Given such practical fears, the smoothest transition for an active closeted player to go public depends primarily on his current status; one could expect an established premiere player, far enough along in his career where financial gain and reputation are less of a hindrance, to be most comfortable in coming out. This, however, does not discount Cuban’s theory that endorsement dollars await the athlete, regardless of star-power, time in the league or accomplishments; if true, it should be no surprise to see an athlete of any level of athletic ability or notoriety to step forward to take advantage of the financial rewards.

VII. Preparing for the “I’m Gay” Disclosure

Leagues and clubs are beginning to address discrimination by way of an institutional and coordinated effort.¹⁵⁴ In the right scenario, an active player would come out with the express backing of the league and his team. In the case of Jackie Robinson. Brooklyn Dodgers general

¹⁵² *Id.*

¹⁵³ *Id.* at 101.

¹⁵⁴ Jeff Z. Klein & Judy Battista, *Major Sports Leagues Prepare for the ‘I’m Gay’ Disclosure*, N.Y. TIMES, Apr. 11, 2013, available at <http://www.nytimes.com/2013/04/12/sports/hockey/nhl-announces-initiative-in-support-of-gay-athletes.html?pagewanted=all>.

manager Branch Rickey signed Robinson, and with the help of their minor league affiliate the Montreal Royals and team president Hector Racine, began the journey of integrating the first black player in Major League Baseball. Though Robinson is the name remembered, this was a concerted effort among many, and had institutional support.

In April 2013, the NHL announced a formal partnership with the *You Can Play Project* – an advocacy group pledged to fighting homophobia in sports – to plan training and counseling on gay issues for its teams and players.¹⁵⁵ *You Can Play* will help run seminars for NHL rookies to educate them on gay issues and make resources and personnel available to each team, as desired. The League and the players union will also work with *You Can Play* to integrate the project into their behavioral health program, enabling players to seek counseling on matters of sexual orientation confidentially. Patrick Burke, founder of *You Can Play*, said the joint venture would also step forward when players make homophobic remarks.¹⁵⁶

Laying the groundwork for an openly gay player was not an official part of the program. “But we’re ready to do whatever that player wants,” said Burke. “If he wants to do a thousand interviews and march in pride parades, we’re equipped to handle that. And if he wants us to pass block for him so he never has to do another interview in his life, we’re equipped to handle that, too.”¹⁵⁷

Leagues and teams are just opening their eyes to the issue, and beginning to allocate resources to prepare. Beyond one-off public service announcements, initial ideas raised by advocacy groups to the leagues are myriad. Much of the conversation has centered on the league’s rookie symposium, a convention for incoming players, and the training of ambassadors

¹⁵⁵ NHL, *NHLPA announce partnership with You Can Play*, NHL.COM (Apr. 11, 2013 12:00 PM), <http://www.nhl.com/ice/news.htm?id=665247>.

¹⁵⁶ *Id.*

¹⁵⁷ Klein & Battista, *supra* note 153.

(former players who can deliver the message). The dialogue includes other issues such as ordering stadiums and arenas to stop jokingly focusing their “kiss cams” on two men, for instance.¹⁵⁸

After education and awareness, leagues and clubs have two primary ways to affect the issue of homosexuals in men’s professional team sports: through anti-discrimination policy and through discipline. In order for a homosexual professional athlete to come out publicly and continue to have success in his athletic career, it will take a truly concerted effort within sport.

VIII. The Potential for Discrimination

Current federal law generally does not prohibit workplace discrimination based on sexual orientation or gender identity. Title VII protections from discrimination based on sex do not extend to sexual orientation.¹⁵⁹ Nonetheless, gay male athletes could potentially succeed on claims related to sexual orientation or gender identity either by utilizing their state or local laws, if applicable, or by shaping their claims to fit within the very particular requirements of cognizable same-sex sexual harassment or gender stereotyping claims under federal law.

A. Federal Law

Despite the express lack of protection for sexual orientation, Title VII does provide protections from harassment or discrimination based on sex or gender stereotyping—a type of sex discrimination based on a person's failure to comply with gender stereotypes.¹⁶⁰ For example, under Title VII, a gay male athlete may base a discrimination claim on evidence of same-sex

¹⁵⁸ *Id.*

¹⁵⁹ 42 U.S.C.A. § 2000e-2 (The Civil Rights Act of 1964 introduced new federal statutory rights against discrimination based upon several categories of prohibited discrimination. The statute made it unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.).

¹⁶⁰ *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

discrimination resulting from his failure to meet stereotyped expectations of masculinity. An employee's claims for hostile work environment and disparate treatment were found sufficient under Title VII where they included allegations that the employer discriminated against him because he did not fit the employer's stereotype of how a male should act. In one instance, an employee alleged that co-workers and supervisors frequently made fun of his appearance, mannerism, gestures, patterns of speech, and his seriousness, and that he was harassed because he did not fit the employer's "macho image."¹⁶¹

Sex stereotype discrimination is where an employer takes an "employment action" against someone based on that person's non-conformance with a gender stereotype.¹⁶² An employer's employment action can be any number of things to an employee, including: failing to hire, failing to promote, firing, demotion, transfer to a an undesirable job, being placed on probation, put on leave or lowering of pay. Basically, any undesirable action that an employer takes based on the failure of an employee to meet a gender stereotype can qualify as a negative employment action.¹⁶³

It has proven difficult for many gay plaintiffs to establish a claim under Title VII for discrimination based on gender stereotyping because “[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.”¹⁶⁴ Recognizing that a gender-stereotyping claim should not be used to “bootstrap protection for sexual orientation into Title VII,” circuit courts have struggled to distinguish between discrimination based on sexual orientation and that based on gender

¹⁶¹ Schlegelmilch v. City of Sarasota Police Dep't., 2006 WL 2246147 (M.D. Fla. Aug. 3, 2006).

¹⁶² Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (“A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”).

¹⁶³ *Id.* at 808.

¹⁶⁴ Howell v. N. Cent. Coll., 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004).

stereotyping.¹⁶⁵ In determining whether discrimination is based on a plaintiff's nonconforming gender behavior, courts look to *Price Waterhouse*, where the Supreme Court focused principally on characteristics that were readily demonstrable in the workplace, such as work attire, hairstyle, and one's manner of walking and talking.¹⁶⁶ Thus, courts that have applied *Price Waterhouse* have reasoned that, for a gender-stereotyping claim to succeed, plaintiffs should be able to identify the observable, nonconforming gender behavior upon which the discrimination could be based.

Title VII does also carve out an exception for sex-specific hiring practices justified because of a so-called "bona fide occupational qualification," or "BFOQ."¹⁶⁷ If an employer can demonstrate that being either male or female is an essential part of the job, the BFOQ provision protects the employer from liability under Title VII. The BFOQ provision reads:

Notwithstanding any other provision of this subchapter . . . it shall not be an unlawful practice for an employer to hire and employ employees ... on the basis of his religion, sex or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise

Courts have accepted the BFOQ justification in a residual cluster of sex discrimination cases involving prison guards, medical attendants and bathroom custodians.¹⁶⁸ In essence, the BFOQ exception was meant to accommodate those rare jobs that absolutely required employees to possess some unique sex-specific trait.

¹⁶⁵ *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000).

¹⁶⁶ *Price Waterhouse*, 490 U.S. at 235.

¹⁶⁷ Although Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.) prohibits sex discrimination in employment, the bona fide occupational qualification (BFOQ) exception provided in § 703(e)(1) of Title VII (42 U.S.C.A. § 2000e-2(e)(1)) justifies such discrimination in the instances where sex is a BFOQ reasonably necessary to the normal operation of the particular business for which the exception is claimed.

¹⁶⁸ *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Fesel v. Masonic Home of Del., Inc.* 428 F. Supp. 573 (D. Del. 1977); *Mieth v. Dothard*, 418 F. Supp. 1169, 1184-85 (M.D. Ala. 1976); *Reynolds v. Wise*, 375 F. Supp. 145, 151 (N.D. Tex. 1973).

Avi Sinenski draws an interesting comparison to the world of sports, suggesting that organizations owning men's professional team sports might be sheltered by the BFOQ in the event they decide to dismiss openly gay athletes:

While seemingly unrelated, these positions (prison guards, medical attendants and bathroom custodians) share a common element because they involve the potential or actual observation of the naked body. It is this rationale inherent in the BFOQ that might give a professional sports league a leg to stand on if they decided to bar openly gay players from the locker room. Just as it might be inappropriate for a female to serve in certain roles where men would risk the potential undesired exposure of their naked bodies to a female, the argument could be made that the same should be true where men would risk the potential undesired exposure of their naked bodies to a homosexual male. While it might be a bit of a stretch to suggest that the exposure of the male body to a female is equivalent to the exposure of the male body to a homosexual male, the same discomfort and sexual tension might exist in both cases. Thus, if a player were to come out of the closet, the team or league that he plays for might be able to find an ally within the confines of Title VII to ban him from the locker room, and consequently, from the sport as a whole.¹⁶⁹

In terms of harassment, until 1998, it was unclear whether and under what circumstances Title VII applied in cases of sexual harassment where the harasser and victim were of the same sex. After years of divisiveness and bitterly split circuits, the Supreme Court finally decided in *Oncale v. Sundowner Offshore Services, Inc.* that same-sex sexual harassment “because of sex” is actionable under Title VII.¹⁷⁰ Since *Oncale*, plaintiffs' claims of same-sex sexual harassment have had mixed success. While several courts have recognized claims for same-sex sexual harassment under Title VII, many courts have dismissed such claims based on a lack of sufficient evidence that the alleged harassment was based on sex, rather than on sexual orientation. These courts have invoked the Supreme Court's analysis in *Oncale* that same-sex sexual harassment can

¹⁶⁹ Avi Sinenski, *Not That There Is Anything Wrong With That: The Practical And Legal Implications Of A Homosexual Professional Athlete*, 10:4 U. PA. JOURNAL OF BUSINESS AND EMPLOYMENT LAW 1009, 1026 (2008), <https://www.law.upenn.edu/journals/jbl/articles/volume10/issue4/Sinensky10U.Pa.J.Bus.&Emp.L.1009%282008%29.pdf>.

¹⁷⁰ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

be inferred only where there is evidence of sexual desire, general hostility toward one sex, or noncompliance with gender stereotypes.¹⁷¹ Plaintiffs have been required to provide evidence that fits squarely into one of those specific situations in order to have a viable claim. Despite recognition that there may be other ways to establish that discrimination was “because of sex,” in practice, courts have rarely gone beyond the narrow *Oncale* opinion.¹⁷²

For example, in *Bibby v. Philadelphia Coca Cola Bottling Co.*, a gay male employee alleged hostile work environment sexual harassment based on the actions of a coworker. The employee claimed the coworker assaulted him in a locker room; used a forklift to slam a load of pallets on the platform where he was standing; and yelled at the plaintiff: “everybody knows you're gay as a three dollar bill,” “everybody knows you're a faggot,” and “everybody knows you take it up the ass.”¹⁷³ While acknowledging that same-sex sexual harassment claims are cognizable under Title VII, the United States Court of Appeals for the Third Circuit nonetheless held that this plaintiff had not alleged a viable claim because the evidence showed that the harassment occurred because of his sexual orientation and not because of his sex.¹⁷⁴

The Employment Non-Discrimination Act was introduced in the U.S. House of Representatives on June 24, 2009.¹⁷⁵ If enacted, the current version of ENDA, which closely tracks Title VII, would prohibit employment discrimination on the basis of sexual orientation and gender identity nationwide. Under ENDA, an employer that employs fifteen or more employees may not “fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment

¹⁷¹ Edward J. Reeves & Lainie D. Decker, *Before ENDA: Sexual Orientation and Gender Identity Protections in the Workplace Under Federal Law*, 20 LAW & SEXUALITY 61, 67 (2011).

¹⁷² *Id.*

¹⁷³ *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 260 (3d Cir. 2001).

¹⁷⁴ *Id.* at 264.

¹⁷⁵ H.R. 3017, 111th Cong. (2009).

of the individual, because of such individual's actual or perceived sexual orientation or gender identity,” including such actions “taken against an individual based on the actual or perceived sexual orientation or gender identity of a person with whom the individual associates or has associated.”¹⁷⁶ Therefore, even if an athlete is not gay, an employer that makes an adverse employment decision based on erroneous perceptions about the player’s sexual orientation would be in violation of ENDA.

In sum, there is little legal recourse at federal law for gay male athletes who believe they have been discriminated against in the workplace as a result of their sexual orientation. Narrow protections from harassment or discrimination based on sex or gender stereotyping do exist, as well as even less proven avenues in the BFOQ provision. Brushing the surface of potential harassment claims above, it is clear that same-sex sexual harassment claims are perhaps as difficult to remedy. In regard to federal law, gay male athletes will be best protected if and when ENDA is enacted.

B. State Laws

Aside from federal law, many state and local laws prohibit employment discrimination based on sexual orientation. Twenty-one states, and the District of Columbia prohibit sexual orientation discrimination by statute.¹⁷⁷

Given the varying levels of protection throughout the United States, just over half (64) of professional teams in the four major North American sports leagues are organized in states with sexual orientation anti-discrimination protections. In the NFL, 14 of the league’s 32 member

¹⁷⁶ *Id.*

¹⁷⁷ *Non-Discrimination Laws: State by State Information – Map*, ACLU.ORG, <http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map> (The states with sexual orientation antidiscrimination statutes are: California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.).

clubs play in states with such protections.¹⁷⁸ In the NBA, 14 of the league's 30 member clubs play in states with such sexual orientation anti-discrimination statutes (one of which is located in Canada).¹⁷⁹ In the NHL, 19 of the league's 30 member clubs are covered (seven of which are located in Canada).¹⁸⁰ In Major League Baseball, 17 of the league's 30 member clubs are covered (one of which is located in Canada).¹⁸¹ Thus, in total, 58 NFL, NBA, NHL and MLB are not located in states and provinces with sexual orientation anti-discrimination protections. At least 181 cities and counties prohibit sexual orientation discrimination by statute; thus more professional sport franchises may fall under such jurisdiction.

As stated above, a substantial and legitimate fear exists in the minds of closeted athletes, that their career would alter significantly (in length, in game success, in financial return) if the organization's management were to discover their sexual orientation. The fact that a player is gay might give the key decision-makers reason to factor sexual orientation into the complex algorithm that determines who to sign to long-term lucrative deals, who to waive or cut, who to trade and who to trade for. Though employment discrimination is difficult to prove by any measure, some solace must exist for closeted athletes playing for teams based in states or

¹⁷⁸ NFL member clubs organized in states with sexual orientation antidiscrimination statutes are: Seattle Seahawks, San Francisco 49ers, Oakland Raiders, San Diego Chargers, Denver Broncos, Minnesota Vikings, Green Bay Packers, Chicago Bears, Washington Redskins, Baltimore Ravens, Buffalo Bills, New York Jets, New York Giants and New England Patriots.

¹⁷⁹ NBA member clubs organized in states with sexual orientation antidiscrimination statutes are: Portland Trailblazers, Sacramento Kings, Golden State Warriors, Los Angeles Lakers, Los Angeles Clippers, Denver Nuggets, Minnesota Timberwolves, Milwaukee Bucks, Chicago Bulls, Washington Wizards, New York Knicks, Brooklyn Nets, Boston Celtics and, in Canada, Toronto Raptors.

¹⁸⁰ NHL member clubs organized in states with sexual orientation antidiscrimination statutes are: San Jose Sharks, Los Angeles Kings, Anaheim Ducks, Colorado Avalanche, Minnesota Wild, Chicago Bulls, Buffalo Sabres, Washington Capitals, New York Rangers, New York Islanders, New Jersey Devils, Boston Bruins. In Canada, Vancouver Canucks, Edmonton Oilers, Calgary Flames, Winnipeg Jets, Toronto Maple Leafs, Ottawa Senators and Montreal Canadiens.

¹⁸¹ MLB member clubs organized in states with sexual orientation antidiscrimination statutes are: Seattle Mariners, San Francisco Giants, Oakland Raiders, Los Angeles Dodgers, Anaheim Angels, San Diego Padres, Colorado Rockies, Minnesota Twins, Milwaukee Brewers, Chicago Cubs, Chicago White Sox, Washington Nationals, Baltimore Orioles, New York Yankees, New York Mets, Boston Red Sox and, in Canada, Toronto Blue Jays.

provinces with statutory protections against employment discrimination based on sexual orientation.

C. Private Protections

In 2003, former professional baseball player Billy Bean, one of the very few professional athletes who has come out during retirement, believed that Major League Baseball and the union representing its players, have been defunct in creating an atmosphere of tolerance and has therefore silently promoted homophobia.

The Major League Baseball Players Association, of which I'm a member, should make the case for sexual orientation non-discrimination, as other unions routinely do. As the association has made clear, baseball is a workplace, not a playground. In states and municipalities with gay-rights laws on the books, baseball clubs may actually be violating antidiscrimination statutes by allowing a hostile workplace.¹⁸²

The NBA, NFL, MLB and NHL have taken steps in recent years, adopting policies to protect LGBT employees against unfair employment practices, because there are no legal protections at the federal level. This was accomplished through amending the collective bargaining agreements with each respective players union to prohibit discrimination based on sexual orientation.

The NHL was first to include such language in their CBA, back in 2005. Article 7.2 reads:

Neither the NHLPA, the NHL, nor any Club shall discriminate in the interpretation or application of this Agreement against or in favor of any Player because of religion, race, disability, color, national origin, sex, sexual orientation, age, marital status, or membership or non-membership in or support of or non-support of any labor organization.¹⁸³

And the relevant clause from Article 49 of the NFL CBA is:

¹⁸² BEAN WITH CHRIS BULL, *GOING THE OTHER WAY: LESSONS FROM A LIFE IN AND OUT OF MAJOR-LEAGUE BASEBALL* 238-239 (2003).

¹⁸³ NHL Collective Bargaining Agreement, Art. 7.2, (Jul. 22, 2005), <http://www.nhl.com/cba/2005-CBA.pdf>.

There will be no discrimination in any form against any player by the NFL, the Management Council, any Club or by the NFLPA because of race, religion, national origin, sexual orientation, or activity or lack of activity on behalf of the NFLPA.¹⁸⁴

In 2011, Major League Baseball is followed in the footsteps of the NHL and NFL by banning anti-gay discrimination as part of a new collective bargaining agreement. A news release, issued jointly by the MLB and the Players' Association read as follows: "Non-discrimination based on sexual orientation were added to Article XV."¹⁸⁵ The language mirrors NFL's collective bargaining agreement. In December, the National Basketball Association (NBA) announced they would be adopting a non-discrimination policy that covers sexual orientation as part of their collective bargaining agreement as well.¹⁸⁶

IX. Conclusion

While we can safely assume that men's professional team sports remain a bastion in the reproduction of hyper-masculinity and homophobia, we can also suggest that homophobia is not seamless and the orthodox form of masculinity is beginning to be contested. Though many scholars and journalists continue to accuse professional sports of institutionalizing homophobia, we can also begin to see cracks, through homo-positive public statements of heterosexual athletes and newly formed organizational alliances between athletes and the LGBT community.

Within sports, more conducive discourse is beginning to develop. Still, coming out in the world of professional sports will be no easy task. Gay athletes have grown up in a near-total

¹⁸⁴ NFL Collective Bargaining Agreement, Art. 49 (Aug. 4, 2011), <http://www.widerights.com/download/2011-NFL-CBA.pdf>.

¹⁸⁵ Andy Martino, *MLB's new collective bargaining agreement to add 'sexual orientation' to discrimination clause*, N.Y. DAILY NEWS, Nov. 22, 2011.

¹⁸⁶ *NBA Adds Sexual Orientation Protections to Collective Bargaining Agreement*, HRC.ORG (Dec. 9, 2011), <http://www.hrc.org/blog/entry/nba-adds-sexual-orientation-protections-to-collective-bargaining-agreement>.

institution predicated upon homophobia, and challenging the system might first mean confronting some of the fears they have built up throughout their socialization and existence in a highly homophobic arena. Not to mention, the unpredictable financial implications of coming out would make any gay athlete concerned about their livelihood think twice before disclosing their homosexuality.

With growing expectations in recent months that a gay male athlete in one of the four major professional sports leagues in North America will soon come out publicly for the first time, the NFL, NBA, NHL and MLB have begun exploring ways to accommodate and respond to such a landmark announcement. For all the education and awareness the leagues intend to bombard rookies and fans with, and the public league-wide commitments to acceptance regardless of sexual orientation, it is clear that the leagues must still protect themselves against themselves. Why? The lack of federal protections and the varying state-to-state statutes leave nearly half of these franchises without restriction to discriminate based on sexual orientation. The league's word, it has been proven, is inadequate.

As a glaring example of how sport is functioning under current laws and private protections, we need not look any further than this year's (2013) NFL Combine. Earlier in 2013, University of Colorado tight end Nick Kasa told ESPN Radio that teams have more or less asked him about his sexual orientation outright. Kasa claimed that "[Teams] ask you like, do you have a girlfriend? Are you married? Do you like girls?" Here, it is obvious that coaching staffs and management teams remain concerned about how a homosexual athlete would affect team chemistry and, in the end, if the financial investment in the player is worth it. The assumption here is that the questions are asked because the coach or general manager sees being gay as a potential liability or distraction.

The NFL confirmed in February 2013 that it has no direct policy on the line of questioning teams and their officials can undertake, stipulating only that they adhere to relevant employment laws. "Teams are expected to comply with the law in terms of any employment interview," NFL spokesman Greg Aiello told Yahoo! Sports in an email.¹⁸⁷ This, of course, creates an imbalance based on state law. Equally confusing and concerning is the level of protections that govern when considering where such interviews take place. "Most likely the company or the team would just have to abide by the laws of the state in which they are based," said Professor Dylan Malagrino, a sports law expert from Western State University College of Law. "Although it highlights the confusion that these gaps in the law can cause – a company from Georgia could ask questions of an interviewee in California that a Californian company could not."¹⁸⁸ Incidentally, the NFL Combine took place in the state of Indiana, which only prohibits discrimination based on sexual orientation in public employment; private sector companies, such as the NFL remain unrestricted.

Leagues must focus on what they can control; that is, to develop specific policies during critical moments – such as the Combine, Draft, during free agency periods or in waiver transactions, to name a few – to restrict discrimination based on sexual orientation and simultaneously increase oversight and enforcement, to put an end to the split-treatment. Sport continues to be playing from behind. If a league is unprepared for the first openly gay male professional athlete, public backlash could cause that respective sport to lose social significance and be viewed as a vestige of an archaic model of masculinity.

¹⁸⁷ Martin Rogers, *Can NFL teams ask Manti Te'o if he's gay? Depends on which teams are doing the asking*, YAHOO.COM (Feb. 26, 2013 9:41 PM), <http://sports.yahoo.com/news/nfl--can-nfl-teams-ask-manti-te-o-if-he-s-gay--depends-on-which-teams-are-doing-the-asking-024157625.html>.

¹⁸⁸ *Id.*