DOCUMENTS FOR CLE PRESENTATION

**Ripped From Headlines: How Work from Other Disciplines Informs Current Sports Law Controversies**

**Stephen F Ross, Penn State Law, April 21, 2018**

1. **IS COLIN KAEPERNICK THE VICTIM OF COLLUSION?**

* Article 17 of the NFL Collective Bargaining Agreement
* Marc Edelman, *Moving Past Collusion in Major League Baseball: Healing Old   
  Wounds and Preventing New Ones,* 54 Wayne L. Rev. 601 (2008)
* Abraham Khan, “Arguing with Colin Kaepernick,” McCourtney Institute for Democracy (Penn State College of the Liberal Arts) (Sept 2016)

1. **NCAA CORRUPTION INDICTMENTS**

* Complaint, *United States v. Gatto* (SDNY 2017) [separate pdf file]
* *United States v. Walters,* 997 F2d 1219 (7th Cir 1993)

**NATIONAL FOOTBALL LEAGUE – NFLPA COLLECTIVE BARGAINING AGREEMENT**

**ARTICLE 17**

**ANTI-COLLUSION**

***Section 1.* Prohibited Conduct:**

(a) No Club, its employees or agents shall enter into any agreement, express

or implied, with the NFL or any other Club, its employees or agents to restrict or limit

individual Club decision-making as follows:

(i) whether to negotiate or not to negotiate with any player;

(ii) whether to submit or not to submit an Offer Sheet to any Restricted Free

Agent;

(iii) whether to offer or not to offer a Player Contract to any player;

(iv) whether to exercise or not to exercise a Right of First Refusal; or

(v) concerning the terms or conditions of employment offered to any player

for inclusion, or included, in a Player Contract.

(b) Any approval or disapproval of a player's contract by the Commissioner,

or any communication thereof, timely notice of which is provided to the NFLP A cannot

be the basis of any claim of collusion. The NFLP A or the affected Player shall have the

right to appeal the Commissioner's disapproval of such player contract to the System

Arbitrator, pursuant to Article 15 and Article 14.

***Section 2.* Other Club Conduct:** No Club may have a policy not to negotiate with, or

enter into a Player Contract with, any player who is free to negotiate and sign a Player

Contract with any Club, on any of the following grounds, if such policy is inconsistent

with Section 1 above:

(a) that the player has previously been subject to the exclusive negotiating

rights obtained by another Club in a College Draft, by virtue of a Required Tender to a

player with less than three Accrued Seasons, or a Franchise Player designation; or

(b) that the player has refused or failed to enter into a Player Contract for a

prior season containing a Right of First Refusal or an option clause (i.e., any clause that

authorizes an extension or renewal by a Club of a Player Contract beyond its stated

term);

(c) that the player has become a Restricted Free Agent or an Unrestricted

Free Agent; or

(d) that the player is or has been subject to any Right of First Refusal.

***Section 3.* Club Discretion:** Section 2 above does not diminish any Club's right not to

negotiate or contract with any particular player on any policy ground not specified above.

In conjunction with other evidence of an alleged violation(s) of Section 1, a Club's adherence

to a policy identified in Section 2 above may be offered as evidence of an alleged

violation of Section 1 above, but may not be the basis of any separate proceeding seeking

any penalty or other relief against any Club or the NFL.

***Section 4.* League Disclosures:** Neither the NFL nor the Management Council shall

knowingly communicate or disclose, directly or indirectly, to any NFL Club that another

NFL Club has negotiated with or is negotiating with any Restricted Free Agent, unless

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and until an Offer Sheet for such Restricted Free Agent has been given to the Prior

Club, or with any Unrestricted Free Agent, prior to the execution of a Player Contract

with that Unrestricted Free Agent, if such communication or disclosure is inconsistent

with Section 1 above. It shall not be a violation of this Article for the NFL to respond to

an inquiry from a Club about whether and under what circumstances proposed transactions

would be permissible under this Agreement or NFL Rules consistent with this

Agreement. In conjunction with other evidence of an alleged violation of Section 1

above, a Club's communication or disclosure of the kind identified in the first sentence

of this Section may be offered as evidence of an alleged violation(s) of Section 1 above,

but may not be the basis of any separate proceeding seeking any penalty or other relief

against any Club or the NFL.

***Section 5.* Enforcement of Anti-Collusion Provisions:** Except as provided in Section

16(d) below, any player or the NFLPA, acting on that player's or any number of players'

behalf, may bring an action before the System Arbitrator alleging a violation of Section 1

of this Article. In any such proceeding, the Federal Rules of Evidence shall apply. Issues

of relief and liability shall be determined in the same proceeding (including the amount

of damages, pursuant to Section 9 below, if any). The complaining party shall bear the

burden of demonstrating by a clear preponderance of the evidence that (1) the challenged

conduct was or is in violation of Section 1 of this Article and (2) caused any

economic injury to such player(s).

***Section 6.* Burden of Proof:** The failure by a Club or Clubs to negotiate, to submit

Offer Sheets, or to sign contracts with Restricted Free Agents or Transition Players, or

to negotiate, make offers, or sign contracts for the playing services of such players or

Unrestricted Free Agents, shall not, by itself or in combination only with evidence about

the playing skills of the player(s) not receiving any such offer or contract, satisfy the

burden of proof set forth in Section 1 above. However, any of the types of evidence

described in the preceding sentence may support a finding of a violation of Section 1 of

this Article, but only in combination with other evidence which, by itself or in combination

with such evidence, indicates that the challenged conduct was in violation of Section

1 of this Article. Nothing in this Agreement shall preclude the NFL or its Clubs from

arguing that any evidence is insufficient to satisfy the burden of proof set forth in Section

5 above. Nothing in this Agreement shall preclude the NFLPA or any player from

arguing that any evidence is sufficient to satisfy the burden of proof set forth in Section

5 above, except as set forth above.

***Section 7.* Summary Judgment:** The System Arbitrator may, at any time following the

conclusion of the permitted discovery, determine whether or not the complainant's

evidence is sufficient to raise a genuine issue of material fact capable of satisfying the

standards imposed by Sections 5 and/ or 6 above. If the System Arbitrator determines

that complainant's evidence is not so sufficient, he shall dismiss the action.

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***Section 8.* Remedies:** In the event that an individual player or players or the NFLPA

acting on his, or their, behalf, successfully proves a violation of Section 1 of this Article,

the player or players injured shall have the right:

(a) To terminate his (or their) existing Player Contract(s) at his (or their)

option, or void any Club's Draft rights or other rights with respect to such player(s) at

his (or their) option; any Player Contract terminated during the course of a playing season

shall be terminated as of the end of that season. Such rights shall not arise until the

recommendation of the System Arbitrator finding a violation is no longer subject to

further appeal and must be exercised by the player within thirty (30) days therefrom. If,

at the time the Player Contract is terminated, such player would have been a Restricted

Free Agent pursuant to Article 9, such player shall immediately become a Restricted Free

Agent upon such termination. If, at the time the Player Contract is terminated, such

player would have been an Unrestricted Free Agent pursuant to Article 9, such player

shall immediately become an Unrestricted Free Agent upon such termination. If, at the

time the Player Contract is terminated, such player would have been subject to a Club's

exclusive negotiating rights, such player shall remain subject to such rights upon such

termination. In any case described in the preceding three sentences, the player shall not

be subject to any signing period. In the case of a Drafted Rookie who does not sign a

Player Contract and who is given the option of voiding a Club's Draft rights pursuant to

this Subsection (a), such player shall then be treated as either: (i) a Drafted Rookie subject

to the NFL waiver system as described in Article 6, Section 4, if the termination

takes place during the player's first League Year; or (ii) a Drafted Rookie subject to the

rules of Article 6, Section 9, if the termination takes place during the player's second

League Year; or (iii) a Free Agent, if the termination takes place during the player's third

League Year or thereafter; and

(b) To recover all of his damages, as described in Section 9 below, for any

alleged injuries suffered as a result of the violation.

***Section 9.* Computation of Damages:** Upon any finding of a violation of Section 1 of

this Article, compensatory damages (i.e., the amount by which any player has been injured

as a result of such violation) shall be awarded. In addition, the System Arbitrator

shall award non-compensatory damages (i.e., the amount exceeding compensatory damages)

as follows:

(a) Two times the amount of compensatory damages, in the event that all of

the Clubs found to have violated Section 1 of this Article, have committed such a violation

for the first time. Any Club found to have committed such a violation for the first

time shall be jointly and severally liable for two times the amount of compensatory damages.

(b) Three times the amount of compensatory damages, in the event that any

of the Clubs found to have violated Section 1 of the Article, have committed such a

violation for the second time. In the event that damages are awarded pursuant to this

Subsection: (i) any Club found to have committed such a violation for the first time shall

be jointly and severally liable for two times the amount of compensatory damages; and

(ii) any Club found to have committed such a violation for the second time shall be

jointly and severally liable for three times the amount of compensatory damages.

(c) Three times the amount of compensatory damages, plus, for each Club

found to have violated Section 1 of this Article for at least the third time, a fine of

$5,000,000 in the event that any of the Clubs found to have violated Section 1 of this

Article have committed such violation for at least the third time. In the event that damages

are awarded pursuant to this Subsection: (i) any Club found to have committed such

a violation for the first time shall be jointly and severally liable for two times the amount

of compensatory damages; (ii) any Club found to have committed such a violation for at

least the second time shall be jointly and severally liable for three times the amount of

compensatory damages; and (iii) any Club found to have committed such a violation for

at least the third time shall, in addition, pay a fine of $5,000,000.

(d) For each League Year after the 2011 League Year, each of the enumerated

fines set forth in this Subsection (c) above shall be adjusted by the same percentage

as the change in Projected AR for that League Year as compared to Projected AR for the

prior League Year (up to a maximum of ten percent (10%) per League Year).

***Section 10.* Player Election:** A proceeding prosecuting an alleged violation of Section 1

of this Article shall initially be limited to the issues of liability and damages sustained to

the date of the System Arbitrator's determination. In the event the System Arbitrator

finds a violation, the player shall make a determination within thirty (30) days of the date

the System Arbitrator's determination is final, or within thirty (30) days after the last

game of the season for such player (including any playoff games) if the finding is made

during the course of the season, whether the player intends to void the applicable Player

Contract or Draft right. If the player voids the applicable Player Contract or Draft right,

the player may commence a supplemental proceeding before the System Arbitrator, for

the purpose of determining his future damages, if any, only after the player has signed a

new Player Contract or after the first scheduled game of the next regular season, whichever

is earlier. If the player elects not to void the applicable Player Contract or Draft

right, he may immediately commence a supplemental proceeding before the System

Arbitrator for the purpose of determining his future damages, if any.

***Section 11.* Payment of Damages:** In the event damages are awarded pursuant to Section

9 above, the amount of compensatory damages shall be paid to the injured player or

players. The amount of non-compensatory damages, including any fines, shall be paid

directly to any NFL player pension fund, any other NFL player benefit fund, or any

charitable fund for the benefit of present or former NFL players, as selected by the

NFLP A, subject to the reasonable approval of the NFL.

***Section 12.* Effect on Cap Computations:** In the event that damages are awarded

pursuant to Section 9 above, the amount of non-compensatory damages, including any

fines, will not be included in any of the computations described in Article 12 or 13

above. The amount of compensatory damages awarded will be included in such computations.

***Section 13.* Effect of Salary Cap:** In awarding any amount of damages, the System

Arbitrator shall take into account that in any League Year no Club would have been

authorized to pay out any Salary in excess of that permitted under the Salary Cap.

***Section 14.* No Reimbursement:** Any damages awarded pursuant to Section 9 above

must be paid by the individual Clubs found liable and those Clubs may not be reimbursed

or indemnified by any other Club or the NFL.

***Section 15.* Costs:** In any action brought for an alleged violation of Section 1 of this

Article, the System Arbitrator shall order the payment of reasonable attorneys' fees and

costs by any party found to have brought such an action or to have asserted a defense to

such an action without any reasonable basis for asserting such a claim or defense. Otherwise,

each party shall pay his or its own attorneys' fees and costs.

***Section 16.* Termination:** The NFLPA shall have the right to terminate this Agreement,

under the following circumstances:

(a) Where there has been a finding or findings of one or more instances of a

violation of Section 1 of this Article with respect to any one NFL season which, either

individually or in total, involved five or more Clubs and caused injury to 20 or more

players; or

(b) Where there has been a finding or findings of one or more instances of a

violation of Section 1 of this Article with respect to any two consecutive NFL seasons

which, either individually or in total, involved seven or more Clubs and caused injury to

28 or more players. For purposes of this Subsection 16(b), a player found to have been

injured by a violation of Section 1 of this Article in each of two consecutive seasons shall

be counted as an additional player injured by such a violation for each such NFL season;

or

( c) Where, in a proceeding brought by the NFLP A, it is shown by clear and

convincing evidence that 14 or more Clubs have engaged in a violation or violations of

Section 1 of this Article causing injury to one or more NFL players.

( d) In order to terminate this Agreement:

~) The proceeding must be brought by the NFLP A;

(ii) The NFL and the System Arbitrator must be informed at the outset of

any such proceeding that the NFLP A is proceeding under this Section for the purpose

of establishing its entitlement to terminate this Agreement; and

~) The System Arbitrator must find that the Clubs engaged in willful collusion

with the intent of restraining competition among teams for players.

***Section 17.* Time Limits:** Any action under Section 1 of this Article must be brought

within ninety (90) days of the time when the player knows or reasonably should have

known with the exercise of due diligence that he had a claim, or within ninety (90) days

of the first scheduled regular season game in the season in which a violation of Section 1

of this Article is claimed, whichever is later. Any party alleged to have violated Section 1

of this Article shall have the right, prior \_to any proceedings on the merits, to make an

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initial motion to dismiss any complaint that does not comply with the timeliness requirements

of this section.

***Section 18.* Prior Conference:** Prior to the initiation of any proceeding under this Article

by the NFLP A, the parties shall confer in person or by telephone to attempt to

negotiate a resolution of the dispute.

# MOVING PAST COLLUSION IN MAJOR LEAGUE BASEBALL: HEALING OLD WOUNDS, AND PREVENTING NEW ONES

54 Wayne L. Rev. 601 Summer, 2008

Marc Edelman

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 [\*604]

II. Baseball's Reserve System, Free Agency, and Anti-Collusion Clause

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D. Negotiating Baseball's Free Agency System

Initially, MLB club-owners took the position that free agency rights should be very limited, while the MLBPA claimed to support the broadest possible free agency rights. [[1]](#footnote-1)39  [\*608]  The parties eventually reached a compromise, restricting free agent eligibility to two classes of players: (1) players with "no less than six years of major league service," and (2) players released or not tendered contracts by their club. [[2]](#footnote-2)40 This compromise preserved Baseball's "reserve system" for the game's younger players, while also limiting the supply of free agents in a manner that made free agency rights very valuable to veterans.

E. Anti-Collusion Provisions in the Free Agent System

Along with the advent of Baseball's free agency, the 1976 Basic Agreement established language pertaining to how players and teams may conduct themselves in the free agent market. [[3]](#footnote-3)41 Specifically, the 1976 Basic Agreement set forth the "Individual Nature of Rights" with respect to players and teams. [[4]](#footnote-4)42 Originally drafted as Article XVIII, Section H of the 1976 Basic Agreement, the "Individual Nature of Rights" clause of the 1976 Basic Agreement stated as follows:

The utilization or non-utilization of [free agency shall be] an individual matter to be determined solely by each Player and Club for his or its own benefit. [With regard to free agency], Players may not act in concert with other Players, and Clubs may not act in concert with other Clubs. [[5]](#footnote-5)43

Although the Individual Nature of Rights clause has primarily protected player rights, this clause was originally implemented at the demand of club-owners. [[6]](#footnote-6)44 In 1976, many club-owners feared that without this clause, free agent players would bargain in tandem for new contracts. [[7]](#footnote-7)45 A similar event had occurred prior to free agency in 1966 when Los Angeles Dodgers pitchers Sandy Koufax and Don Drysdale decided to collectively threaten to hold out for more money. [[8]](#footnote-8)46 In the case  [\*609]  of Koufax and Drysdale, their tandem bargaining helped earn them Baseball's two highest paid contracts. [[9]](#footnote-9)47

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[\*610]

III. MLB Clubs Begin to Violate the "Independent Nature of Rights" Clause: Collusion Grievances I, II & III

Immediately upon signing of the 1976 Basic Agreement, Baseball's new free agent system commenced. [[10]](#footnote-10)53 During the first ten years of Baseball free agency, the average MLB player salary increased from $ 50,000 per year to over $ 370,000 per year. [[11]](#footnote-11)54 At the same time, the average MLB franchise value increased annually by more than 12 percent. [[12]](#footnote-12)55

Although the MLBPA expressed some initial concerns that certain club-owners were not playing exactly by the new free agency rules, these concerns were limited. [[13]](#footnote-13)56 For the most part, MLBPA members were satisfied with their higher salaries and greater freedom of movement provided by free agency rights. [[14]](#footnote-14)57

A. Baseball's Free Agent System Breaks Down

Shortly after the 1985 season, however, Major League Baseball's free agent system completely broke down. [[15]](#footnote-15)58 Glen Macnow-then a  [\*611]  sports reporter for the Houston Chronicle-recorded the following observations:

Things are different this year. Not only are conservative clubs such as the Tigers shunning big-name free agents, but once-active clubs such as Texas, San Diego and Milwaukee are suddenly closing their wallets. Even notoriously high rollers Ted Turner and George Steinbrenner are praising the merits of 'fiscal responsibility,' which is sort of like Hugh Hefner praising the merits of abstinence. [[16]](#footnote-16)59

During the 1985-86 off-season, Major League Baseball players no longer had any real opportunity to move to new clubs. [[17]](#footnote-17)60 Reluctantly most players signed contracts with their previous clubs for less money than expected, and for fewer years than desired. [[18]](#footnote-18)61 As a result, the players' share of total league revenues fell substantially that season. [[19]](#footnote-19)62

Despite this phenomenon, few within baseball circles immediately recognized the presence of collusion. Slowly, however, various player agents began to sense something was wrong with the free agent market. [[20]](#footnote-20)63 One of the first agents to publicly express concern was David Pinter, the agent who represented California Angels star relief pitcher Donnie Moore. [[21]](#footnote-21)64 Moore finished the 1985 season sixth in the American League Most Valuable Player voting, posting a 1.92 Earned Run Average and 31 Saves for the California Angels. [[22]](#footnote-22)65 However, during the 1985 off-season, Moore received just two contract offers-one from his current team, the  [\*612]  California Angels, and the other from the Hankyu Braves, a club located in Japan. [[23]](#footnote-23)66

Shortly thereafter, another player agent who began to voice concern was Doug Baldwin, the agent for Detroit Tigers outfielder Kirk Gibson. [[24]](#footnote-24)67 On October 29, 1985, the Los Angeles Times had reported that Gibson was "at the top of his game," and that "even the traditionally conservative Kansas City Royals, baseball's new champions, are expected to compete for Gibson [on the free agent market.]" [[25]](#footnote-25)68 However, during the 1985 off-season, Gibson did not receive a single offer from any club other than the Tigers. [[26]](#footnote-26)69 Not even the Royals pursued Gibson. [[27]](#footnote-27)70

As the winter progressed, additional unusual events made players and their agents even more skeptical. First, there was the fact that, as of New Years Day 1986, not a single free agent player received an offer  [\*613]  that induced his changing teams. [[28]](#footnote-28)71 Then, there was the bizarre case of Los Angeles Dodgers catcher Steve Yeager, who no team wanted to sign as a free agent, but was quickly traded from the Dodgers to the Mariners upon relinquishing his free agency rights. [[29]](#footnote-29)72 When asked why Yeager only became enticing to the Mariners after he re-signed with the Dodgers, no MLB employee or member of the Mariners front office offered any logical answer. [[30]](#footnote-30)73 By this point, MLBPA leader Donald Fehr, who was initially slow to accuse MLB club-owners of colluding, told the media that the off-season happenings had become "troublesome." [[31]](#footnote-31)74

B. The Collusion I Grievance

Based on a culmination of all of these unusual events, on January 31, 1986, the MLBPA decided to file its first of three annual collusion grievances on behalf of 139 MLB players purportedly harmed by collusion during the 1985-86 off-season ("Collusion I"). [[32]](#footnote-32)75 The named players in the Collusion I grievance included not only superstars such as Moore, [[33]](#footnote-33)76 Gibson, [[34]](#footnote-34)77 Carlton Fisk, [[35]](#footnote-35)78 Tony Bernazard, [[36]](#footnote-36)79 Phil Niekro, [[37]](#footnote-37)80 and  [\*614]  Joe Niekro, [[38]](#footnote-38)81 but also more ordinary players such as Yeager, who did not command multi-million dollar salaries. [[39]](#footnote-39)82 The grievance alleged that the twenty-six MLB clubs harmed each of these 139 players by violating provisions in the Basic Agreement as a result of "acting in concert with each other with respect to individuals who became free agents under Article XVIII after the 1985 season." [[40]](#footnote-40)83

Initially, the MLB clubs denied nearly every aspect of this grievance. [[41]](#footnote-41)84 In their opening brief, the MLB club-owners alleged that the lack of interest in free agent players during the 1985 off-season was "nothing more than the culmination of a predictable evolution to a more sober and rational free agent market." [[42]](#footnote-42)85 Commissioner Uerberroth additionally told the media that "the only conspiracy [in Baseball was] between a few agents and a few other people to get owners to continue spending stupidly and crazily." [[43]](#footnote-43)86

 [\*615]

The facts presented at the hearing, however, almost fully supported the players' claims. [[44]](#footnote-44)87 Upon reviewing 5,674 pages of verbatim transcript and 288 exhibits, [[45]](#footnote-45)88 Baseball's neutral arbitrator Thomas Roberts ruled that "the Baseball Clubs violated Article XVIII(H) of the Basic Agreement following the completion of the 1985 championship season by acting in concert with regard to the free agency provisions." [[46]](#footnote-46)89 Further, Roberts found that "every major league club abstained from the free agency market during that winter until an available free agent was 'released' by his former club upon the announcement that the former club was no longer interested in his services." [[47]](#footnote-47)90

With respect to individual players, Roberts found that MLB clubs showed "no interest in the available free agents at all at any price," [[48]](#footnote-48)91 and that Chicago White Sox catcher Carlton Fisk was the only player to receive a bona fide offer from a club other than his previous employer while his previous employer was still interested in securing his services. [[49]](#footnote-49)92 In addition, even Fisk's offer was unusually secretive. [[50]](#footnote-50)93

In a later section of the opinion, Roberts described "the situation of Kirk Gibson" in vivid detail. [[51]](#footnote-51)94 According to Roberts, the evidence indicated that Kansas City Royals management, as had been expected, at first expressed strong interest in signing Gibson to a contract for the 1986 season and beyond. [[52]](#footnote-52)95 Team officials even entertained Gibson on a  [\*616]  hunting trip to gauge his interest in joining their organization. [[53]](#footnote-53)96 However, the Royals' interest in Gibson "suddenly cooled . . . concurrently with a meeting of owners in St. Louis in October of 1985 and a gathering of general mangers in Tapon Springs, Florida during November of 1985." [[54]](#footnote-54)97 At that meeting, it was the retiring Director of the Player Relations Committee, Leland S. MacPhail, who distributed a memorandum to Baseball owners, urging clubs to "exercise more self-discipline in making their operating decisions and to resist the temptation to give in to the unreasonable demands of experienced marginal players." [[55]](#footnote-55)98 Roberts viewed the memorandum as somewhat of a "smoking gun," indicating a formal agreement amongst MLB club-owners to collude. [[56]](#footnote-56)99

C. The Collusion II Grievance

While Baseball and MLBPA lawyers were in the process of arbitrating the Collusion I grievance, Major League Baseball teams and players proceeded to play the 1986 season. [[57]](#footnote-57)100 For baseball fans, the 1986 season was an especially memorable one, culminating with a seven-game World Series featuring the New York Mets and Boston Red Sox. [[58]](#footnote-58)101 Although the Mets trailed in the series three games to two, and at one point were even down to their final out, they rallied back to win both games six and seven and earn their second-ever World Series championship. [[59]](#footnote-59)102 Veteran third baseman Ray Knight, who hit a decisive home run in game seven, was named the series MVP. [[60]](#footnote-60)103

 [\*617]

Then, upon conclusion of the 1986 World Series, a new class of baseball players, including Knight, declared for free agency. [[61]](#footnote-61)104 Like the free agent class from the previous winter, these players found the market conditions cold. [[62]](#footnote-62)105 Again, the MLBPA suspected collusion. [[63]](#footnote-63)106

On February 18, 1987, the MLBPA filed its second collusion grievance in as many years, charging club owners with "acting in concert with respect to those players who became free agents during the 1986-87 season" ("Collusion II"). [[64]](#footnote-64)107 By the time the MLBPA had filed their Collusion II grievance, the MLB clubs had terminated Roberts as the game's neutral arbitrator. [[65]](#footnote-65)108 This meant that even though Roberts was still responsible for deciding Collusion I, a new neutral arbitrator would render a ruling in Collusion II. [[66]](#footnote-66)109

 [\*618]

The parties chose as their new arbitrator George Nicolau, a Columbia law school graduate and esteemed labor law veteran. [[67]](#footnote-67)110 At the time of his selection, Nicolau already had substantial experience arbitrating sports disputes involving basketball and indoor soccer. [[68]](#footnote-68)111 MLB club owners were hoping that Nicolau would take a club-friendly view to the changes in Baseball.

Before Nicolau got too far along in arbitrating the new dispute, however, Roberts found the MLB clubs liable for wrongdoing in Collusion I. [[69]](#footnote-69)112 This left Nicolau, in his view, with the task of simply determining whether the "club [owners'] actions during the 1986-87 off-season had continued unabated from the previous winter." [[70]](#footnote-70)113

In Collusion II, the MLBPA argued that the baseball clubs' pattern of dealing with players did not ostensibly change. [[71]](#footnote-71)114 The MLB clubs, meanwhile, took the position that even if there was an agreement to collude during the 1985-86 off-season as Roberts had already found, in 1986-87 there was neither "direct evidence of any such meeting of the minds" amongst teams, nor "any circumstantial evidence of the kind Arbitrator Roberts found so persuasive in the prior case." [[72]](#footnote-72)115 The clubs further contended that certain premier free agents during the 1986-87 off-season, including starting pitchers Jack Morris and Doyle Alexander and first-baseman Bob Horner, "artificially limited the market for their services by . . . pricing themselves too high." [[73]](#footnote-73)116

Upon reviewing all of the evidence, Nicolau, in an extremely thorough 81-page opinion, found that MLB clubs again illegally  [\*619]  colluded. [[74]](#footnote-74)117 Stating that "it is not one piece of evidence, but the evidence taken as a whole that tells us where a common understanding exists," [[75]](#footnote-75)118 Nicolau explained that even though in Collusion II there was less evidence of a formal agreement amongst club-owners, "there still were no offers by other clubs before January 8 for free-agent players that former clubs wanted to re-sign (a precise echo of 1985), and that activity for such free agents after January 8, which must be weighed in light of what occurred, was exceedingly limited." [[76]](#footnote-76)119

The MLB clubs argued that any finding of collusion must be negated by the movement of free agent players Andre Dawson and Lance Parrish each to new teams; however, Nicolau found that the movement of these players "can hardly be characterized as ordinary or routine," and the evidence pertaining to these players did more to support the finding of collusion than to negate it. [[77]](#footnote-77)120 With respect to Dawson's movement from the Montreal Expos to the Chicago Cubs, Nicolau explained that the evidence showed that Dawson "was so willing to leave the Expos that he called a unilateral press conference to announce he would sign a blank contract to play for the Cubs." [[78]](#footnote-78)121 Embarrassed by these events, "the Cubs then offered the all-star outfielder a contract for $ 500,000-almost half of his previous season's salary." [[79]](#footnote-79)122 Although the offer was far below what seemed to be Dawson's fair market value, Dawson accepted the offer and proceeded to play for the Cubs in 1987. [[80]](#footnote-80)123

Meanwhile, in the case of Lance Parrish, Nicolau found that he had received no offers from teams other than his previous employer, the Detroit Tigers, until after January 8, 1987, and even then certain team owners tried to prevent Parrish's movement to the Philadelphia Phillies. [[81]](#footnote-81)124 Nicolau specifically found the evidence to indicate that American League President Dr. Bobby Brown, as well as Milwaukee Brewers owner Alan Bud Selig and Chicago White Sox owner Jerry Reinsdorf, each separately requested that Philadelphia Phillies president  [\*620]  William Giles not sign Parrish. [[82]](#footnote-82)125 Both Reinsdorf and Selig reminded Giles that he should "keep his 'fiscal responsibilities' in mind." [[83]](#footnote-83)126 Meanwhile, according to Giles's testimony, Selig even suggested that failure to show restraint in the free agent market might lead other owners, such as the Yankees' George Steinbrenner, to jump into the free agent market. [[84]](#footnote-84)127 Each of these conversations evidenced, at a minimum, an attempt to collude. [[85]](#footnote-85)128

D. The Collusion III Grievance

With Roberts's decision in Collusion I still several months away, and Nicolau's review of Collusion II just beginning, Baseball players returned to the field for the 1987 season. [[86]](#footnote-86)129 By Opening Day of 1987, fans could sense that the players had grown increasingly frustrated with management. [[87]](#footnote-87)130 As Boston Red Sox outfielder Dwight Evans described matters, Commissioner Ueberroth was "playing a game with this game and acting like the 'Grinch Who Stole Christmas.'" [[88]](#footnote-88)131

Although the 1987 season featured an exciting seven-game World Series between the Minnesota Twins and the St. Louis Cardinals, [[89]](#footnote-89)132 the World Series was somewhat overshadowed by Roberts's strongly-worded September 21 ruling that found MLB club-owners liable for "trying to destroy free agency" by colluding against the interests of  [\*621]  players in Collusion I. [[90]](#footnote-90)133 To veteran pitcher Jack Morris, Roberts's ruling proved that certain Baseball owners were indeed "crooks." [[91]](#footnote-91)134

Yet, even after Roberts's stinging ruling, the free agent market did not return to normal. [[92]](#footnote-92)135 Although many players received free agent offers for the first time since the 1984-85 off-season, these offers remained lower than expected, not to mention oddly identical to one another. [[93]](#footnote-93)136

Still unhappy with the market, on January 19, 1988-for a third consecutive year-the MLBPA filed a collusion grievance against the MLB clubs. [[94]](#footnote-94)137 This grievance alleged that club-owners had continued to violate the independent rights of players by forming an illegal "Information Bank" that provided all clubs with detailed information about other clubs' free-agent bids-thus preventing bid inflation ("Collusion III"). [[95]](#footnote-95)138 The MLBPA contended that while certain forms of information exchange amongst clubs may be permissible, the Information Bank certainly was not. [[96]](#footnote-96)139

 [\*622]

Nicolau was named the neutral arbitrator in Collusion III, and he again ruled in favor of the MLBPA. [[97]](#footnote-97)140 In Collusion III, Nicolau specifically found that "the Clubs violated Article XVIII(H) of the Basic Agreement following the 1987 season by unilaterally establishing and maintaining the Information Bank." [[98]](#footnote-98)141 Although the MLB clubs contended that the Information Bank was no different from longstanding forms of information exchange amongst teams, Nicolau explained that based on general contract-law principles "the Panel must first look to the language of the provision at issue" before considering issues of past industry practices. [[99]](#footnote-99)142 Because Article XVIII(H) prohibited the behavior of "acting in concert," he found the Information Bank impermissible. [[100]](#footnote-100)143 According to Nicolau, the Information Bank "was designed, implemented, and manned, not by one club, but by the official representative of all the Clubs," and, as a result, information to which generally only one club was privy became available to all. [[101]](#footnote-101)144

E. Settlement of Collusion I, II and III

Shortly after Nicolau rendered his ruling in Collusion III, the MLB clubs began to slowly negotiate a settlement with the MLBPA. [[102]](#footnote-102)145 On November 4, 1990, the clubs formally agreed to pay the MLBPA a sum of $ 280 million plus interest and distribution costs. [[103]](#footnote-103)146 As part of this settlement, the MLBPA promised not to file any grievance for collusion that may have occurred during the 1989-90 off-season. [[104]](#footnote-104)147 The clubs in turn agreed to provide "new-look" free agency to sixteen players directly harmed by Collusion I, II & III. [[105]](#footnote-105)148

 [\*623]

Thereafter, MLB clubs spent significant parts of the next fifteen seasons paying out the settlement amount to injured players. [[106]](#footnote-106)149 In sum, the MLB clubs paid $ 434 million to players, including damages, interest, and distribution costs. [[107]](#footnote-107)150 Nonetheless, the clubs never felt much of the financial impact of the settlement. [[108]](#footnote-108)151 This is because the MLB clubs raised funds by selling expansion franchises to ownership groups in Miami, Denver, Phoenix and Tampa Bay. [[109]](#footnote-109)152

In May 2004, the MLB clubs finally completed their payment obligations to the MLBPA and closed the settlement fund-thus fulfilling their obligations under the settlement agreement. [[110]](#footnote-110)153

…

F. Baseball's Post-Settlement Denials

Although Roberts and Nicolau unequivocally found that MLB clubs colluded in violation of the terms of the CBA, most MLB officials have since tried to revise history by reverting back to Ueberroth's mantra that "the only conspiracy [in Baseball was] between a few agents and a few other people to get owners to start spending stupidly and crazily." [[111]](#footnote-111)154

Ueberroth still has not apologized for his role in the 1985-88 collusion. [[112]](#footnote-112)155 Meanwhile, Baseball's current commissioner Bud Selig  [\*624]  remains mum on the topic, refusing even to acknowledge the telephone calls that he placed to former Phillies owner William Giles during the 1986-87 off-season, which were cited in Nicolau's Collusion II opinion. [[113]](#footnote-113)156 The closest that Selig has come to acknowledging collusion was a brief statement he made immediately after Collusion I, implying hope that Roberts's decision in favor of the players would lead to "resolving our differences and beginning the process of a new financial structure." [[114]](#footnote-114)157

That hope, however, never came into fruition. To this day, the rift between MLB owners and players has only grown wider.

…

V. Ramifications of MLB Collusion

…

 [\*634]

C. Collusion Sends the Message to Children that Lying, Cheating, and Deception is Acceptable

Finally, Major League Baseball's history of collusion sends a message to fans, including children, that MLB club-owners do not find their past behavior morally wrong. [[115]](#footnote-115)225 This message is especially troubling given that, according to Baseball's own Mitchell Report, American children emulate the behavior that they see in professional sports. [[116]](#footnote-116)226 Indeed, if today's children continue to grow up in an era marked by corporate scandals and greed, they will become more likely to emulate these behaviors. [[117]](#footnote-117)227

Ethicist Michael Josephson is quick to point out that the entertainment industry has glorified cheating and deception, not only through movies and fictional television shows, but also through reality television program such as "The Apprentice," which suggest these behaviors equal success in the boardroom. [[118]](#footnote-118)228 Because Major League Baseball is the ultimate form of reality television, when MLB club-owners collude against the rights of MLB players, children become especially likely to emulate these behaviors. [[119]](#footnote-119)229 This means the wrongs of collusion may survive beyond just one generation.

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# Abraham Khan, “Arguing with Colin Kaepernick,” McCourtney Institute for Democracy (Penn State College of the Liberal Arts)

Sep 10, 2016

Colin Kaepernick’s refusal to stand for the national anthem during an NFL preseason game should have occasioned vigorous public debate regarding the problem of police violence, the fairness of the criminal justice system, and the persistence of racial conflict. Kaepernick, to the surprise of some, was thoughtful, sincere, and unambiguous in [explaining what motivated his protest](http://deadspin.com/colin-kapernick-refuses-to-stand-for-anthem-there-are-1785838030). “I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color.” Implicitly invoking the recent [acquittals of the police officers](http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-rice-verdict-20160718-story.html) accused of Freddy Gray’s murder in Baltimore, Kaepernick’s comments, simultaneously earnest and provocative, attempted to give meaning to the symbolism contained in his protest: “There are bodies in the street and people getting paid leave and getting away with murder.” News of those acquittals was largely consumed by the flames of a vitriolic presidential campaign. Last summer, Baltimore was engulfed in the flames of a black, underclass insurrection, and one wonders what kind of public expression could better remind us of those events than the [most elemental expression of democratic dissent](http://edition.cnn.com/2016/08/29/sport/colin-kaepernick-flag-protest-has-history-trnd/): refusing to salute the American flag.

Of course, Kaepernick’s interpretation of that violence, his assumption of police culpability, and his imputation of police motives are each subject to plausible refutation, but refutation is a condition of argument, and Kaepernick’s fiercest critics seem to have little interest in argumentation. Instead, the response to Kaepernick reflects a broad cultural impulse to [disqualify one’s interlocutors and political opponents](http://www.cnn.com/2016/04/06/politics/bernie-sanders-hillary-clinton-qualified/). Colin Kaepernick claims that *there are bodies in the street*, but his critics rarely address the evidence that supports this claim, nor the variety of arguments towards which the claim points. Instead, Kaepernick has faced persistent attempts to simply disqualify him by denying him the authority to speak.

There are variations on these themes, but criticism of Kaepernick clusters into three basic positions: (1) Kaepernick has not been oppressed enough to speak, (2) Kaepernick is not black enough to speak, and (3) Kaepernick is disrespecting America, its troops, and its flag. I worry not only that these positions squander the opportunity to have useful debates, but also commit corrosive political errors. So, I want to address each of these in turn.

***I.***[Colin Kaepernick had not been oppressed enough to speak](http://ijr.com/2016/08/682216-i-wrote-an-open-letter-to-colin-kaepernick-i-didnt-expect-how-many-people-would-respond-to-it/)***.***

Oppression is not experienced uniformly. There are in fact large patterns of racism in society that are typically related to socioeconomic class. The black poor have it worse, of course, than the black middle-class. But that doesn’t mean that that oppression is an alien concept to those who find themselves inside the black middle-class. (You may remember Henry Louis Gates, the Harvard University professor who was [arrested for attempting to enter his own home](http://www.theatlantic.com/national/archive/2010/08/the-arrest-of-henry-louis-gates/61365/).) The truth is that people of color both in the US and around the world experience varying levels of social exclusion, ostracism, and vulnerability, and that those experiences are felt differently, and sometimes very differently. To say that Colin Kaepernick lacks the authority to speak because he hasn’t been “oppressed enough" is to dispute his lived experience, and that’s not something anyone has authority to do.

Many claim that Kaepernick stands in a [righteous tradition](http://theundefeated.com/features/the-courage-of-colin-kaepernick/) of black protest embodied in pro athletes like Jackie Robinson, Kareem Abdul-Jabbar, Muhammad Ali, and Arthur Ashe. Consider, however, that Robinson’s experiences were not Kareem’s, which were not Ali’s, and which were not Ashe’s, differences which tend to be lost inside the banal observation that these figures were all “fighting for the same goal.” In many cases, they were not. Jackie Robinson and Malcolm X [disagreed vociferously](http://theundefeated.com/features/jackie-robinson-vs-malcolm-x/) in 1964, for example, not long after Malcolm and Ali had formed an i[mportant friendship](http://wfpl.org/new-book-explores-friendship-between-muhammad-ali-and-malcolm-x/). I think that we can both acknowledge a full variety of black freedom struggles in sport *and* hear Colin Kaepernick in a way that affirms his experience. When we address ourselves to the hard work of meeting others inside their histories, we make argument possible. We may come to disagree with Kaepernick, of course, to hold anyone to the standard of *absolute* oppression, or to try to parse whether someone is oppressed enough, is to paralyze our political discourse.

Disqualifying protest speech in this manner, in fact, reinforces the oppressive conditions against which protestors agitate. For such a standard requires that the oppressed must constantly *perform* their oppression in order to be heard. This is precisely what reduces the oppressed to victims, instead of recognizing them as agents of their own history. Political theorist [Jodi Dean identifies the double-bind](https://www.dukeupress.edu/democracy-and-other-neoliberal-fantasies) into which victims are placed: “To speak at all they have to demonstrate how they are harmed and vulnerable, how they are weak, inadequate, or suffering. They must speak as those who have lost, those who are losers. One who feels the political impulse to struggle, who is ready to fight against injustice, is not injured enough to speak.” To say that Colin Kaepernick [hasn’t experienced the requisite degree of oppression](http://www.houstonchronicle.com/sports/columnists/smith/article/49ers-QB-Colin-Kaepernick-has-rights-but-he-s-9188784.php) to speak is to endorse both the idea that the poor in America [aren’t poor enough to complain](http://www.salon.com/2014/09/17/fox_news_thinks_you_arent_really_poor_if_you_have_an_air_conditioner_and_internet_access/). It is to identify with whatever is implied in asserting that slaves tasked with building the White House [ate well](http://www.nytimes.com/2016/07/28/business/media/bill-oreilly-says-slaves-who-helped-build-white-house-were-well-fed.html?_r=0). Not only do we simply argue about who’s more oppressed (a key to any divide and conquer strategy), but we also deny the oppressed an affirmative role in naming and resisting their oppressors. In this case, Kaepernick wants to draw our attention to racism, so let’s have that debate, instead of mining his biography for the authority to speak.

***II.***[Kaepernick is not black enough to speak](http://fusion.net/story/343279/colin-kaepernick-blackness/)***.***

This position hides in more distant corners of public life, but it was advanced most prominently by former NFL star [Rodney Harrison, who insisted](http://ftw.usatoday.com/2016/08/rodney-harrison-kaepernick) that Kaepernick, “is not black.” When corrected, Harrison reportedly noted that he “didn’t even know that Kaepernick is mixed.” The problem is that Kaepernick’s racial identity is irrelevant to his point. Moreover, we are all “mixed.” Race, of course, [is biologically inconsequential](http://unesdoc.unesco.org/images/0012/001229/122962eo.pdf), if not meaningless. Race is a categorical system invented by humans to manage and control other humans. That doesn’t mean it isn’t real — it is — it [has material effects and motivates people](http://www.truth-out.org/opinion/item/16188-recognizing-racism-in-the-era-of-neoliberalism) to do real things. But to say that Kaepernick cannot speak because he isn’t “black enough” or because he “is mixed” is to repeat racism’s error. It is an argument which gives race its meaning, validating the categorical utility of race instead of undermining its power. To the extent that we are all “mixed,” nobody would ever be “black enough” to talk about racism and its effects. I’m “mixed.” My own father is South Asian, but my mother is white. Does that mean I am somehow prohibited from explaining the funny looks I get at the airport? Or that I am afraid of Trump’s “deportation force?” Am I still allowed to be a professor of African American studies?

Second, this position recalls a dubious history. The idea that someone isn’t “black enough” to speak is simply the reverse of the idea that someone isn’t “white enough” to speak. Before the end of Jim Crow, what classified a person as “black” was a policy called the “[one drop rule](https://en.wikipedia.org/wiki/One-drop_rule).” In other words, “one drop” of "black blood" meant that you were susceptible to legal mistreatment. Now, if that’s all it took to disqualify people of color from the protection of the law, why hold “one drop” of whiteness against a person of color who wants to express her or his opposition to the legally sanctioned, judicially endorsed mistreatment of other persons of color? This is a line of reasoning that not only disavows the possibility of interracial solidarities, but willfully ignores both the way our culture [confers subordinate status to all people of color](http://news.harvard.edu/gazette/story/2010/12/one-drop-rule-persists/) and the particular indignities experienced by Colin Kaepernick in being conferred with such a status.

***III.***[Colin Kaepernick disrespects America, its troops, and its flag](http://hollywoodlife.com/2016/08/27/colin-kaepernick-sits-during-national-anthem-fans-furious-nfl-49ers-twitter/)***.***

The accusation that Kaepernick is being “unpatriotic” or “disrespectful to our troops” commits two errors. First, it is a deflection, a ship passing in the night. Kaepernick made no comment on the military, the troops, or even foreign wars. He wasn't talking about Iraq, or ISIS, or drones. *There are bodies in the streets*, he said, and *people getting away with murder*. The argument from patriotism avoids these facts in favor of [sanctimonious scripts](http://www.barstoolsports.com/barstoolu/army-veteran-rips-colin-kaepernick-for-refusing-to-stand-during-national-anthem-tells-him-to-get-off-his-ass-and-actually-go-make-a-difference/) about the virtue of military service. At their worst, these scripts valorize nationalist militarism, but their routine function in the Kaepernick controversy is to redirect argumentative attention from police violence, legally sanctioned murder, and the history of racism with which such discord is infused. It is not simply that patriotic assertions leave us blind to the facts in question, but that they deploy the courage required for service as a [wedge with which to separate Kaepernick](http://www.nationalreview.com/article/439479/colin-kaepernick-national-anthem-protest-cowardly) from the right to his convictions.

With an ironic twist, in this context – one in which a professional football player has violated the symbolic expectations associated with ritualized nationalism – the argument from patriotism is literally the opposite of a courageous argument. Saying that you love the troops and that you love America and the others must hate the troops and hate America is — without exception — the *safest* possible claim in American political culture. [Aristotle once said](http://rhetoric.eserver.org/aristotle/rhet1-9.html) (quoting Socrates), “It is not difficult to praise Athenians in Athens.” Is it any more difficult to praise American soldiers in the United States? More specifically, is it any more courageous to [praise the troops at a football game](https://www.washingtonpost.com/news/checkpoint/wp/2016/08/29/the-colin-kaepernick-flap-highlights-the-nfls-complex-history-with-the-military-and-patriotism/)? Even if we bracket football’s symbolic reliance on military tropes – a game predicated upon the occupation of enemy territory – NFL commissioner Roger Goodell expressed the need to secure the League’s [special reverence](https://thinkprogress.org/colin-kaepernick-patriot-8ebf65da7e9f#.ucdcjsckj) for the military. To ignore the argument toward which Kaepernick’s gesture intends to point is fundamentally craven. It is a feeble retreat from the risky arena of meaningful debate, a move toward the shelter of platitude.

Second, the patriotism claim assumes that the flag and the anthem belong exclusively to the military. Yes, they help constitute the symbolism of the flag, but they do not *exhaust* the symbolism of the flag, and we can only know that -- we can only get to the idea that the flag and the anthem can mean other things -- when someone like Colin Kaepernick (or [Craig Hodges](http://www.manhoodraceculture.com/2014/12/16/the-ballad-of-craig-hodges-how-black-nba-stars-have-betrayed-the-jordan-rules-and-begun-resisting-the-implicit-expectations-and-demands-of-nba-ownership/) or [Mahmoud Abdul-Rauf](http://theundefeated.com/features/abdul-rauf-doesnt-regret-sitting-out-national-anthem/) or [Carlos Delgado](http://www.nytimes.com/2004/07/21/sports/sports-of-the-times-delgado-makes-a-stand-by-taking-a-seat.html)) does something like he did. Kaepernick’s point is, in part, “If that flag belongs to black people too, if the troops are supposed to protect black people too, then maybe we should stop letting cops get away with murder.” Like [John Carlos and Tommie Smith](https://www.thenation.com/article/forty-five-years-later-john-carlos-and-tommie-smith-have-never-been-more-relevant/) may have wondered before raising their black-gloved fists in Mexico City in 1968, how do you make that point without turning away from the flag and making your case? What the flag means — indeed, what the republic stands for — is precisely what’s at stake.

I believe there are sensible reasons to disagree with Colin Kaepernick (even if I am likely to refute those reasons), but racial tests, oppression tests, and stale patriotism aren’t persuasive, principally because they are not arguments. Like Muhammad Ali and Jackie Robinson before him, Colin Kaepernick has [placed his livelihood in peril](http://www.sportsnet.ca/football/nfl/backlash-colin-kaepernick-familiar/) in the service of his conscience. It is a risk that deserves our attention. Are the risks the same as those faced by Ali? No, of course not. As Jackie’s? Certainly not. But like both of them, Kaepernick, his protest, and the cause which motivates him are not going away. The entire Seattle Seahawks squad, [according to recent reports](http://deadspin.com/seahawks-considering-national-anthem-protest-as-a-team-1786375531), intends to present a gesture of solidarity on Sunday. Instead of disqualifying its participants, let’s recognize that they have something useful, important, and urgent to say: *There are bodies in the street.*

# United States v. Walters

United States Court of Appeals for the Seventh Circuit

June 11, 1993, Argued ; June 30, 1993, Decided

No. 92-3420, 997 F.2d 1219

**Opinion**

 [\*1221]  EASTERBROOK, *Circuit Judge.* Norby Walters, who represents entertainers, tried to move into the sports business. He signed 58 college football players to contracts while they were  [\*\*2]  still playing. Walters offered cars and money to those who would agree to use him as their representative in dealing with professional teams. Sports agents receive a percentage of the players' income, so Walters would profit only to the extent he could negotiate contracts for his clients. The athletes' pro prospects depended on successful completion of their collegiate careers. To the NCAA, however, a student who signs a contract with an agent is a professional, ineligible to play on collegiate teams. To avoid jeopardizing his clients' careers, Walters dated the contracts after the end of their eligibility and locked them in a safe. He promised to lie to the universities in response to any inquiries. Walters inquired of sports lawyers at Shea & Gould whether this plan of operation would be lawful. The firm rendered an opinion that it would violate the NCAA's rules but not any statute.

Having recruited players willing to fool their universities and the NCAA, Walters discovered that they were equally willing to play false with him. Only 2 of the 58 players fulfilled their end of the bargain; the other 56 kept the cars and money, then signed with other agents. They relied on the fact  [\*\*3]  that the contracts were locked away and dated in the future, and that Walters' business depended on continued secrecy, so he could not very well sue to enforce their promises. When the 56 would neither accept him as their representative nor return the payments, Walters resorted to threats. One player, Maurice Douglass, was told that his legs would be broken before the pro draft unless he repaid Walters' firm. A 75-page indictment charged Walters and his partner Lloyd Bloom with conspiracy, RICO violations (the predicate felony was extortion), and mail fraud. The fraud: causing the universities to pay scholarship funds to athletes who had become ineligible as a result of the agency contracts. The mail: each university required its athletes to verify their eligibility to play, then sent copies by mail to conferences such as the Big Ten.

After a month-long trial and a week of deliberations, the jury convicted Walters and Bloom. We reversed, holding that the district judge had erred in declining to instruct the jury that reliance on Shea & Gould's advice could prevent the formation of intent to defraud the universities. 913 F.2d 388, 391-92 (1990). Any dispute [\*\*4]  about the adequacy of Walters' disclosure to his lawyers and the bona fides of his reliance was for the jury, we concluded. Because Bloom declined to waive his own attorney-client privilege, we held that the defendants must be retried separately. *Id.* at 392-93. On remand, Walters asked the district court to dismiss the indictment, arguing that the evidence presented at trial is insufficient to support the convictions. After the judge denied this motion, 775 F. Supp. 1173 (N.D. Ill. 1991), Walters agreed to enter a conditional *Alford* plea: he would plead guilty to mail fraud, conceding that the record of the first trial supplies a factual basis for a conviction while reserving his right to contest the sufficiency of that evidence. In return, the prosecutor agreed to dismiss the RICO and conspiracy charges  [\*1222]  and to return to Walters all property that had been forfeited as a result of his RICO conviction. Thus a case that began with a focus on extortion has become a straight mail fraud prosecution and may undergo yet another transformation. The prosecutor believes that Walters hampered the investigation preceding his indictment.  [\*\*5]  *See In re Feldberg,* 862 F.2d 622 (7th Cir. 1988) (describing some of the investigation). The plea agreement reserves the prosecutor's right to charge Walters with perjury and obstruction of justice if we should reverse the conviction for mail fraud.

"Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . or knowingly causes [such matter or thing] to be delivered by mail" commits the crime of mail fraud. ***HN1***[[](#Bookmark_clscc1)] 18 U.S.C. § 1341. Norby Walters did not mail anything or cause anyone else to do so (the universities were going to collect and mail the forms no matter what Walters did), but the Supreme Court has expanded the statute beyond its literal terms, holding that a mailing by a third party suffices if it is "incident to an essential part of the scheme," *Pereira v. United States,* 347 U.S. 1, 8, 98 L. Ed. 435, 74 S. Ct. 358 (1954). While stating that such [\*\*6]  mailings can turn ordinary fraud into mail fraud, the Court has cautioned that ***HN2***[[](#Bookmark_clscc2)] the statute "does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud". *Kann v. United States,* 323 U.S. 88, 95, 89 L. Ed. 88, 65 S. Ct. 148 (1944). Everything thus turns on matters of degree. Did the schemers foresee that the mails would be used? Did the mailing advance the success of the scheme? Which parts of a scheme are "essential"? Such questions lack obviously right answers, so it is no surprise that each side to this case can cite several of our decisions in support. Compare *United States v. McClain,* 934 F.2d 822, 835 (7th Cir. 1991), and *United States v. Kwiat,* 817 F.2d 440, 443-44 (7th Cir. 1987), among cases reversing convictions because use of the mails was too remote or unforeseeable, with *Messinger v. United States,* 872 F.2d 217 (7th Cir. 1989), among many cases holding that particular uses of the mails were vital to the scheme and foreseeable.

"***HN3***[[](#Bookmark_clscc3)] The relevant question . . . is whether the mailing is part of the execution [\*\*7]  of the scheme as conceived by the perpetrator at the time". *Schmuck v. United States,* 489 U.S. 705, 715, 103 L. Ed. 2d 734, 109 S. Ct. 1443 (1989). Did the evidence establish that Walters conceived a scheme in which mailings played a role? We think not--indeed, that no reasonable juror could give an affirmative answer to this question. Walters hatched a scheme to make money by taking a percentage of athletes' pro contracts. To get clients he signed students while college eligibility remained, thus avoiding competition from ethical agents. To obtain big pro contracts for these clients he needed to keep the deals secret, so the athletes could finish their collegiate careers. Thus deceit was an ingredient of the plan. We may assume that Walters knew that the universities would ask athletes to verify that they were eligible to compete as amateurs. But what role do the mails play? The plan succeeds so long as the athletes conceal their contracts from their schools (and remain loyal to Walters). Forms verifying eligibility do not help the plan succeed; instead they create a risk that it will be discovered if a student should tell the truth. Cf. *United States v. Maze,* 414 U.S. 395, 38 L. Ed. 2d 603, 94 S. Ct. 645 (1974). [\*\*8]  And it is the forms, not their mailing to the Big Ten, that pose the risk. For all Walters cared, the forms could sit forever in cartons. Movement to someplace else was irrelevant. In *Schmuck,* where the fraud was selling cars with rolled-back odometers, the mailing was essential to obtain a new and apparently "clean" certificate of title; no certificates of title, no marketable cars, no hope for success. Even so, the Court divided five to four on the question whether the mailing was sufficiently integral to the scheme. A college's mailing to its conference has less to do with the plot's success than the mailings that transferred title in *Schmuck.*

 [\*1223]  To this the United States responds that the mailings were essential because, if a college had neglected to send the athletes' forms to the conference, the NCAA would have barred that college's team from competing. Lack of competition would spoil the athletes' pro prospects. Thus the use of the mails was integral to the profits Walters hoped to reap, even though Walters would have been delighted had the colleges neither asked any questions of the athletes nor put the answers in the mail. Let us take this as sufficient under *Schmuck* [\*\*9]  (although we have our doubts). The question remains whether Walters caused the universities to use the mails. [[120]](#footnote-120)1 ***HN4***[[](#Bookmark_clscc4)] A person "knowingly causes" the use of the mails when he "acts with the knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen." *United States v. Kuzniar,* 881 F.2d 466, 472 (7th Cir. 1989), quoting *Pereira,* 347 U.S. at 8-9. The paradigm is insurance fraud. Perkins tells his auto insurer that his car has been stolen, when in fact it has been sold. The local employee mails the claim to the home office, which mails a check to Perkins. Such mailings in the ordinary course of business are foreseeable. E.g., *United States v. Richman,* 944 F.2d 323 (7th Cir. 1991). Similarly, a judge who takes a bribe derived from the litigant's bail money causes the use of the mails when the ordinary course is to refund the bond by mail. E.g., *United States v. Murphy,* 768 F.2d 1518, 1529-30 (7th Cir. 1985). The prosecutor contends that the same approach covers Walters.

 [\*\*10]  No evidence demonstrates that Walters *actually* knew that the colleges would mail the athletes' forms. The record is barely sufficient to establish that Walters knew of the forms' existence; it is silent about Walters' knowledge of the forms' disposition. The only evidence implying that Walters knew that the colleges had students fill out forms is an ambiguous reference to "these forms" in the testimony of Robert Perryman. Nothing in the record suggests that Perryman, a student athlete, knew what his university did with the forms, let alone that Perryman passed this information to Walters. So the prosecutor is reduced to the argument that mailings could "reasonably be foreseen." Yet why should this be so? Universities frequently collect information that is stashed in file drawers. Perhaps the NCAA just wants answers available for inspection in the event a question arises, or the university wants the information for its own purposes (to show that it did not know about any improprieties that later come to light). What was it about these forms that should have led a reasonable person to foresee their mailing? Recall that Walters was trying to break into the sports business. Counsel [\*\*11]  specializing in sports law told him that his plan would not violate any statute. These lawyers were unaware of the forms (or, if they knew about the forms, were unaware that they would be mailed). The prosecutor contends that Walters neglected to tell his lawyers about the eligibility forms, spoiling their opinion; yet why would Walters have to brief an expert in sports law if mailings were foreseeable even to a novice?

In the end, the prosecutor insists that the large size and interstate nature of the NCAA demonstrate that something would be dropped into the mails. To put this only slightly differently, the prosecutor submits that all frauds involving big organizations necessarily are mail frauds, because big organizations habitually mail things. No evidence put before the jury supports such a claim, and it is hardly appropriate for judicial notice in a criminal case. Moreover, adopting this perspective would contradict the assurance of Kann, 323 U.S. at 95, and many later cases that most frauds are covered by state law rather than § 1341. That statute has been expanded considerably  [\*1224]  by judicial interpretation, but it does not make a federal crime of every [\*\*12]  deceit. The prosecutor must *prove* that the use of the mails was foreseeable, rather than calling on judicial intuition to repair a rickety case.

There is a deeper problem with the theory of this prosecution. The United States tells us that the universities lost their scholarship money. Money is property; this aspect of the prosecution does not encounter a problem under *McNally v. United States,* 483 U.S. 350, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987). Walters emphasizes that the universities put his 58 athletes on scholarship long before he met them and did not pay a penny more than they planned to do. But a jury could conclude that had Walters' clients told the truth, the colleges would have stopped their scholarships, thus saving money. So we must assume that the universities lost property by reason of Walters' deeds. Still, they were not out of pocket *to Walters;* he planned to profit by taking a percentage of the players' professional incomes, not of their scholarships. Section 1341 condemns "any scheme or artifice to defraud, or *for obtaining* money or property" (emphasis added). If the universities were the victims, how did he "obtain" their property?, Walters asks.

According [\*\*13]  to the United States, neither an actual nor a potential transfer of property from the victim to the defendant is essential. It is enough that the victim lose; what (if anything) the schemer hopes to gain plays no role in the definition of the offense. We asked the prosecutor at oral argument whether on this rationale practical jokes violate § 1341. A mails B an invitation to a surprise party for their mutual friend C. B drives his car to the place named in the invitation. But there is no party; the address is a vacant lot; B is the butt of a joke. The invitation came by post; the cost of gasoline means that B is out of pocket. The prosecutor said that this indeed violates § 1341, but that his office pledges to use prosecutorial discretion wisely. Many people will find this position unnerving (what if the prosecutor's policy changes, or A is politically unpopular and the prosecutor is looking for a way to nail him?). Others, who obey the law out of a sense of civic obligation rather than the fear of sanctions, will alter their conduct no matter what policy the prosecutor follows. Either way, the idea that practical jokes are federal felonies would make a joke of the Supreme Court's [\*\*14]  assurance that § 1341 does not cover the waterfront of deceit.

Practical jokes rarely come to the attention of federal prosecutors, but large organizations are more successful in gaining the attention of public officials. In this case the mail fraud statute has been invoked to shore up the rules of an influential private association. Consider a parallel: an association of manufacturers of plumbing fixtures adopts a rule providing that its members will not sell "seconds" (that is, blemished articles) to the public. The association proclaims that this rule protects consumers from shoddy goods. To remain in good standing, a member must report its sales monthly. These reports flow in by mail. One member begins to sell "seconds" but reports that it is not doing so. These sales take business away from other members of the association, who lose profits as a result. So we have mail, misrepresentation, and the loss of property, but the liar does not get any of the property the other firms lose. Has anyone committed a federal crime? The answer is yes--but the statute is the Sherman Act, 15 U.S.C. § 1, and the perpetrators are the firms that adopted the "no  [\*\*15]  seconds" rule. *United States v. Trenton Potteries Co.,* 273 U.S. 392, 71 L. Ed. 700, 47 S. Ct. 377 (1927). The trade association we have described is a cartel, which the firm selling "seconds" was undermining. Cheaters depress the price, causing the monopolist to lose money. Typically they go to great lengths to disguise their activities, the better to increase their own sales and avoid retaliation. The prosecutor's position in our case would make criminals of the cheaters, would use § 1341 to shore up cartels.

Fanciful? Not at all. Many scholars understand the NCAA as a cartel, having power in the market for athletes. E.g., Arthur A. Fleisher III, Brian L. Goff & Robert D. Tollison, *The National Collegiate Athletic Association: A Study in Cartel Behavior* (1992); Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?*, 60  [\*1225]  Tenn. L. Rev. 263 (1993); Roger D. Blair & Jeffrey L. Harrison, *Cooperative Buying, Monopsony Power, and Antitrust Policy,* 86 Nw. U. L. Rev. 331 (1992); Lee Goldman, Sports and Antitrust: Should College Students be Paid to Play?, 65 Notre Dame L. Rev. 206 (1990);  [\*\*16]  Richard B. McKenzie & E. Thomas Sullivan, Does the NCAA Exploit College Athletes? An Economic and Legal Reinterpretation, 32 Antitrust Bull. 373 (1987); Stephen F. Ross, *Monopoly Sports Leagues,* 73 Minn. L. Rev. 643 (1989). See also *NCAA v. University of Oklahoma,* 468 U.S. 85 (1984) (holding that the NCAA's arrangements for the telecasting of college football violated the Sherman Act); *Banks v. NCAA,* 977 F.2d 1081 (7th Cir. 1992) (showing disagreement among members of this court whether the NCAA's restrictions on athletes violate the Sherman Act). The NCAA depresses athletes' income--restricting payments to the value of tuition, room, and board, while receiving services of substantially greater worth. The NCAA treats this as desirable preservation of amateur sports; a more jaundiced eye would see it as the use of monopsony power to obtain athletes' services for less than the competitive market price. Walters then is cast in the role of a cheater, increasing the payments to the student athletes. Like other cheaters, Walters found it convenient to hide his activities.  [\*\*17]  If, as the prosecutor believes, his repertory included extortion, he has used methods that the law denies to persons fighting cartels, but for the moment we are concerned only with the deceit that caused the universities to pay stipends to "professional" athletes. For current purposes it matters not whether the NCAA *actually* monopsonizes the market for players; the point of this discussion is that the prosecutor's theory makes criminals of those who consciously cheat on the rules of a private organization, even if that organization is a cartel. We pursue this point because any theory that makes criminals of cheaters raises a red flag.

Cheaters are not self-conscious champions of the public weal. They are in it for profit, as rapacious and mendacious as those who hope to collect monopoly rents. Maybe more; often members of cartels believe that monopoly serves the public interest, and they take their stand on the platform of business ethics, e.g., *National Society of Professional Engineers v. United States,* 435 U.S. 679, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978), while cheaters' glasses have been washed with cynical acid. Only Adam Smith's invisible hand turns their self-seeking activities [\*\*18]  to public benefit. It is cause for regret if prosecutors, assuming that persons with low regard for honesty must be villains, use the criminal laws to suppress the competitive process that undermines cartels. Of course federal laws have been used to enforce cartels before; the Federal Maritime Commission is a cartel-enforcement device. Inconsistent federal laws also occur; the United States both subsidizes tobacco growers and discourages people from smoking. So if the United States simultaneously forbids cartels and forbids undermining cartels by cheating, we shall shrug our shoulders and enforce both laws, condemning practical jokes along the way. But what is it about § 1341 that labels as a crime all deceit that inflicts any loss on anyone? Firms often try to fool their competitors, surprising them with new products that enrich their treasuries at their rivals' expense. Is this mail fraud because large organizations inevitably use the mail? "Any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" reads like a description of schemes to get money or property by fraud rather than methods of doing [\*\*19]  business that incidentally cause losses.

None of the Supreme Court's mail fraud cases deals with a scheme in which the defendant neither obtained nor tried to obtain the victim's property. It has, however, addressed the question whether 18 U.S.C. § 371, which prohibits conspiracies to defraud the United States, criminalizes plans that cause incidental loss to the Treasury. *Tanner v. United States,* 483 U.S. 107, 130, 97 L. Ed. 2d 90, 107 S. Ct. 2739 (1987), holds that § 371 applies only when the United States is a "target" of the fraud; schemes that cause indirect losses do not violate that statute. *McNally* tells us that § 371 covers a broader range of frauds than does § 1341,  [\*1226]  see 483 U.S. at 358-59 n.8, and it follows that business plans causing incidental losses are not mail fraud. We have been unable to find any appellate cases squarely resolving the question whether the victim's loss must be an objective of the scheme rather than a byproduct of it, perhaps because prosecutions of the kind this case represents are so rare. [[121]](#footnote-121)2 According to the prosecutor, however, there have been such cases, and in this circuit. The  [\*\*20]  United States contends that we have already held that a scheme producing an incidental loss violates § 1341. A representative sample of the cases the prosecutor cites shows that we have held no such thing.

 [\*\*21]  For example, *United States v. Ashman,* 979 F.2d 469, 477-83 (7th Cir. 1992), affirms convictions for fraud in a matched-order scheme on the floor of the Chicago Board of Trade. Customers sent orders for execution "at the market." Traders paired some of these orders off the market at times chosen to divert profits to themselves. This deprived the customers of the benefits provided by an open-outcry auction; more important, it moved money directly from customers' accounts to the traders' accounts. The transfers were the objective of the scheme. Nothing comparable took place here; no money moved from the universities to Walters. There is, however, some parallel in *Ashman:* we held that trades executed after the market was limit-up or limit-down could not support mail fraud convictions. *Id.* at 479. Once the market had moved the limit for the day, customers received the same price no matter when or with whom they traded. A customer willing to trade at a known price is like a university willing to give a scholarship to a known athlete. A customer who loses the honesty of the traders, but no money, has not been defrauded of  [\*\*22]  property; a university that loses the benefits of amateurism likewise has been deprived only of an intangible right, which per *McNally* does not support a conviction. [[122]](#footnote-122)3

*United States v. Richman* sustained mail fraud convictions [\*\*23]  arising out of a lawyer's attempt to bribe the claims adjuster for an insurance company. Retained to represent the victim of an accident, the lawyer offered the adjuster 5 percent of any settlement. Here was a fraud aimed at obtaining money from the insurer--a settlement was the objective rather than a byproduct of the scheme. The lawyer defended by contending that, because his client really *had* been injured, the insurer would have paid anyway. 944 F.2d at 330. This was highly implausible; why was the lawyer willing to bribe the adjuster? The scheme was designed to increase the settlement, or to induce the insurer to pay even if its insured was not negligent. At all events, we observed, the statute prohibits schemes that are designed to bilk other persons out of money or other property; the lawyer's scheme had this objective even though the deceit might have been unnecessary. 944 F.2d at 330-31. Walters lacked any similar design to separate the universities from their money. Then there is *United States v. Jones,* 938 F.2d 737 (7th Cir. 1991). The Joneses impersonated loan brokers. In exchange for [\*\*24]  $ 4,000 paid up front, they promised  [\*1227]  to procure large loans for their clients. Although they accepted almost $ 10 million in fees, they never found funding for a single client. Next they dispersed the money in an effort to prevent the assessment and collection of taxes on the booty. Our holding that the scam violated both § 371 and § 1343 (wire fraud) by preventing the United States from taking its cut of the proceeds does not support a conclusion that any deceit that incidentally causes a loss to someone also violates federal law.

Many of our cases ask whether a particular scheme deprived a victim of property. E.g., *Lombardo v. United States,* 865 F.2d 155, 159-60 (7th Cir. 1989). They do so not with an emphasis on "deprive" but with an emphasis on "property"--which, until the enactment of 18 U.S.C. § 1346 after Walters' conduct, was essential to avoid the "intangible rights" doctrine that *McNally* jettisoned. No one doubted that the schemes were designed to enrich the perpetrators at the victims' expense; the only difficulty was the proper characterization of the deprivation. [[123]](#footnote-123)4 Not until today have we dealt with [\*\*25]  a scheme in which the defendants' profits were to come from legitimate transactions in the market, rather than at the expense of the victims. ***HN6***[[](#Bookmark_clscc6)] Both the "scheme or artifice to defraud" clause and the "obtaining money or property" clause of § 1343 contemplate a transfer of some kind. Accordingly, following both the language of § 1341 and the implication of *Tanner,* we hold that ***HN7***[[](#Bookmark_clscc7)] only a scheme to obtain money or other property from the victim by fraud violates § 1341. A deprivation is a necessary but not a sufficient condition of mail fraud. Losses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement.

 [\*\*26]  Anticipating that we might come to this conclusion, the prosecutor contends that Walters is nonetheless guilty as an aider and abettor. If Walters did not defraud the universities, the argument goes, then the athletes did. Walters put them up to it and so is guilty under 18 U.S.C. § 2, the argument concludes. But the indictment charged a scheme *by Walters* to defraud; it did not depict Walters as an *aide de camp* in the students' scheme. The jury received a boilerplate § 2 instruction; this theory was not argued to the jury, or for that matter to the district court either before or after the remand. Independent problems dog this recasting of the scheme--not least the difficulty of believing that the students hatched a plot to employ fraud to receive scholarships that the universities had awarded them long before Walters arrived on the scene, and the lack of evidence that the students knew about or could foresee any mailings. Walters is by all accounts a nasty and untrustworthy fellow, but the prosecutor did not prove that his efforts to circumvent the NCAA's rules amounted to mail fraud.

REVERSED

**[add Gatto indictment]**

1. 39 See QUIRK & FORT, HARD BALL, supra note 10, at 61-62. [↑](#footnote-ref-1)
2. 40 See Grievance No. 87-3 supra note 11, at 2-3; see also In the Matter of the Arbitration Between Major League Baseball Players Ass'n and the Twenty-Six Major League Baseball Clubs, Grievance No. 86-2 (1986) (Roberts, Arb.), at 1-2 [hereinafter Grievance No. 86-2]; WEILER & ROBERTS, supra note 12, at 285. [↑](#footnote-ref-2)
3. 41 See WEILER & ROBERTS, supra note 12, at 285. [↑](#footnote-ref-3)
4. 42 See Grievance No. 86-2, supra note 40, at 2. [↑](#footnote-ref-4)
5. 43 See id. [↑](#footnote-ref-5)
6. 44 See ABRAMS, supra note 9, at 28. [↑](#footnote-ref-6)
7. 45 Marc Edelman, Has Collusion Returned to Baseball? Analyzing Whether a Concerted Increase in Free Agent Player Supply Would Violate Baseball's "Collusion Clause," 1 LOY. L.A. ENT. L. REV. 159, 161 (2004). [↑](#footnote-ref-7)
8. 46 JANE LEAVY & SANDY KOUFAX, A LEFTY'S LEGACY (HarperCollins 2003) ("[Koufax's] joint holdout with Don Drysdale in 1966 was an unprecedented act of solidarity, a revolutionary act, received as heresy in a time of national rebellion. The world of baseball has never been the same."). [↑](#footnote-ref-8)
9. 47 Id.; see also Edelman, supra note 45, at 161. [↑](#footnote-ref-9)
10. 53 See generally Edelman, supra note 45, at 162. [↑](#footnote-ref-10)
11. 54 Id. at 162 (citing JAMES QUIRK & RODNEY FORT, PAY DIRT: THE BUSINESS OF PROFESSIONAL TEAM SPORTS 212 (1992) [hereinafter QUIRK & FORT, PAY DIRT]). [↑](#footnote-ref-11)
12. 55 See, e.g., QUIRK & FORT, PAY DIRT, supra note 54, at 212. [↑](#footnote-ref-12)
13. 56 Specifically, concerns about collusion in the market for free agent players emerged during the 1981-82 off-season; however, the MLBPA ultimately dropped its grievance upon finding an improved market for free agents during the 1982-83 off-season. See Peter Gammons, A Positive Step Forward: Players' Owners Develop Programs to Check Drug, Alcohol Problems, THE BOSTON GLOBE, Jan. 16, 1983 ("The Players Association reportedly is dropping its collusion suit from the last free agent crop. This year's signings have made the suit seem a tad silly."); Peter Pascarelli, Hall of Fame Voting Remains Inconsistent, MIAMI HERALD, Jan. 23, 1983, at 5C ("The Players Association's grievance over alleged collusion among owners involving free agents is likely to be quietly dropped after this season's improved free-agent climate."). [↑](#footnote-ref-13)
14. 57 See generally Gammons, supra note 56. [↑](#footnote-ref-14)
15. 58 See Mecury News Wire Services, Union Chief Complains About Free-Agent Plot, SAN JOSE MERCURY NEWS, Dec. 20, 1985, at 3E (citations omitted):

    Don Fehr, chief of the baseball players union, calls the free-agent negotiating position of the 26 major league clubs strange, to say the least. Not a single free agent has signed with any club except his own during the current off-season. Players seem to be worth thousands to their former clubs, but not a nickel to others, Fehr said Thursday.

    Id.; see also Dave Anderson, 1985 Sports Review: Looking Back at the Bad and the Beautiful, N.Y. TIMES, Dec. 29, 1985, at 51 ("As the year ended, either in thrift or in collusion, free agents, notably the outfielder Kirk Gibson, were being ignored by clubs in need of available talent."); Jerome Holtzman, Big Leaguers Not Getting "That Little Something Extra," CHI. TRIB., Dec. 15, 1985, at 4. [↑](#footnote-ref-15)
16. 59 See Glen Macnow, Free Agency/The Big Money and the Big Offers are Disappearing as Major-League Owners Fashion the "Era of Good Sense," HOUSTON CHRON., Dec. 25, 1985. [↑](#footnote-ref-16)
17. 60 See id. [↑](#footnote-ref-17)
18. 61 See, e.g., Tigers' Gibson Signs Just Before Deadline, CHI. TRIB., Jan. 10, 1986, at 3. [↑](#footnote-ref-18)
19. 62 See Aaron Bernstein, Baseball's Owners Want to Play Softball: Their Revenue-Sharing Proposal Could Ward Off a Players' Strike, BUS. WK., Dec. 18, 1989, at 52 ("Owner collusion cut players' share to 46% in 1988. And while salaries are rising rapidly this year, the new TV contracts will lift revenues even faster. The players face this choice: Try to regain the 53% share they had in 1983 by standing pat or give up some potential gains to stop the fighting."); Steve Fainaru, Ueberroth Made Majors a Big Business, DAILY NEWS (Los Angeles, CA), Apr. 2, 1989, at 1 ("With Ueberroth harping and beating, average players salaries increased a modest 4.7 percent between 1986 and '88. Total revenue, according to commissioner's office figures, rose 770 percent between 1986 and '87 alone."). [↑](#footnote-ref-19)
20. 63 See Macnow, supra note 59. [↑](#footnote-ref-20)
21. 64 Id. [↑](#footnote-ref-21)
22. 65 See Donnie Moore Profile, available at http://www.baseball-reference.com/m/mooredo01.shtml (last visited Nov. 11, 2008). [↑](#footnote-ref-22)
23. 66 See Macnow, supra note 59. [↑](#footnote-ref-23)
24. 67 See Holtzman, supra note 58. [↑](#footnote-ref-24)
25. 68 Ross Newhan, Detroit Slugger Kirk Gibson May Spark a Bidding War; Reliever Donnie Moore Gets a Serious Offer from the Angels, L.A. TIMES, Oct. 29, 1985, at 1. [↑](#footnote-ref-25)
26. 69 Holtzman, supra note 58; see also Peter Gammons, Intentional Pass Irks Gibson; Owners' New Strategy: They Will No Longer Pitch to Free Agents, THE BOSTON GLOBE, Nov. 24, 1985, at 62:

    The Cubs were the first major market that evaporated on Kirk Gibson. Then came the Royals and, Monday, the Braves. Now that all the evaporation has taken place, the only choice the prize of this year's free agent market seems to be left with is going back to the Tigers.

    Id.; United Press International, Gibson Fed Up with Tigers' Stall Tactics, SAN JOSE MERCURY NEWS, Dec. 22, 1985, at 17E ("Gibson's agent has suggested collusion among club-owners to hold down the price of free agent marketing."); Tim Kurkjian, Baseball's Free Agents in a Freeze, DALLAS MORNING NEWS, Dec. 12, 1985, at 1B ("Something is going on here. Outfielder Kirk Gibson, maybe the top free-agent attraction since Dave Winfield in 1980, has received one offer - from Detroit, three years for $ 3.9 million. Tigers General Manager Bill Lajoie said it's his best offer. Gibson, obviously believing himself worth a lot more, said he would rather 'vomit' than sign for three years with Detroit."); Ben Walker, Owners Throwing the Players a Curve, L.A. TIMES, Dec. 15, 1985, at 31:

    "There's a very, very unified effort to close off negotiations, specifically with Kirk," says Gibson's agent, Doug Baldwin. "We're at an absolute dead end right now. We haven't heard from a single team." . . . Yet at age 28, Gibson, an outfielder who batted .287 with 29 home runs, 97 runs batted in and 30 stolen bases last season, is the kind of player who would have attracted tremendous attention in the past. In addition, procedural changes this year allow any team that wants to pursue a free agent to go after him.

    Id. [↑](#footnote-ref-26)
27. 70 Peter Gammons, Turner No Longer Pursuing Gibson, BOSTON GLOBE, Nov. 19, 1988, at 78 ("Well, lo and behold, four days later, Turner announced that he had changed his mind and - like the Royals and Cubs - the Braves would not offer Gibson all that Gen. Sherman left behind."). [↑](#footnote-ref-27)
28. 71 Union Chief Complains about Free-Agent Plot, supra note 58. [↑](#footnote-ref-28)
29. 72 Id. [↑](#footnote-ref-29)
30. 73 See, e.g., Murray Chass, Murray Chass on Baseball: Familiar Problem for Pinella, N.Y. TIMES, Dec. 15, 1985, at 57:

    The Seattle Mariners, seeking a veteran catcher to help their young pitching staff, could have signed Steve Yeager as a free agent. Instead, they waited until he re-signed with the Los Angeles Dodgers for a guaranteed $ 600,000, then not only took on the contract but also gave up a hard-working pitcher, Ed VandeBerg, for him. Dick Balderson, the Mariners' general manager, acknowledged that "it might have been" easier to pursue Yeager as a free agent, but, he added, "at that point it wasn't the direction we wanted to go."

    Id. [↑](#footnote-ref-30)
31. 74 Mercury News Wire Services, supra note 58. [↑](#footnote-ref-31)
32. 75 See Larry Whiteside, Award Tops $ 10M: Collusion to Cost Baseball Owners, BOSTON GLOBE, Sept. 1, 1989, at 51. [↑](#footnote-ref-32)
33. 76 Donnie Moore was one of the most dominant relievers in baseball during the 1985 season. Moore not only made the 1985 American League All-Star Team but he also finished sixth in the voting for American League Most Valuable Player and seventh in the voting for the American League Cy Young Award. During the season, Moore also finished third in the American League in saves (31). See Donnie Moore Profile, supra note 65. [↑](#footnote-ref-33)
34. 77 Kirk Gibson was one of the most dominant outfielders in baseball during the 1984 and 1985 seasons. In 1984, Gibson finished sixth in the American League Most Valuable Player voting, posting a .287 batting average, with 27 home runs, 91 RBI and 29 stolen bases. In 1985, Gibson finished eighteenth in the American League Most Valuable Player voting, posting a .287 batting average, with 29 home runs, 97 RBI and 30 stolen bases. See Kirk Gibson Profile, available at http://www.baseball-reference.com/g/gibsoki01.shtml (last visited Nov. 3, 2008). [↑](#footnote-ref-34)
35. 78 Carlton Fisk won the Silver Slugger Award and was elected to the all-star game as a catcher in 1985. That season, Fisk hit .238 with 37 home runs, 107 RBI and 17 stolen bases. See Carlton Fisk Profile, available at http://www.baseball-reference.com/f/fiskca01.shtml (last visited Nov. 3, 2008). [↑](#footnote-ref-35)
36. 79 Tony Bernazard, a 5'9" 160-lb second baseman, was one of the grittier performers in the league. Bernazard, at the time just age 27, was coming off of his fourth consecutive season as a starting second baseman. In 1985, Bernazard batted .274 with 11 home runs and 17 stolen bases-all solid numbers in that era for a second baseman. See Tony Bernazard Profile, available at http://www.baseball-reference.com/b/bernato01.shtml (last visited Nov. 3, 2008). [↑](#footnote-ref-36)
37. 80 Phil Niekro was a five-time all-star who as of the 1985 off-season had amassed 300 career wins, and was inducted into the Hall of Fame in 1997. See Phil Niekro Profile, available at http://www.baseball-reference.com/n/niekrph01.shtml (last visited Nov. 3, 2008). In 1985, Phil Niekro had finished ninth in the American League in wins (16), and eighth in the American League in strikeouts per inning pitched (6.10). Id. [↑](#footnote-ref-37)
38. 81 Joe Niekro was a one-time all-star who as of the 1985 off-season had amassed 231 wins. Joe Niekro had finished second in the National League Cy Young Award voting in 1979 and fourth in 1980. Although in the twilight of his career by 1985, Joe Niekro won 11 games that season, including two for the New York Yankees, after the Yankees acquired him late in the season from the Houston Astros. See Joe Niekro Profile, available at http://www.baseball-reference.com/n/niekrjo01.shtml (last visited Nov. 3, 2008). [↑](#footnote-ref-38)
39. 82 Chass, supra note 73 (listing Yeager's salary at $ 600,000). [↑](#footnote-ref-39)
40. 83 Grievance No. 86-2, supra note 40, at 2; see also Edelman, supra note 45, at 163 (citing Seabury, supra note 14, at 361); Jeffrey Perron, Administrative Law-Court's Scope of Review of Arbitration Decisions, 12 SETON HALL J. SPORT L. 131, 134 (2002). [↑](#footnote-ref-40)
41. 84 See, e.g., Murray Chass, Chats or Collusion; Baseball Owners Repeat Past at Their Peril, INT. HERALD TRIB. (N.Y.), Nov. 10, 2007, at 19 ("I recall how, before any arbitrator found the owners guilty, any time I mentioned collusion the clubs' chief labor executive, Barry Rona, would laugh and scoff at the idea."). [↑](#footnote-ref-41)
42. 85 Grievance No. 86-2, supra note 40, at 4. [↑](#footnote-ref-42)
43. 86 Walker, supra note 69; see also Kurkjian, supra note 69. [↑](#footnote-ref-43)
44. 87 Id. [↑](#footnote-ref-44)
45. 88 See Grievance No. 86-2, supra note 40; see also Collusion Ruling Costs Owners $ 10.5 Million, AKRON BEACON JOURNAL (Ohio), Sept. 1, 1989, at E1; Excerpts From the Ruling, N.Y. TIMES, Sept. 22, 1987, at A32; RAY YASSER ET AL., SPORTS LAW: CASES AND MATERIALS 490-91 (6th ed. 2006). [↑](#footnote-ref-45)
46. 89 Grievance No. 86-2, supra note 40. Roberts thereafter awarded the MLBPA $ 10,528,087 in damages. See also LEE LOWENFISH, THE IMPERFECT DIAMOND: A HISTORY OF BASEBALL'S LABOR WARS 267-68 (DeCupo Press 1991) (1980); Seabury, supra note 14, at 362; Collusion Ruling Costs Owners $ 10.5 Million, supra note 88; Richard Justice, Collusion Award is $ 10.5 Million: Baseball Owners are Wincing, WASH. POST, Sept. 1, 1989, at D1; Chris Mortensen, Collusion Decision will Cost AL/NL Owners $ 10.5, ATLANTA J. & CONST., Sept. 1, 1989, at F1 ("Arbitrator Roberts also decided that players damaged by the loss of multi-year contracts, signing bonuses, bonus clauses, and no-trade clauses . . . could submit additional damage claims."). [↑](#footnote-ref-46)
47. 90 Grievance No. 86-2, supra note 40, at 15 ("The right of the clubs to participate in the free agent provisions of the Basic Agreement no longer remained an individual matter to be determined solely for the benefit of each club. The contemplated benefit of common goal was substituted . . . in violation of the prohibition against concerted conduct found in [the Basic Agreement]."). [↑](#footnote-ref-47)
48. 91 Id. at 3-4. [↑](#footnote-ref-48)
49. 92 Id. at 3, 11. [↑](#footnote-ref-49)
50. 93 Id. at 11. [↑](#footnote-ref-50)
51. 94 Id. at 10. [↑](#footnote-ref-51)
52. 95 Grievance No. 86-2, supra note 40, at 10. [↑](#footnote-ref-52)
53. 96 Id. at 10 [↑](#footnote-ref-53)
54. 97 Id. at 10. [↑](#footnote-ref-54)
55. 98 Id. at 14 (quotations and citations omitted). [↑](#footnote-ref-55)
56. 99 Id. [↑](#footnote-ref-56)
57. 100 See, e.g., Joseph Durso, Yanks Top Royals, Gooden Foils Pirates in Openers; Mets Win By 4-2, N.Y. TIMES, Apr. 9, 1986, at A23 (discussing Opening Day for the New York baseball teams). [↑](#footnote-ref-57)
58. 101 See Peter Alfano, The World Series '86: Mets Win It, City Loves It, N. Y. TIMES, Oct. 28, 1986, at D29; Dave Anderson, Sports of the Times: Mets Reach "116," N. Y. TIMES, Oct. 28, 1986, at D29; Joseph Durso, The World Series: '86, Mets Get the Magic Back, Take 7th Game of the Series; 55,032 at Shea and Millions in Other Spots Celebrate as Red Sox Finally Fall, 8-5, N. Y. TIMES, Oct. 28, 1986, at A1. [↑](#footnote-ref-58)
59. 102 See id.; Leigh Montville, After Heartbreak, A Showdown Tonight: Red Sox Still Chasing World Series Title, THE BOSTON GLOBE, Oct. 27, 1986, at 1; Leigh Montville, They Were Just One Pitch Away, THE BOSTON GLOBE, Oct. 26, 1986, at 1 ("One pitch away from a world championship. One pitch from an end to 68 years of frustration. One pitch. Not close enough."). [↑](#footnote-ref-59)
60. 103 See Peter Richmond, Knight Turnaround Earns MVP Award, MIAMI HERALD, Oct. 28, 1986, at 1C. [↑](#footnote-ref-60)
61. 104 See, e.g., Carlton Joins List of Free Agent Filings, SAN JOSE MERCURY NEWS, Nov. 1, 1986, at 15E; Murray Chass, Horner Becomes Free Agent, N. Y. TIMES, Oct. 30, 1986, at D31 ("Bob Horner, who is virtually certain to join baseball's select circle of $ 2 million-a-year players, was one of six players who filed for free agency yesterday. Thirteen players, five of whom earned $ 1 million or more this year, have placed their names on the free-agent list in the first two days of the 15-day filing period."); Free-Agent List Now Stands at 25, ORLANDO SENTINEL, Nov. 1, 1986, at 7. [↑](#footnote-ref-61)
62. 105 See Tracy Ringolsby, Signs Indicate a Hard Winter, DALLAS MORNING NEWS, Nov. 9, 1986, at 3B ("The second season is underway - the one played at the bargaining table. While the free-agent wars are in the preliminary stages - the deadline for filing is Tuesday - owners already are showing signs of playing hardball with finances for a second consecutive winter."). [↑](#footnote-ref-62)
63. 106 See Collision on Collusion Continues, L.A. TIMES, Nov. 2, 1986, at 10; Steve Marcus, Fehr: Union to Fight Collusion: Says Union Stand May Cause Strikes, NEWSDAY (N.Y.), Jan. 29, 1987, at 145 ("Major League Players Association director Don Fehr yesterday delivered a strongly worded indictment against baseball's owners, renewing his contention that a conspiracy exists to restrict player movement for the purpose of driving down salaries. Fehr said the union is prepared to counter with legal action and, if necessary, a strike when the Basic Agreement runs out in 1989."). [↑](#footnote-ref-63)
64. 107 Edelman, supra note 45; see also Grievance No. 87-3, supra note 11; LOWENFISH, supra note 89, at 264; Stephen Willis, A Critical Perspective of Baseball's Collusion Decisions, 1 SETON HALL J. SPORTS L. 104, 110 (1991). [↑](#footnote-ref-64)
65. 108 See Edelman, supra note 45, at 164; see also Dan Shaughnessy, It's Time for LA to Cash In, Astros Can't Count on First Place if Dodgers Make a Move Soon, THE BOSTON GLOBE, Aug. 10, 1986, at 56 ("Arbitrator Tom Roberts was fired by baseball's owners Tuesday, a few days after striking the drug-testing clauses in ballplayers' contracts. The owners were afraid that Roberts was going to rule against them again in the collusion/free agent grievance."). [↑](#footnote-ref-65)
66. 109 Edelman, supra note 45, at 164; see also Collision on Collusion Continues, supra note 106, at 10 (explaining that the MLB clubs wanted Roberts removed from Collusion I as well; however, Roberts "was restored to the collusion case and resumed hearings at the end of the World Series"). [↑](#footnote-ref-66)
67. 110 Edelman, supra note 45, at 164; see also George Nicolau Biography, available at http://www.nmb.gov/arbitrator-resumes/nicolau-george-gnres.pdf (last visited Nov. 3, 2008). [↑](#footnote-ref-67)
68. 111 See id. [↑](#footnote-ref-68)
69. 112 See Grievance No. 86-2, supra note 40. [↑](#footnote-ref-69)
70. 113 Edelman, supra note 45, at 164-65. [↑](#footnote-ref-70)
71. 114 Grievance No. 87-3, supra note 11, at 16. The MLBPA further asserted:

    (1) That no re-entry free agent received offers from any club save his former club unless and until that club had declared its lack of interest or became ineligible to sign or negotiate with the player after the passing of the January 8 deadline; and (2) that, with one possible exception, no such free agent ever had at any one time two or more offers from two or more clubs.

    Id. (quotations omitted); see also Edelman, supra note 45, at 165 ("Although the MLBPA argued that direct proof of the defendants' agreement was not required under the antitrust doctrine of conscious parallelism, the MLBPA again produced some evidence indicating there was a formal agreement still in place."). [↑](#footnote-ref-71)
72. 115 Grievance No. 87-3, supra note 11, at 14 (quotations omitted). In testifying that the alleged conspiracy was entirely "imagined," club witnesses claimed there was interest in certain players by new clubs even before their former club indicated a lack of interest, and that, ultimately, certain players did switch teams. Id. at 17. [↑](#footnote-ref-72)
73. 116 Id. at 19. [↑](#footnote-ref-73)
74. 117 Id. at 2, 21. The ruling was based on the testimony of 50 witnesses, 335 exhibits, 8,346 pages of transcripts, and almost 450 pages of submitted briefs. Id. [↑](#footnote-ref-74)
75. 118 Id. at 24. [↑](#footnote-ref-75)
76. 119 Id. at 66. [↑](#footnote-ref-76)
77. 120 Id. [↑](#footnote-ref-77)
78. 121 Grievance No. 87-3, supra note 11, at 49-50; see also Edelman, supra note 45, at 165. [↑](#footnote-ref-78)
79. 122 Edelman, supra note 45, at 165. [↑](#footnote-ref-79)
80. 123 Id. Stunned by these events, Chicago Cubs President Dallas Green sent a memorandum to both the Players Relations Committee and to league presidents Bobby Brown and Bart Giamatti, stating that he had not been as prepared as he probably should have been to handle Dawson's proposal. Grievance No. 87-3, supra note 11, at 50. [↑](#footnote-ref-80)
81. 124 Grievance No. 87-3, supra note 11, at 50-52. [↑](#footnote-ref-81)
82. 125 Id. at 52-55; Edelman, supra note 45, at 165-66. [↑](#footnote-ref-82)
83. 126 See Grievance No. 87-3, supra note 11, at 52. [↑](#footnote-ref-83)
84. 127 Id. [↑](#footnote-ref-84)
85. 128 Based on these findings, Nicolau then awarded the MLBPA an additional $ 138 million in damages. Edelman, supra note 45, at 166. Nicolau further ordered that MLB clubs grant those players deprived of their proper free agent rights with the opportunity to accept "new look" free agency following the 1998 season. See Baseball, HOUSTON CHRON., Nov. 29, 1989, at 7. [↑](#footnote-ref-85)
86. 129 Cf. Bill Fleischman, Kubek: Stance on Free Agents Diluting the Game, PHILA. INQUIRER, Apr. 7, 1987, at B27 (noting that the benches of Major League Baseball teams were weakened because of the growing number of veteran players that elected not to play baseball at all when not offered the kind of contracts they had expected). [↑](#footnote-ref-86)
87. 130 See Bob Verdi, Tensions of Opening Day: Imperfects Grow in Sports' Most Perfect Game, CHI. TRIB., Apr. 5, 1987, at 1 ("Opening Day, a celebration for the ages, will be tarnished further by an unrest in the ranks that will not go away quietly. Rarely have players been so united on any issue, this one being their accusation of collusion."). [↑](#footnote-ref-87)
88. 131 Id. (quotations omitted). [↑](#footnote-ref-88)
89. 132 See Fred Mitchell, Viola's Two Wins Make Him MVP, CHI. TRIB., Oct. 26, 1987, at 4; see also Dan Shaughnessy, Minnesota Brings it Home, Twins Champs at Last, THE BOSTON GLOBE, Oct. 26, 1987, at 33. [↑](#footnote-ref-89)
90. 133 Ross Newhan, Arbitrator Rules Baseball Owners Guilty of Collusion, L.A. TIMES, Sept. 22, 1987, at 1; see also Tracy Ringsolsby, Collusion Case Goes to Players, DALLAS MORNING NEWS, Sept. 22, 1987, at 1B. [↑](#footnote-ref-90)
91. 134 Morris Says Ruling Proves Owners are Crooks, S. FLA. SUN-SENTINEL, Sept. 22, 1987, at 4C. [↑](#footnote-ref-91)
92. 135 See Glen Macnow, A Shift In the Free Agent Market: A Freeze-Out Thawed, but Neither Side is Particularly Happy, PHILA. INQUIRER, Jan. 9, 1988, at C1. [↑](#footnote-ref-92)
93. 136 See id. ("'Collusion is price-fixing, not location-fixing,' the union's associate counsel, Gene Orza, said in yesterday's New York Times. . . . 'Clubs are making offers, but they're all the same offer. . . . The numbers aren't competitive; they're orchestrated.'"); see also Steve Marcus, Union Charges Owners are on Collusion Course, NEWSDAY (N.Y.), Nov. 16, 1987, at 162:

    "There is no free market," agent Tony Attanasio said. "Look at Bob Horner; he can hit 30 homers a year and he gets no offers. And if you make an offer to a player that is coveted by his former team, whatever you do, don't make the offer unbelievable." That seems to be the case with Yankee free agent Dave Righetti, who has received several offers - all about the same - and none is believed to be much higher than what the Yankees are offering.

    Id. [↑](#footnote-ref-93)
94. 137 Players Union Files Grievance Alleging Third Case of Collusion, DALLAS MORNING NEWS, Jan. 21, 1988, at B5 ("'It's become obvious to us that they're orchestrating prices,' Gene Orza, associate general counsel of the union, said Wednesday. 'When there's interest from teams, it's remarkably similar.'"). [↑](#footnote-ref-94)
95. 138 In the Matter of the Arbitration Between Major League Baseball Players Ass'n and the 26 Major League Clubs, Grievance No. 88-1 (1990) (Nicolau, Arb.) at 1 [hereinafter Grievance No. 88-1]; see also Edelman, supra note 45, at 166 ("The 'Information Bank' provided all teams with access to detailed information about every contract offer made to any free agent player and permitted every team to get immediate knowledge of the demand for services of every player in the free agent market.") (citation omitted). [↑](#footnote-ref-95)
96. 139 See Grievance No. 88-1, supra note 138, at 12. [↑](#footnote-ref-96)
97. 140 Id. at 34. [↑](#footnote-ref-97)
98. 141 Id. [↑](#footnote-ref-98)
99. 142 Id. at 15-16. [↑](#footnote-ref-99)
100. 143 Id. at 17. [↑](#footnote-ref-100)
101. 144 Id. at 18. Arbitrator Nicolau further pointed out that the Information Bank's "use was explained and encouraged as a centralized means of ascertaining what the clubs were offering particular free agents." Id. [↑](#footnote-ref-101)
102. 145 See generally Ronald Blum, Owners in No Rush to Pay for Collusion, Fehr Says, BALT. SUN, Feb. 19, 1990, at 3D (discussing eventual need to pay collusion damages). [↑](#footnote-ref-102)
103. 146 Edelman, supra note 45, at 167 (citing Willis, supra note 107, at 148); see also Murray Chass, Baseball: Players Said to Hit Collusion Jackpot, N.Y. TIMES, Nov. 4, 1990, at 81; QUIRK & FORT, HARD BALL, supra note 10, at 91. [↑](#footnote-ref-103)
104. 147 Id. [↑](#footnote-ref-104)
105. 148 See Murray Chass, Baseball, Market Will be Well-Stocked, N.Y. TIMES, Nov. 5, 1990, at C2; Helene Elliot, Parrish Signs for Three Years with the Angels, L.A. TIMES, Dec. 14, 1989, at 1; Parrish Declared Free, HOUSTON CHRON., Nov. 29, 1989, at 7 (explaining that arbitrator has ordered new look: free agency). [↑](#footnote-ref-105)
106. 149 Murray Chass, Murray Chass Says It's Hard to Believe Baseball's Collusion Case is Finally Closed, PITTSBURGH POST-GAZETTE, May 26, 2004, at B2. [↑](#footnote-ref-106)
107. 150 Id. [↑](#footnote-ref-107)
108. 151 See Jacob Lamme, The Twelve Year Rain Delay: Why a Change in Leadership will Benefit the Game of Baseball, 68 ALA. L. REV. 155, 177 (2004). [↑](#footnote-ref-108)
109. 152 See id. ("Instead of paying the $ 280 million settlement that Selig and the other owners agreed to, Commissioner Selig found a way to pawn off their debt onto the innocent. MLB (Selig and the owners) approved the expansion of the game into four new cities: Miami, Denver, Phoenix, and Tampa Bay."); see also Marc Topkin, Vincent: Expansion Was a "Mistake," ST. PETERSBURG PRESS (Fla.), Mar. 5, 2006, at C5 ("Vincent, who served [as commissioner] from 1989-92, said he would have preferred that baseball didn't expand but instead move troubled franchises to Denver, Arizona, South Florida and Tampa Bay, but the owners, desperate for cash to pay off millions in collusion damages, didn't listen."). [↑](#footnote-ref-109)
110. 153 Chass, supra note 148. [↑](#footnote-ref-110)
111. 154 Walker, supra note 69; see also Murray Chass, When Owners' Offers Better Reflect Starters' Worth, N.Y. TIMES, Mar. 25, 2008, at D3 (discussing continued ownership denial of collusion); Kurkjian, supra note 69. [↑](#footnote-ref-111)
112. 155 See Fainaru, supra note 62 ("Ueberroth acknowledged, 'I have harped and beaten for good business practices,' but he denied that he encouraged the owners to act in concert."); see also Ross Newhan, Owners' Bill in Collusion: $ 10 Million, L.A. TIMES, Sept. 1, 1989, at 1 ("Ueberroth . . . denied that he orchestrated collusion and claimed that it stemmed from the owners' shock when they opened their books during the collective bargaining negotiations of 1985 and learned how much money was being lost."); Walker, supra note 69 ("'Collusion? I can't take that seriously,' Uerberroth said. 'The losses have built up and built up, and it just can't continue. Common sense has taken over.'"). [↑](#footnote-ref-112)
113. 156 Grievance No. 87-3, supra note 11, at 49-51; see also Chass, supra note 148 ("Selig . . . has always refrained from discussing collusion."); Selig Envies the NFL's Situation but Critics Say Commissioner is to Blame, ST. LOUIS DISPATCH, Aug. 27, 2002, at E1 ("Selig adamantly denies he was behind collusion."). [↑](#footnote-ref-113)
114. 157 Peter Pascarelli, Drama Should Be Abound, NEW ORLEANS TIMES PICAYUNE, Sept. 3, 1985, at C5. [↑](#footnote-ref-114)
115. 225 See generally MITCHELL REPORT, supra note 2, at 15. [↑](#footnote-ref-115)
116. 226 See id. [↑](#footnote-ref-116)
117. 227 See, e.g., Personal author, compiler, or editor name(s); click on any author to run a new search on that name.Mohammed Rawwas, Ziad Swaidan & Hans Isakson, A Comparative Study of Ethical Beliefs of Master of Business Administration Students in the United States with those in Hong Kong, 82 J. EDUC. FOR BUS. 146 (2007) ("As a result of the corporate scandals involving Enron, WorldCom, Tyco, Health-South, Martha Stewart, and the Wall Street analysts and the firms that supported them, educators have developed a growing concern about the character of today's master of business administration (MBA) students' ethical beliefs, primarily because the students are tomorrow's business leaders."); cf. Greg Burns, Enron's Skilling Gets 24-year Prison Term; Judge Rejects His Plea for Leniency, CHI. TRIB., Oct. 24, 2006, at C1. [↑](#footnote-ref-117)
118. 228 See Steve Churm, An Ethical View, ORANGE COUNTY METRO. (Newport Beach, Cal.), May 27, 2004, at 10:

     Josephson expresses concern over what he considers "influences on young people" today. For example, highly-rated reality TV shows, he says, are "absolutely subversive." Programs like "Survivor," "The Bachelor'"and "The Apprentice," Josephson cautions, send a message that "being sneaky and lying" is not only acceptable behavior but also the way to get ahead. "It's a troubling, troubling trend that parents must play an active role to help stop," he says. Otherwise, Josephson says, we may be doomed to more Enrons.

     Id. [↑](#footnote-ref-118)
119. 229 Cf. MITCHELL REPORT, supra note 2, at 15 (making the same argument with respect to steroid use). [↑](#footnote-ref-119)
120. 1The United States contends that Walters has waived the causation argument by failing to raise it with sufficient specificity after remand. Yet the judge addressed this subject and rejected Walters' argument on the merits. 775 F. Supp. at 1181. ***HN5***[[](#Bookmark_clscc5)] An argument presented clearly enough to draw a response from the district judge has been preserved for decision on appeal. Moreover, causation is an element of the offense, and Walters expressly contended that the evidence was deficient. Both the plea agreement and the letter of understanding negotiated by the parties preserve this contention. [↑](#footnote-ref-120)
121. 2Cases such as *United States v. Goodrich,* 871 F.2d 1011, 1013 (11th Cir. 1989); *United States v. Evans,* 844 F.2d 36, 39-40 (2d Cir. 1988), and *United States v. Baldinger,* 838 F.2d 176, 180 (6th Cir. 1988), contain language implying support for Walters' position, but none of these cases directly confronted the question. Other cases contain language seeming to undermine that position, e.g., *United States v. Gimbel,* 830 F.2d 621, 627 (7th Cir. 1987), but again the court did not confront the issue. *(Gimbel* reversed the conviction on *McNally* grounds; the panel's passing observation that the scheme "resulted in the [victim] being deprived of money or property" hardly settles the question in our case.) One district court has held that the victim's loss must be an objective of the scheme. *United States v. Regan,* 713 F. Supp. 629, 636-38 (S.D.N.Y. 1989). The district court's opinion in Walters' case appears to be the only expressly contrary authority. [↑](#footnote-ref-121)
122. 3The United States recasts this argument by contending that the universities lost (and Walters gained) the "right to control" who received the scholarships. This is an intangible rights theory once removed--weaker even than the position rejected in *Toulabi v. United States,* 875 F.2d 122 (7th Cir. 1989), and *United States v. Holzer,* 840 F.2d 1343 (7th Cir. 1988), because Walters was not the universities' fiduciary. *Borre v. United States,* 940 F.2d 215 (7th Cir. 1991), did not purport to overrule *Toulabi* and *Holzer,* and is at all events a case in which the fraud (a) transferred property from victim to perpetrator, and (b) was committed by a group of schemers that includes the victim's fiduciary. [↑](#footnote-ref-122)
123. 4In *Lombardo* the plan was to bribe a Senator by selling him, for $ 1.4 million, a piece of property worth $ 1.6 million. Had the scheme succeeded, the Senator would have been $ 200,000 richer and the Teamsters pension fund $ 200,000 poorer, although it might have received some "legislative appreciation." The defendants would have been among the beneficiaries of that "appreciation" and thus stood to receive, indirectly, a portion of the fund's loss. [↑](#footnote-ref-123)