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America, Land of the Free and Home of the Bullies: An Argument for Workplace Bullying Laws in Professional Sports

Cathryn Copeland Wood

AMERICA, LAND OF THE FREE AND HOME OF THE BULLIES: AN ARGUMENT FOR WORKPLACE BULLYING LAWS IN PROFESSIONAL SPORTS

*Cathryn Copeland Wood**

I. INTRODUCTION

IT was the slur heard around the world when Miami Dolphins lineman Richie Incognito left a voicemail for his teammate, rookie offensive guard Jonathan Martin, calling him a "half-n—- piece of s—-," saying he wanted to "s—- in [Martin's] f—-ing mouth," and threatening to kill him.[1] Some rushed to Incognito's defense; the justifications ranged from a "this is the way of the locker room" mentality to the fact that Incognito's coaches looked to him as a leader to "toughen up" Martin and that Incognito was simply doing his job.[2] In fact, Dolphins teammates were quick to defend veteran Incognito and disclaim support for Martin. Dolphins quarterback Ryan Tannehill stated to the media, "If you asked Jonathan Martin who his best friend is on this team two weeks ago, he'd say Richie Incognito," expressing apparent frustration over Martin's change in tune.[3] Another teammate, tackle Tyson Clabo, refuted the public's perception of Incognito as a "psychopath racist."[4] Yet another teammate, wide receiver Brian Hartline, presumably in an attempt to undermine Martin's credibility, told the media that Martin was laughing about the

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1. Stephen Mansfield, *Incognito Scandal's Manly Men*, USA TODAY (Dec. 22, 2013, 4:39 PM), http://www.usatoday.com/story/opinion/2013/12/22/incognito-martin-bullying-nfl-column/4167505/; Eric Allen, Herm Edwards, & Bill Polian, *Culture of a Locker Room*, ESPN (Nov. 5, 2013, 9:09 AM), http://espn.go.com/nfl/story/_/id/9926139/richie-incognito-miami-dolphins-used-slurs-messages-jonathan-martin.

2. *See, e.g.*, Mansfield, *supra* note 1; Tony Manfred, *Miami Dolphins Coaches Reportedly Told Richie Incognito to "Toughen Up" Jonathan Martin Before Bullying Fiasco*, BUS. INSIDER (Nov. 6, 2013, 9:20 AM), http://www.businessinsider.com/dolphins-coaches-incognito-toughen-up-martin-2013-11.

3. Gary Mihoces, *Dolphins Players Defend Incognito, Question Martin in Bullying Case*, USA TODAY (Nov. 6, 2013, 8:31 PM), http://www.usatoday.com/story/sports/nfl/dolphins/2013/11/06/miami-dolphins-jonathan-martin-richie-incognito-locker-room/3458891/.

4. *Id.*

voicemail just before he turned it over to the team and the NFL, launching a league and legal investigation.[5] And on a silver platter, defensive tackle Randy Starks served the public the cliché that for so long has excused inhumane behavior in "tough" industries: "You can't have thin skin around here."[6]

On the other side of the fence, many criticized the lineman's actions as bullying, racism, harassment, and evidence of a moral deficiency in sports and our broader society.[7] One reporter characterized the incident as a disgrace, indicative of a "spreading cancer in society as a whole."[8] Another critic labeled the incident "disgusting" and chastised our society for propagating menacing and sociopathic behavior by professional athletes as long as it boosts on-field competition and, consequently, entertainment.[9] In a critique more of the audience than the actor, he hinted that perhaps Incognito was just "making sure the culture gets what the culture demands."[10] During a discussion on ESPN television, former Colts executive Bill Polian referred to teammates as "coworkers" whose job it is to foster a winning environment, described a "code of conduct" in the locker and weight rooms and other off-field team settings, and characterized Incognito's actions as "way over the line."[11] Polian admitted that rookie players do have certain customs such as providing donuts and chicken to veteran players, but he drew a line between those customs and bullying.[12] In the same conversation, football analyst and former coach Herm Edwards agreed that Incognito's actions were "over the line" and that veteran players should aim to foster camaraderie rather than intimidation.[13]

Fellow NFL players also stepped out against Incognito. David Garrard of the Houston Texans noted that he was not at all surprised that Incognito had become the center of a bullying controversy, stating, "You are what you are I guess."[14] Former player Bart Scott called for action against Incognito in a scathing radio segment:

> I want to see [NFL Commissioner] Roger Goodell step up . . . . [T]his guy needs to be out of this league. . . . You got to be some type of loser in your spare time away from the building you want to call me and leave threatening messages and text messages on my phone. That's taking bullying to a whole other level.[15]

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5. *See id.*
6. *Id.*
7. *See* Mansfield, *supra* note 1.
8. *Id.*
9. Tim Keown, *Failure Lies with Dolphins Leadership*, ESPN (Nov. 4, 2013), http://espn.go.com/nfl/story/_/id/9926888/miami-dolphins-kept-richie-incognito-control.
10. *Id.*
11. Eric Allen et al., *supra* note 1.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

And in perhaps the most significant backlash to Incognito's actions, the Dolphins suspended the lineman, releasing the statement: "We believe in maintaining a culture of respect for one another and as a result we believe this decision is in the best interest of the organization at this time," evidently repudiating Incognito's actions as beyond tolerable locker room banter and putting a sizeable dent in his football career.[16]

Whether one condones Incognito's behavior or not, no one can deny that the fiasco has raised the curtain shrouding the locker room and thrust bullying in professional sports into the public discourse. This Comment will posit that professional athletes are employees like many others in America and that bullying in the world of professional sports therefore should be viewed through the broader lens of workplace bullying. Section II of this Comment explores the history and intertwining of sports, culture, and the law. Section III illustrates the threat that workplace bullying poses to American employees and employers. Section IV explains why existing causes of action are insufficient to address workplace bullying. Section V considers proposed workplace bullying legislation in the United States, known as the Healthy Workplace Bill. Section VI discusses how the Healthy Workplace Bill would remedy the problem of bullying in professional sports. Lastly, the conclusion advocates the need for enactment of workplace bullying laws that would apply to all American workplaces, including professional sports teams.

II. SPORTS, CULTURE, AND THE LAW INTERTWINE THROUGHOUT HISTORY

A. Sports Have Evolved to Play a Central Role in Culture

"Sports" in forms less sophisticated than modern athletic competition seem to have been an important part of human culture since the beginning of the species. An investigation of the historical importance of sports in culture sheds light on the central role it plays in today's society. The earliest evidence of competitive sports comes from paintings on the wall of an Egyptian tomb dated circa 2000 B.C., depicting scenes from a wrestling match.[17] Over the next several centuries, sports achieved a more central role in culture, reaching a pinnacle when the Greeks founded the world's "first athletic fixture" in 776 B.C.: the Olympic Games.[18]

Homer's *The Iliad* offers some insight into what athletic competition was like in eighth century B.C. Greece and its lingering effect on modern society.[19] In the epic, a funeral crowd gathers to observe and participate

16. Tom Pelissero, *Dolphins Suspend Richie Incognito Amid Investigation*, USA Today (Nov. 4, 2013, 12:18 AM), http://www.usatoday.com/story/sports/nfl/dolphins/2013/11/04/miami-dolphins-richie-incognito-jonathan-martin-player-misconduct-investigation/3429871/.

17. *History of Sports and Games*, Hist. World, http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=ac02, 1 (last visited Mar. 2, 2014).

18. *Id.* at 2.

19. *Id.* at 2.

in a series of three athletic contests after burning the deceased's body on a pyre.[20] The accompaniment of a funeral with "funeral games" was a custom in Greek tradition.[21] In *The Iliad*, the first contest is a chariot race, and the scene evokes a typical athletic contest today.[22] It begins with an announcer: Achilles, the host of the event, stands before the crowd and delivers an introduction, which excites the audience for the upcoming show.[23] Next, the competitors strategize and prepare: one competitor, Antilochus, receives words of inspiration and tactical advice from his father.[24] Then, a high-speed, high-adrenaline contest ensues as the players struggle for the lead.[25] During the contest, the spectators even get into a fight over their "teams," and Achilles has to step in and break up the argument.[26] Finally, when the contest has ended, prizes are bestowed upon the victors, and one competitor accuses another of cheating.[27] In essence, by the mid-eighth century B.C., Greeks had set the stage for modern sports: announcers, strategy, contest, spectator rivalry, prizes, and sore losers.

In early athletic competition, profuse bloodshed was common. Most Americans have seen depictions or heard stories of the infamous Aztec ball game, *ullamaliztli*, wherein two teams of players used their hips, elbows, and heads to hit a hard rubber ball through stone hoops attached to the arena walls.[28] The ball weighed nearly ten pounds and was not allowed to touch the ground, so the game often became bloody as players threw themselves onto the court to save the ball.[29] Spectators gambled on contestants as the game pressed on and the stakes climbed.[30] Most people have heard, and most historians agree, that when a match ended, one team was sacrificed to the gods.[31] Closer to modern times, the Roman Coliseum was built around 72 A.D. and operated as popular public entertainment for 400 years.[32] The amphitheater seated more than 50,000 spectators (that is almost three Staples Centers—home of the Los Angeles Lakers), and people traveled from around the empire to watch fellow men battle each other and wild animals, often to the death.[33]

But as people evolve, sports evolve. Today, developed societies impose limits on the amount of violence and injury they will tolerate in sports.

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20. HOMER, THE ILIAD bk. XXIII, 192–261 (eighth century B.C.) *available at* http://www.poetryintranslation.com/PITBR/Greek/Iliad23.htm#_Toc239246470.
21. *History of Sports and Games*, *supra* note 17, at 2.
22. HOMER, *supra* note 20, at 1–53.
23. *Id.*
24. *Id.* at 262–361.
25. *Id.* at 362–447.
26. *Id.* at 448–98.
27. *Id.* at 499–565.
28. *Aztec Ball Game*, AZTEC-HISTORY.COM, http://www.aztec-history.com/aztec-ball-game.html (last visited Mar. 2, 2014).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Colosseum*, HIST. CHANNEL, http://www.history.com/topics/colosseum (last visited Apr. 17, 2014).
33. *Id.*

We no longer watch people fight to the death or sacrifice the losers of a match, and most people find those concepts repulsive and morally reprehensible. To the contrary, the evolution of American sports shows a continual focus on making sports safer and more humane. Baseball players wear helmets; football players wear helmets, rib protectors, and other pads; and basketball players are forbidden from hanging on the rim—all in the name of safeguarding players.[34] These changes reflect the evolution of modern society's desire to protect contestants engaged in healthy entertainment rather than to see them suffer.

One current movement toward safe sports is the shift in baseball from metal bats back to wooden bats. In the 1970s, aluminum bats replaced their wooden predecessors as the norm because they were cheaper.[35] However, people soon began to suspect that metal bats presented a greater danger to players. Metal bats seem to propel the ball harder and faster, and many players have suffered injury or death as a result of a blow to the head or chest.[36] Because of tragedies like these, restrictions on non-wood bats have increased, and wooden bats have begun to reclaim the field.[37]

The NFL has taken steps to help football evolve with societal norms. Recently, the American Academy of Neurology, in conjunction with the NFL Players Association, revised concussion guidelines in an effort to eviscerate rampant mild traumatic brain injury in the NFL.[38] Moreover, the New Orleans Saints endured scrutiny and pressure from the NFL, media, and public concerning their 2010 to 2013 seasons in connection with a bounty scandal.[39] After months of suspicion, an unidentified source revealed that the defensive coordinator of the Saints had created a bounty system in which defensive players could receive additional compensation for causing game-stopping physical injury to the opponent's players.[40] In response, the NFL imposed substantial sanctions on the team, suspending everyone from the players involved to the defensive coordinator and the head coach.[41] Further, shortly after the scandal emerged, NFL Commissioner Roger Goodell negotiated a new collective

34. OFFICIAL RULES OF THE NATIONAL BASKETBALL ASSOCIATION 40 (2013–2014), *available at* http://mediacentral.nba.com/media/mediacentral/Official-NBA-Rule-Book.pdf.

35. Ira Berkow, *Metal Bats Are an Issue of Life and Death*, N.Y. TIMES (July 16, 2006), http://www.nytimes.com/2006/07/16/sports/baseball/16bats.html?pagewanted=all&_r=0.

36. *Id.* (discussing the death of eighteen-year-old Brandon Patch, two-week coma of sixteen-year-old Bill Kalant, and severe injuries of fourteen-year-old Anthony Ricci at the hands of metal bats).

37. *See, e.g.*, *Approved and Unapproved Non-wood BESR Baseball Bat Lists*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS (Jan. 18, 2013), http://www.nfhs.org/content.aspx?id=4775.

38. Bret Stetka, MD, & Andrew N. Wilner, MD, *New Concussion Guidelines: An Analysis*, MEDSCAPE MULTISPECIALTY (April 17, 2013), http://www.medscape.com/viewarticle/782407.

39. Larry Holder, *New Orleans Saints' Bounty Scandal Timeline as Sean Payton Prepares for Return*, THE TIMES-PICAYUNE (Aug. 30, 2013, 6:00 AM), http://www.nola.com/saints/index.ssf/2013/08/new_orleans_saints_bounty_scan_2.html.

40. *Id.*

41. *Id.*

bargaining agreement with the NFL Players Association, which awarded him broad disciplinary power over players in order to address similar conduct in the future.[42]

Society is learning to prioritize people over entertainment, as evidenced by the consistent evolution of sports toward protecting participants. We continue to value competition—our nation's economy is structured around the idea that competition is beneficial. However, we recognize that a line must be drawn between healthy competition that reflects and promotes the ideals of our culture and that which contradicts the very same. Today, thousands of years after the first athletic contests, we do not tolerate certain evils in sports as our ancestors did. We support safety through protective gear; we implement strict rules to which participants must adhere or be faulted; we set limits on the level of injury that may be sustained; we pay referees and umpires to regulate fair play; and if our protective systems fail, we open the legal system to participants who suffer harm in the name of sports.

However, we still have miles to go in the realm of emotional and psychological protection of athletes and other entertainers. Today, we support the sexualization of young girls by watching shows like "Toddlers and Tiaras," wherein mothers parade their daughters across the national stage in makeup and risqué clothing.[43] The consequences manifest in statistics like the following: about 80% of ten-year-old girls in the United States report that they have been on a diet.[44] We condone the assault and harassment by paparazzi of celebrities and their families so that we can enjoy pleasure-reading at the nail salon. To a horrific extreme, we have supported invasive voyeurism to the point of what some have labeled "internet" or "voyeuristic rape" when we made sportscaster Erin Andrews the unwitting victim of a viral, pornographic video.[45] In sports, we reward narcissists[46] and alleged rapists[47] with Heisman trophies. Our societal report card may read "satisfactory" for advancements in physical protection of athletes and other entertainers, but at best, our emotional and psychological competency "needs improvement."

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42. *Id.*

43. *See* Mandy Morgan, *Toddlers and Tears: The Sexualization of Young Girls*, DESERET NEWS (Nov. 17, 2012, 10:40 PM), http://www.deseretnews.com/article/865567072/Toddlers-and-Tears-The-sexualization-of-young-girls.html?pg=all.

44. Myles Collier, *80 Percent of 10-Year-Olds Diet, Says Study*, CHRISTIAN POST (July 4, 2012, 2:59 PM), http://www.christianpost.com/news/80-percent-of-10-year-olds-diet-says-study-77679/.

45. Joseph Perkins, *Erin Andrews a Victim of Internet Rape*, EXAMINER (Sept. 14, 2009), http://www.examiner.com/article/erin-andrews-a-victim-of-internet-rape.

46. *See* Dan Wolken, *Thankfully Someone Stood Up to Johnny Manziel*, USA TODAY (Aug. 31, 2013), http://www.usatoday.com/story/sports/ncaaf/sec/2013/08/31/texas-am-johnny-manziel-kevin-sumlin-bench/2752065/.

47. Julie DiCaro, *Why I Believe Jameis Winston's Accuser*, DEADSPIN (Dec. 9, 2013, 3:50 PM), http://deadspin.com/why-i-believe-jameis-winstons-accuser-1479782169.

B. The Law Goes Hand-in-Hand With Sports

Wherever there is competition, the law is sure to follow. In the case of sports, two or more people compete and also pose a physical threat to one another, necessitating legal supervision even more than in the scenario of, say, free-market competition. In the United States, sports law encompasses many areas of law that together provide a framework for regulating athletic competition.[48] Sports law involves contract law, as exemplified by the Supreme Court's multi-year case grappling with the controversial reserve clause in professional baseball contracts.[49] It involves antitrust law, a reality highlighted by the 2011 class action led by Tom Brady against the NFL and its thirty-two member teams, alleging violations in restraint of trade.[50] In fact, Brady and the class were only able to bring an antitrust suit because they strategically withdrew recognition of their union, the NFL Players Association; otherwise, the case necessarily would have been a labor law issue.[51] Sports law also can involve tort law in the event that one participant sues another for injuries sustained during competition.[52] Most relevant to this Comment, sports law involves employment law, as each player is employed by a team. Accordingly, sports law encompasses contract, antitrust, labor, tort, and employment law, just to name a few

Moreover, the world of sports is regulated by state and federal statutes. For example, any educational institution that receives federal financial support must comply with Title IX, which prohibits gender-based discrimination by ensuring that schools provide both sexes with equal financial assistance and athletic opportunities.[53] Additionally, under certain circumstances, the Americans with Disabilities Act may require an athletic institution to make reasonable accommodations so that a disabled athlete can participate in a sport.[54] State right-to-publicity statutes may govern an issue regarding player publicity rights if not preempted by federal copyright law.[55]

Despite widespread and increasing legal regulation of sports consistent with society's evolving perspective on healthy competition, one issue remains unaddressed: workplace bullying in professional sports. Rules and referees regulate the field, but the locker room goes unguarded. The United States has made great strides in protecting its athletes physically, but it lags behind other countries in protecting the mental and emotional integrity of employees nationwide, including professional athletes. In

48. *Sports Law: An Overview*, Cornell U. L. Sch. Legal Info. Inst., http://www.law.cornell.edu/wex/sports_law (last visited Mar. 2, 2014).

49. Flood v. Kuhn, 407 U.S. 258, 267–69 (1972).

50. Brady v. Nat'l Football League, 644 F.3d 661, 663 (8th Cir. 2011).

51. *See id.* at 671.

52. *See* Dillworth v. Gambardella, 970 F.2d 1113, 1114 (2nd Cir. 1992) (denying recovery under tort law for "injuries resulting from inherent dangers obvious and necessary to participation" in downhill skiing).

53. *See* Cohen v. Brown Univ., 991 F.2d 888, 893 (1st Cir. 1993).

54. *See* Knapp v. Northwestern Univ., 101 F.3d 473, 479 (7th Cir. 1996).

55. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 562 (1977).

2014—almost two millennia after the days of the Roman Coliseum that we scarcely can fathom—it is time for the United States to take the next step in the evolution of sports and prioritize not just the physical but also the mental and emotional health of athletes by addressing the bullying that pervades sports. Otherwise, generations 2,000 years from today will look back and judge our shortcomings as we judge the ills of our ancestors.

III. WORKPLACE BULLYING POSES A THREAT TO AMERICAN EMPLOYEES AND EMPLOYERS

Workplace bullying has been described as an "epidemic" that plagues our country and others.[56] The Workplace Bullying Institute defines workplace bullying as the "repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators that takes one or more of the following forms: verbal abuse, offensive conduct/behaviors (including nonverbal) which are threatening, humiliating, or intimidating, [or] work interference—sabotage—which prevents work from getting done."[57] According to David C. Yamada, Professor of Law at Suffolk University Law School and pioneer in the revolution against workplace bullying, "bosses and others who inflict psychological abuse on their coworkers constitute one of the most common and serious problems facing employees in today's workplace."[58]

The prevalence of bullying in American workplaces is reflected in the numbers reported by the National Institute of Occupational Safety and Health: one quarter of companies that participated in the Institute's study reported having dealt with bullying problems in the previous year.[59] Moreover, in 2010, 35% of employees in the United States reported having experienced bullying in their place of work, and another 15% reported having witnessed bullying—totaling 50% of American employees who had encountered bullying at work in some capacity.[60] By one account, status-blind harassment, i.e. workplace bullying, occurs at a rate four times more frequently than illegal, status-based forms of harassment (such as sexual harassment, which is actionable under Title VII).[61]

Stories abound of the anguish that bullying can cause to teens, and sympathy for victims of teen bullying has swept the country.[62] But until

56. Joanna Canty, *The Healthy Workplace Bill: A Proposal to Address Workplace Bullying in Massachusetts*, 43 NEW ENG. L. REV. 493, 496 (2009).

57. *The WBI Definition of Workplace Bullying*, WORKPLACE BULLYING INST., http://www.workplacebullying.org/individuals/problem/definition/ (last visited Mar. 3, 2014).

58. David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 477 (2000).

59. Kylie Crawford, *Mobbing: A Problem You Can't Ignore*, 15 NO. ARIZ. EMP. L. LETTER 1 (2008).

60. Dan Calvin, *Workplace Bullying Statutes and the Potential Effect on Small Businesses*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 167, 171 (2012).

61. *Id.*

62. *See* EMILY BAZELON, STICKS AND STONES: DEFEATING THE CULTURE OF BULLYING AND REDISCOVERING THE POWER OF CHARACTER AND EMPATHY (2013).

recently, Americans have turned a blind eye to adults who have suffered similar traumas. Bullying can cause "serious physical and psychological effects" in adult victims, just as it does in teens, including headaches, problems in the immune and digestive systems, high blood pressure, stress, depression, sleep loss, shame, embarrassment, and low self-esteem.[63]

One man, Joseph Doescher, whose job it was to assist heart surgeons in the operating room, was unable to return to work after his boss (a surgeon) assaulted him at work.[64] The assault left him incapable of focusing, lacking in confidence, and unable to commit to split-second decisions—critical requirements of his job.[65] Dr. Gary Namie, social psychologist and co-founder of the Workplace Bullying Institute (cited herein), testified on behalf of Mr. Doescher (over vehement objections from the defense) to the effect that the case was a clear "episode of workplace bullying."[66] Another victim of workplace bullying, Mary Coyne, a deputy superintendent at the Boston Water and Sewer Commission, suffered panic attacks and difficulty sleeping, was placed on anti-anxiety and anti-depressant medication, and ultimately had to take a medical leave of absence because her symptoms rendered her "incapable of performing the functions of her job."[67] Coyne had reported a coworker's abusive conduct to her employer, but the employer determined that it could not take action because the bully's conduct was status-blind and therefore did not constitute illegal harassment.[68] Even more tragic, Kevin Morissey, managing editor of a quarterly review, took his own life in 2010 after what witnesses reported to be extensive and ongoing bullying from his boss.[69]

The effects of workplace bullying extend beyond the individual. Businesses have a strong interest in eliminating workplace bullying because of the negative effects it has on productivity and quality of work. The Project for Wellness and Work-Life at Arizona State University reported that "workplace bullying can have both psychological and physical effects, often leading to stress-related illness."[70] Because of these stress-related effects, employees are more likely to exercise leave under the Family and Medical Leave Act and call in sick to work.[71] One article reports that "victims of workplace bullying are more likely to report health problems or even quit than employees who are victims of sexual or racial harassment," illuminating the tangible effects of workplace bullying on the bottom line.[72] Whether an employee calls in sick, exercises leave, or quits, bullying-related stress and illnesses contribute to employee absence.

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63. *Id.* at 174–75.
64. Raess v. Doescher, 883 N.E.2d 790, 793 (Ind. 2008).
65. *Id.* at 795.
66. *Id.* at 796.
67. Canty, *supra* note 56, at 496.
68. *Id.*
69. Calvin, *supra* note 60, at 169.
70. Crawford, *supra* note 59.
71. *Id.*
72. *Id.*

In fact, some studies suggest that bullying in the workplace can cost businesses between $30,000 to $100,000 annually per bullied employee.[73] The American Psychological Association reports that companies lose about $300 billion every year due to decreased "productivity, absenteeism, turnover, and increased medical costs due to increased stress at work caused by bullying and other abuse."[74] The evidence confirms that workplace bullying poses a problem for American businesses, which includes every professional sports team.

Despite the disheartening statistics and stories, the United States trails other countries in taking steps to prevent and remedy workplace bullying. Several European countries have passed laws aimed at bullying in the workplace.[75] A proffered reason for the discrepancy between the anti-bullying focus in the United States and Europe is that European workplace laws (excluding the United Kingdom) tend to be founded on a "dignity-based" paradigm, while American workplace laws traditionally have focused on equal treatment of minority groups in the workplace, forming an "anti-discrimination-based" paradigm.[76]Therefore, if the creation of a hostile work environment is not based on a protected class such as race or religion, an employee has little recourse under American law.

France, Sweden, Australia, and Canada have laws that specifically address status-blind workplace harassment.[77] The United Kingdom also has made advances in combating workplace bullying by extending an anti-stalking law, the Protection from Harassment Law of 1997, to the workplace.[78] Under the extended law, plaintiffs successfully have applied vicarious liability to their employers for workplace issues.[79] Additionally, a parliamentary debate surrounding the proposed Dignity at Work Bill triggered the launching of "the world's largest anti-bullying campaign, funded largely by the British government" in 1996.[80] Lastly, the twenty-first century has seen a "shift in organizational behavior in the U.K.," wherein "employers now self-regulate workplace conduct by issuing anti-bullying policies."[81]

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73. Calvin, *supra* note 60, at 168–69.

74. *Id.* at 175.

75. Crawford, *supra* note 59.

76. Susan Harthill, *Bullying in the Workplace: Lessons from the United Kingdom*, 17 MINN. J. INT'L L. 247, 250–51 (2008).

77. *See* Harthill, *supra* note 75, at 263; Canty, *supra* note 56, at 515 (In Sweden, "moral harassment" is prohibited by the Ordinance on Victimization at Work, which mandates that employers adopt policies for "detecting and correcting 'unsatisfactory working conditions, problems of work organization, or deficiencies of co-operation' which could lead to victimization;" and in Australia, "[e]mployers have a duty to provide a safe workplace, free from workplace bullying and thus can be found liable both in tort under a theory of negligence, and in contract under a duty not to 'destroy or seriously damage the relationship of trust and confidence between employer and worker.'")

78. Harthill, *supra* note 75, at 251.

79. *Id.* at 251.

80. *Id.* at 252.

81. *Id.*

Some critics of the anti-bullying movement in the United States claim that the paradigm on which European workplace law is based fundamentally differs from that of the United States, and as a result, the European model cannot be incorporated into the United States.[82] However, the fact that the United Kingdom, which, unlike most European countries, traditionally has not operated under a system of dignity-based rights, successfully incorporated anti-bullying policy into its occupational landscape bodes well for the ability of the United States to do the same.[83]

Moreover, the response that U.K. employers have shown to the government's push for workplace anti-bullying standards should provide encouragement to Americans who fear increased government presence in business. If American employers began to self-regulate bullying as U.K. employers have—by issuing and enforcing internal anti-bullying policies—they could obviate the need for government or judicial involvement in their affairs. As it stands, American employers need an incentive to take such action, and the implementation of workplace bullying legislation at the state or federal level would provide that.

IV. THE UNITED STATES MUST ADOPT LEGISLATION TO COMBAT WORKPLACE BULLYING

As previously stated, the United States has no comprehensive legal mechanism geared toward status-blind hostile work environment protection. But as Professor Yamada has said, "[I]t should not save an employer from liability that the abuse is dispensed without regard to race, sex or national origin."[84] To this end, Professor Yamada has proposed legislation known as the Healthy Workplace Bill (the Bill), which has led to the consideration of anti-bullying legislation in twenty states since 2003.[85] The Bill advances four policy goals: "prevention, self-help, compensation, and punishment."[86] It creates a cause of action called "Intentional Infliction of a Hostile Work Environment."[87] The cause of action is defined as follows:

> In order to prove intentional infliction of a hostile work environment, the plaintiff must establish by a preponderance of the evidence that the defendant employer, its agent, or both, intentionally subjected the plaintiff to a hostile work environment. A hostile work environment is one that is deemed hostile by both the plaintiff and by a reasonable person in the plaintiff's situation. Employers are to be held vicariously liable for hostile work environments intentionally created by their agents.[88]

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82. *Id.* at 251–52.
83. *Id.* at 252.
84. Yamada, *supra* note 58, at 523.
85. Abigail Rubenstein, *5 Tips For Employers To Beat Workplace Bullying*, LAW360 (Mar. 10, 2014, 7:53 PM), http://www.law360.com/articles/516977/5-tips-for-employers-to-beat-workplace-bullying.
86. Yamada, *supra* note 58, at 508.
87. *Id.* at 524.
88. *Id.*

Professor Yamada explains that the proposed legislation draws heavily from existing Title VII hostile work environment doctrine.[89] To illustrate, he removed references to discrimination from the Supreme Court decision *Harris v. Forklift Systems, Inc.*, and noted that what is left mirrors a description of workplace bullying: "When the workplace is permeated with . . . intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," then relief is appropriate.[90] Because of the close similarities between situations of status-blind workplace bullying and actionable status-based harassment in the workplace, it is prudent and necessary to use Title VII as a starting point for addressing what constitutes a hostile work environment.

One aspect of determining whether a hostile work environment exists is a reasonableness standard. For bullying to be actionable under the Bill, it must be such that both the plaintiff and a reasonable person in the plaintiff's situation would consider the work environment hostile.[91] This reduces the chance that mild cases of friction in the workplace will be brought to court, undermining the "floodgate" concern that inevitably arises any time new legislation is proposed.[92] Yamada clarifies that certain actions that could provide the basis for suit include "abusive language, yelling and screaming, insults and put-downs, continuous, unreasonable work demands, and unfair accusations."[93] Like Title VII, the Bill's standard "strikes a balance 'between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.'"[94] The Bill's reasonableness standard intentionally is less stringent than the near impossible "extreme and outrageous" standard for intentional infliction of emotional distress, a fact that Yamada counterbalanced by opting for a specific and limited definition of abusive conduct.[95] Therefore, the Bill provides a "baseline for minimal dignity in the workplace, while additional protections can exist for those bullied because of their race, sex or national origin."[96]

The Bill will hold employers vicariously liable for the unlawful employment practices of their employees.[97] This creates a strong incentive for employers to take efforts to prevent workplace bullying.[98] However, the Bill also seeks to "reward proactive attempts to prevent bullying" by employers and therefore provides them with specific affirmative defenses.[99] Accordingly, when an employer is sued under the Bill, "it shall be an

89. *Id.* at 525.
90. *Id.* (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).
91. *Id.* at 498.
92. *Id.* at 532–33.
93. *Id.* at 510.
94. *Id.* (citing *Harris*, 510 U.S. at 21).
95. Calvin, *supra* note 60, at 182.
96. *Id.* at 183.
97. *Id.*
98. Yamada, *supra* note 58, at 526.
99. *Id.* at 526–27.

affirmative defense for the employer only if: (a) the employer exercised reasonable care to prevent and correct promptly any actionable behavior; *and*, (b) the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[100]

As a result, an employer will be held responsible for workplace bullying the employer is in the position to prevent and does not, but it will not be held liable for problems that arise despite the employer's reasonable efforts to prevent them. Also, the employer's release from liability does not prevent a plaintiff from bringing suit against the perpetrator.[101] In this way, "the policy goals of compensation and punishment would be advanced even when the employer is properly excused from liability."[102] Finally, as federal employment discrimination statutes provide for back pay, front pay, reinstatement, punitive damages, and injunctive relief, so does Intentional Infliction of a Hostile Work Environment under the Healthy Workplace Bill.[103]

V. EXISTING CAUSES OF ACTION ARE INSUFFICIENT TO ADDRESS WORKPLACE BULLYING

While several state legislatures have considered workplace bullying laws,[104] only California has enacted such a law.[105] Consequently, it is important to note existing causes of action that could provide relief to bullied athletes in the other forty-nine states, insufficient as that relief may be. In general, tort remedies "provide some protection, but only in the most extreme circumstances."[106] Furthermore, "state and federal discrimination statutes provide some relief when the employee is bullied because of his or her membership in a protected class."[107] Overall, existing remedies apply in severely limited situations and provide inadequate relief. But until Congress or state legislatures act to adopt status-blind harassment laws, players may be forced to pursue bullying claims under alternative theories.

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100. *Id.* at 527.
101. *Id.* at 528.
102. *Id.*
103. *Id.*
104. Calvin, *supra* note 60, at 185–186.
105. Laura Mahoney, *California Governor Signs Sick Leave, Anti-Bullying and Interns' Rights Bill*, BLOOMBERG BNA, 175 DLR A-7 (Sept. 10, 2014). On September 10, 2014, California Governor Jerry Brown signed A.B. 2053, which requires that bullying (called "abusive conduct") be included in already-mandated sexual harassment prevention training for supervisors in companies with fifty or more employees. The California bill defines abusive conduct as "conduct of an employee or employer in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. It includes repeated infliction of verbal abuse such as insults or epithets, or verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance." The bill takes effect January 1, 2015, and marks the United States' first meaningful step toward ending workplace bullying.
106. *Id.* at 168.
107. *Id.*

A. Intentional Infliction of Emotional Distress

One such option is the tort theory of intentional infliction of emotional distress (IIED).[108] The Restatement (Second) of Torts defines IIED in the following way: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[109]

At first glance, it seems as if bullying behavior that negatively impacts an employee's health could constitute "extreme and outrageous" behavior under the IIED standard. To the contrary, "most intentional infliction of emotional distress claims arising out of typical status-neutral workplace bullying do not result in a finding of liability."[110]

IIED cases are inherently difficult for plaintiffs to win because the "extreme and outrageous" standard has proven to be an enormously high burden.[111] The Restatement (Second) of Torts explains that in order to constitute extreme and outrageous behavior,

> it is not enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.[112]

Rather, liability is only established "where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[113] Moreover, suits involving intangible emotional damage can become nuanced and complicated.

With such a high standard of atrocity demanded, maintaining a suit under a theory of IIED is difficult enough for the average plaintiff. Applying that cause of action to the relatively new frontier of workplace bullying increases the difficulty of prevailing. Further, applying the standard to workplace bullying in professional sports, a profession in which employees generally are expected to be thick-skinned brutes, could prove to be an insurmountable difficulty. Consequently, IIED is an inadequate

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108. *See* Restatement (Second) of Torts § 46 (1965).
109. *Id.*
110. Canty, *supra* note 56, at 508.
111. *See* Lybrand v. Trask, 31 P.3d 801, 803–05 (Alaska 2001) (holding that painting large, accusatory words, biblical passages and a crucifix on neighbor's home did not rise to level of "outrageous" conduct); Harris v. Jones, 380 A.2d 611, 612 (Md. 1977) (holding that defendant's actions of "maliciously and cruelly" ridiculing a fellow employee for his speech impediment, which ridicule caused the victim to suffer "tremendous nervousness, increasing the physical defect itself and further injuring the mental attitude fostered by the Plaintiff toward his problem" did not constitute "outrageous" conduct); Freeman v. Holy Cross Hosp., No. 10 C 4157, 2011 WL 1559208, at *1 (N.D. Ill. Apr. 25, 2011) (holding that plaintiff could not bring a common law claim of IIED because it was based solely on instances of sexual harassment, and thus was preempted by the Illinois Human Rights Commission's "exclusive jurisdiction over civil rights violations" in the state).
112. Restatement (Second) of Torts § 46 cmt. d (1965).
113. *Id.*

tool for professional athletes to use as protection from status-blind harassment.

B. Workers' Compensation

IIED claims are not only weak but also are preempted in some circumstances by workers' compensation statutes.[114] Workers' compensation is a "no-fault system that provides limited benefits to workers who suffer accidents in the course of and arising out of their employment."[115] Generally, employers are required to obtain private insurance to respond to workers' compensation claims.[116] Some states have held that workers' compensation is the "exclusive remedy for intentional, work-related emotional distress injuries," thereby encompassing claims for IIED that arise out of the workplace.[117]

However, workers' compensation statutes can actually serve to "limit the legal options available to bullied employees."[118] As stated, workers' compensation statutes may preempt claims for IIED, making workers' compensation the only available remedy for some victims who are bullied on the job. Further, workers' compensation focuses on accidents, and a plaintiff can only recover if the incident occurs "in the course of and arising out of their employment."[119] As such, claims under workers' compensation statutes are severely limited, and many plaintiffs do not meet the strict criteria.

Moreover, for professional athletes, workers' compensation claims can be even more limited than those of the typical American worker because sports leagues constantly are pushing to limit players' access to workers' compensation relief. For example, California recently passed a law that "will prevent many professional athletes from filing workers' compensation claims in California."[120] The law was passed in response to an abundance of "cumulative trauma" claims, which can include injuries ranging from arthritis to brain trauma, appearing in California courts.[121] As expected, the NFL, MLB, and other sports leagues backed the law because it resulted in one less avenue for injured players to recover from the leagues' member teams.

Further, the NFL collective bargaining agreement allows a club to elect not to be covered by workers' compensation laws if coverage is not

114. Yamada, *supra* note 58, at 478.

115. *Id.* at 506.

116. *Id.*

117. *Id.*

118. *Id.* at 507.

119. *Id.* at 506.

120. Ken Bensinger, *Gov. Jerry Brown Signs Athlete Workers' Comp Bill*, L.A. Times (Oct. 8, 2013, 4:06 PM), http://www.latimes.com/business/money/la-fi-mo-governor-athlete-workers-comp-20131008,0,7152629.story#axzz2s15KZN5w.

121. *Id.*

mandatory in the club's state.[122] The club may then implement whatever it deems to be "equivalent benefits."[123] Accordingly, whether a player has the option of filing a workers' compensation claim or simply the right to "equivalent benefits" is largely determined by the state in which he plays. The result is that the availability of workers' compensation to professional football players is inconsistent, and the opportunity for relief is bleak.

C. TITLE VII

Perhaps the strongest protection available to victims of workplace bullying is Title VII of the Civil Rights Act of 1964. Title VII provides the following:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[124]

Essentially, an employer may not discriminate in any way on the basis of an enumerated, protected class: race, color, religion, sex, or national origin. When discriminatory conduct, such as "intimidation, ridicule, and insult," becomes so severe or pervasive "that it alter[s] the conditions of the victim's employment and create[s] an abusive working environment," the Supreme Court has held that a hostile work environment exists.[125] Specifically, the Court has enunciated a two-part test to determine whether discriminatory conduct rises to the level of a hostile work environment.[126] First, the conduct must be such that a "reasonable person would find [it] hostile or abusive."[127] Second, the victim must "subjectively perceive the environment to be abusive" such that it "actually alter[s] the conditions of the victim's employment."[128]

Title VII confronts workplace indignities in a way that other causes of action do not, rendering it a capable tool to combat certain instances of workplace bullying. However, because Title VII enumerates the realms of conduct that it will encompass, it leaves many instances of workplace harassment unaddressed. Unless a victim can show that his or her bully was motivated by prejudice against a protected class of which the victim is a member, he or she has no recourse under Title VII.

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122. NFL COLLECTIVE BARGAINING AGREEMENT, ART. 41 § 3, Aug. 4, 2011, *available at* http://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf.

123. *Id.*

124. 42 U.S.C. § 2000e-2 (2006).

125. Yamada, *supra* note 58, at 509–10 (citing Meritor v. Vinson, 477 U.S. 57, 67 (1986)).

126. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

127. *Id.*

128. *Id.* at 21–22.

In terms of the Miami Dolphins fiasco, a case could be made that Richie Incognito violated Title VII by attacking Jonathan Martin with racial slurs because he used the "N word." However, Incognito's many epithets and threats not based on race could weaken the argument that racial onimus motivated him to bully. Moreover, other professional athletes likely endure bullying not at all based on their race, color, religion, sex, or national origin. Instead, bullying could be based on any number of other characteristics or circumstances.

Psychologists agree that bullying often is based on a desire to control others.[129] Research points to cultural, institutional, social, family, and personal causes of bullying.[130] Culturally, power and winning are equated with success, and some people seek to attain that picture of success through violence and intimidation.[131] Additionally, certain institutions promote bullying more than others.[132] It is safe to assume, for example, that the environment of professional sports promotes bullying behavior more than an office full of family counselors does. One anti-bullying organization stated the problem as follows: "If the institution at which the bullying takes place—whether the home, the school, or the workplace—does not have high standards for the way people treat each other, then bullying may be more likely and/or prevalent and have an influence on why people bully."[133]

Compounding the bullying problem, society often rewards negative behavior over positive behavior, as in the case of giving a child that acts out more attention than a child that behaves well.[134] Aphorisms abound: Nice guys finish last. The squeaky wheel gets the grease. Look out for number one.

Moreover, family issues also can encourage bullying behavior:[135] homes that lack consistent warmth and love are more likely to produce bullies than stable and loving homes.[136] Lastly, a bully's personal history can have a significant effect on his behavior.[137] Consistent with cycle-of-violence research, people who are victims of bullying are more likely to become bullies in the future.[138] Consequently, it appears that bullying—workplace or otherwise—has more to do with the bully than the victim. For that reason, discrimination-based protection that hinges on characteristics of the victim, such as Title VII, falls short of offering a comprehensive solution.

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129. Susan Harthill, *Bullying in the Workplace: Lessons from the United Kingdom*, 17 MINN. J. INT'L L. 247, 250 (2008).

130. *Why Do People Bully?*, BULLYING STAT., http://www.bullyingstatistics.org/content/why-do-people-bully.html (last visited Mar. 2, 2014).

131. *Id.*

132. *See id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

D. Americans with Disabilities Act

The Americans with Disabilities Act (ADA) prohibits an employer from discriminating against "a qualified individual on the basis of disability" who, with "reasonable accommodation," can perform the essential functions of the job.[139] Generally, a "disability" is "a physical or mental impairment that substantially limits one or more major life activities."[140] The ADA requires an employer to make reasonable accommodations for both physical and mental disabilities unless the accommodation would impose an "undue hardship on the operation of [its] business."[141] Reasonable accommodation can include reassignment to a vacant position.[142] Consequently, a victim of workplace bullying could pursue a claim under the ADA and seek reasonable accommodation, such as reassignment, if he has incurred a disability as the result of such bullying.

In fact, "a review of hundreds of discrimination cases involving psychiatric disabilities" revealed that claims under the ADA involving nonphysical disabilities generally fell into four categories, one of which was classified as "[e]mployees whose psychiatric disabilities arose from other work environment issues, including women who were sexually harassed; individuals subjected to hostile work environments as a result of disability, gender, race, or sexual preference; whistleblowers; and people whose disabilities were related to other claims of employer abuse or unfair treatment."[143] Furthermore, "in the vast majority of cases [brought under the ADA and pertaining to psychiatric disability] the disability appeared to be triggered or greatly exacerbated by aspects of the workplace environment."[144] Evidently, employees already use the ADA to redress harassment at work.

One major drawback is that in order to pursue a claim under the ADA an employee must suffer harm severe enough to constitute as a disability. As stated above, a "disability" under the ADA is an impairment which interferes with a major life function. If the law waits for workplace bullying to inflict disabling injuries upon employees, the damage may be irrevocable, and legal remedies scarcely can offer meaningful help. Further, many courts are reluctant to find that a consequence of interpersonal conflict at work, no matter how severe, constitutes a disability in the first instance.[145] Rather, courts may be eager to confine application of the ADA primarily to physical disabilities, arguably as it was originally intended, leaving the psychological effects of bullying unaddressed.[146]

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139. 42 U.S.C. § 12112(a), (b) (2012).
140. 42 U.S.C. § 12102 (2012).
141. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 395 (2002) (citing 42 U.S.C. § 12112(b)(5)(A) (2012)).
142. *Id.* at 395–96.
143. Susan Stefan, *You'd Have to Be Crazy to Work Here: Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 Loy. L.A. L. Rev. 795, 798 (1998).
144. *Id.* at 800.
145. *Id.* at 804–05.
146. *See id.*

For victims of bullying in professional sports, the ADA provides little help. A common remedy under the ADA is injunctive relief ordering the employer to provide reasonable accommodations to the disabled employee in order that he may perform the functions of his job.[147] On a professional sport team, where coworkers spend countless hours in intimate proximity, unable to avoid one another, the only effective accommodation for a player suffering from disabling bullying by a teammate might be to fire the perpetrator. But professional athletes come with contracts and players associations. A professional sports team cannot terminate an athlete's contract like some businesses can terminate at-will employees. Therefore, that accommodation is likely not reasonable and would impose an undue hardship on the team. Similarly, a professional sports team cannot simply reassign a bully or victim, each of whom has dedicated a lifetime to training in a specific position. However, less drastic measures that left the bully and victim on the same team, or in the same cohort within a team, would not effectively remedy the problem. Consequently, the ADA offers little relief to victims of bullying in professional sports.

E. National Labor Relations Act

The National Labor Relations Act (NLRA) gives employees the "right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."[148] Under the NLRA, if a group of employees were to choose to exercise their right to be represented by a union, the union "could recommend some type of antibullying provision for the collective bargaining agreement, conceivably mirroring the new cause of action proposed in [the Healthy Workplace Bill]."[149] A second important right afforded employees under the NLRA is the right to "engage in other concerted activities for the purpose of . . . mutual aid or protection."[150] Professor Yamada explains that "[t]his provision potentially protects workers who collectively address workplace bullying, especially abusive supervision."[151]

Professional athletes fall within the NLRA's coverage, as professional sports teams typically opt to be represented by a union. For example, players in the NFL are represented by the NFL Players Association;[152] players in the NBA are represented by the NBA Players Association;[153] and players in Major League Baseball are represented by the MLB Play-

147. *See Show 39—Remedies*, The Disability Law Lowdown Podcast, http://dll.ada-podcasts.com/shownotes/DLLPod39.php.

148. 29 U.S.C. § 157 (2012).

149. Yamada, *supra* note 58, at 517–18.

150. 29 U.S.C. § 157 (2012).

151. Yamada, *supra* note 58, at 518.

152. *See* NFL Players Ass'n, https://www.nflplayers.com/ (last visited Mar. 2, 2014).

153. *See* NBA Players United, http://www.nbpa.org/about-nbpa (last visited Mar. 2, 2014).

ers Association.[154] Consequently, professional athletes can use the NLRA as a weapon against workplace bullying if they band together to insist upon anti-bullying provisions in future collective bargaining agreements.

However, remedies under the NLRA are inadequate to do any serious damage to the problem of bullying in sports or any other workplace. Key remedies under the NLRA are back pay, reinstatement of a terminated employee, and limited injunctive relief.[155] For unionized employees—such as professional football players—the governing collective bargaining agreement usually stipulates that players forfeit their NLRA-given right to strike and that conflicts will be processed through the agreed-to grievance procedure.[156] Therefore, if a professional athlete experiences bullying and seeks the aid of his union, he will find himself precluded from organizing a strike, and he will sit before the League Commissioner or an arbitration panel, not a judge. In either case, judicial review of a determination is doubtful.[157] In short, the grievance system under a collective bargaining agreement between a sports team and its players is far inferior to relief in a court of law.

In the current NFL Collective Bargaining Agreement (CBA), one provision exists as a potential tool against bullying. Under "Club Discipline," the parties agree that any player may be disciplined for "conduct detrimental to [the] Club" in the form of a fine of up to one week's salary and/or suspension without pay for a period not to exceed four weeks.[158] This provision awaits usage against players like Incognito whose rampant bullying disrupts other players' performances and club morale. However, a club's power to invoke this provision is a nonstarter, as management seems unmotivated to combat intra-team bullying.

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154. *See* MLB PLAYERS.COM, http://mlbplayers.mlb.com/pa/index.jsp (last visited Mar. 2, 2014).

155. *See* Yamada, *supra* note 58, at 528.

156. *See* NFL COLLECTIVE BARGAINING AGREEMENT, art. 43 § 1 ("Any dispute (hereinafter referred to as a 'grievance') arising after the execution of this Agreement and involving the interpretation of, application of, or compliance with, any provision of this Agreement, the NFL Player Contract, the Practice Squad Player Contract, or any applicable provision of the NFL Constitution and Bylaws will be resolved exclusively in accordance with the procedure set forth in this Article, except wherever another method of dispute resolution is set forth elsewhere in the Agreement"); art. 16, § 1 ("The parties shall select one of the Non-Injury Grievance Arbitrators who shall concurrently serve as the Impartial Arbitrator, who shall have exclusive jurisdiction to determine disputes that are specifically referred to the Impartial Arbitrator pursuant to the express terms of this Agreement"); art. 3 § 2 (wherein players forfeit their right to sue for multiple claims); art. 70 § 9 ("This Agreement may not be changed, altered, or amended other than by a written agreement signed by authorized representatives of the parties").

157. *See id.* art. 15 § 2 ("Scope of Authority: (a) The System Arbitrator shall make findings of fact and determinations of relief including" and "(b) The Appeals Panel shall accept the System Arbitrator's findings of fact unless clearly erroneous and the System Arbitrator's recommendations of relief unless based upon clearly erroneous findings of fact, incorrect application of the law, or abuse of discretion" and "(d) Except for any matters for which the Appeals Panel has de novo review of the System Arbitrator's determinations, rulings of the System Arbitrator shall upon their issuance be binding").

158. *Id.* art. 42 § 1(a)(xv).

VI. PROFESSIONAL ATHLETES NEED AN INDEPENDENT CAUSE OF ACTION, AS SET FORTH IN THE HEALTHY WORKPLACE BILL, TO PROTECT AGAINST WORKPLACE BULLYING

A. PROFESSIONAL ATHLETES SHOULD BE TREATED LIKE OTHER EMPLOYEES

Professional sports is a business market, and each team is an employer. This fact has been firmly established by the courts.[159] If one needs more practical evidence, one could simply watch the NFL Pro Bowl or the NBA All Star Game and see how hard the athletes play when money is not at stake—at least, not *really* at stake.[160] Like any other business in America, professional sports is about money—for the athlete-employees, it's about a salary; and for the team-employers, it's about the bottom line.

Because sports is a business like any other, it is appropriate that professional athletes be able to expect the same level of dignity when they step into the locker room or weight room as the typical American employee expects when he steps into the office or onto the factory floor. Of course, a football coach can pat a player on the backside in a way that would be deemed inappropriate in the average American workplace. But in addition to the gesture's complete lack of prohibited intent, by any measure of common sense, it is not an assault on one's dignity. This Comment does not seek to address all the ways in which professional athletes are and are not like other employees in the United States. The author recognizes that the job of professional athletes is different in many ways from the jobs of most Americans. Indeed, every job is unique. Rather, this Comment seeks to address a specific issue—that is, the "health-harming mistreatment" of a person sufficient to be labeled "bullying"—and promote the idea that there is one common aspect among all professions in this country: employees are entitled to a minimum level of dignity in the workplace.[161]

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159. *See* Clarett v. NFL, 369 F.3d 124, 141 (2nd Cir. 2004) (stating that "federal labor policy permits the NFL teams to act collectively as a multi-employer bargaining unit in structuring the rules of play and setting the criteria for player employment"); Brown v. Pro Football, Inc., 50 F.3d 1041, 1045 (D.C. Cir. 1995) (referring to the NFL as a multi-employer bargaining unit capable of taking unilateral action after bargaining to impasse with the players' union); Mackey v. NFL, 543 F.2d 606, 612 (8th Cir. 1976) (characterizing the NFL as an "employer group" for the purposes of collective bargaining).

160. Generally, each player on the team that wins the NFL Pro Bowl receives about $50,000, while each player on the losing team receives about $25,000, the difference of which is a drop in the bucket for players whose salaries range from multi-hundreds of thousands of dollars to multi-millions. Many players have contract incentives that reward them for making the Pro Bowl, but the payoff realizes whether the player wins or loses the game (*see* Reed Albergotti, *Making the Pro Bowl Doesn't Always Pay*, WALL ST. J. (June 30, 2010, 12:01 AM), http://online.wsj.com/news/articles/SB10001424052748703389004575033343623829492); Austin Green, *Pro Bowl 2014 Roster: Top Players to Watch in Annual Showcase*, BLEACHER REP. (Jan. 25, 2014), http://bleacherreport.com/articles/1935653-pro-bowl-2014-roster-top-players-to-watch-in-annual-showcase).

161. *The WBI Definition of Workplace Bullying*, WORKPLACE BULLYING INST., http://www.workplacebullying.org/individuals/problem/definition/ (last visited Mar. 03, 2014).

B. Societal Standards and Expectations Contribute to Workplace Bullying Among Professional Athletes

Despite the evolution of sports away from unfettered brutality and toward protecting players, society still views the world of sports with different (and, this Comment argues, lower) standards and expectations than those with which it views other parts of our culture. It goes without saying that in the typical American workplace, employees expect not to be subjected to "verbal abuse" and offensive conduct or behaviors which are "threatening, humiliating, or intimidating."[162] As shown above, many employees unfortunately *are* subjected to such behavior. But such abuse is not expected, much less condoned.

In professional sports, however, there is a different standard, perpetuated by participants in sports and the broader culture. Men in professional sports are expected to be "men" in the Roman-Colosseum sense of the word: hyper-masculine warriors, defined by the physical and impervious to the emotional. Trademarks of professional football, for example, include players trash-talking after plays, getting in each other's faces, and as recently demonstrated by Richard Sherman of the Seattle Seahawks, disparaging other players on national television.[163] Perhaps, Sherman, a graduate of Stanford University, and other athletes that play into this gratuitously "macho" behavior are merely "making sure the culture gets what the culture demands."[164] We, the culture, have set professional athletes apart and established a stereotype they feel compelled to fulfill. We can turn even a Stanford grad into a bully.[165] Thus culture has a long history of promoting and rewarding bullying behavior in professional sports, and the time has come to take a hard look at whether that fits into the otherwise-evolving landscape of our nation.

On one hand, the United States is moving toward broadening its vision of what a "man" should be. There are more male nurses than ever, a field historically dominated by women and viewed as "feminine."[166] An ever-increasing number of people support gay rights and sympathize with a man's right to choose to have an intimate relationship with another man. In fact, there is now one openly gay male in the NBA[167] and another in

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162. *Id.*

163. *See* Rob Raissmann, *Seahawks' Richard Sherman Screams About Michael Crabtree in Postgame Interview with Erin Andrews*, N.Y. Daily News (Jan. 19, 2014, 10:26 PM), http://www.nydailynews.com/sports/football/seahawks-sherman-flips-post-game-interview-article-1.1584972.

164. Keown, *supra* note 9.

165. *See* Tommy Tomlinson, *22 Brief Thoughts About That Richard Sherman Interview*, Forbes (Jan. 19, 2014, 11:43 PM), http://www.forbes.com/sites/tommytomlinson/2014/01/19/22-brief-thoughts-about-that-richard-sherman-interview/.

166. *See*, U.S. Census Bureau, Male Nurses Becoming More Commonplace, Census Bureau Reports (Feb. 25, 2013), http://www.census.gov/newsroom/releases/archives/employment_occupations/cb13-32.html.

167. *See* Andrew Keh, *Jason Collins, First Openly Gay N.B.A. Player, Signs With Nets and Appears in Game*, N.Y. Times (Feb. 23 2014), http://www.nytimes.com/2014/02/24/sports/basketball/after-signing-with-nets-jason-collins-becomes-first-openly-gay-nba-player.html?_r=0.

the NFL.[168] The presence of gay men in professional sports provides heightened incentive to nip bullying in the bud. Imagine what the Incognitos of professional sports, who don't bat an eye at using death threats and racial slurs, will say and do to homosexual teammates unless the law stops them.

Further evidencing evolving gender views, traditional family roles are changing as more women work and more men stay home to care for children. Rock stars, some of the most revered and envied men walking the planet, wear makeup without any backlash. To that end, sportscasters wear makeup without reproach. Modern men are less afraid to seek professional psychological support for life issues, and psychology has responded by expanding its understanding of how to best serve men's emotional needs.[169] Psychologists have worked to greatly reduce the stigma attached to male sexual assault victims, and the number of resources available to male victims continues to rise.[170] In the last few decades, we have all but obliterated the stereotype that "boys don't cry."

By all indications, the change is good. Modern psychology has established that pigeonholing individuals into "socialized gender roles" can result in negative psychological consequences.[171] Known as "Gender Role Conflict," the problem "occurs when rigid, sexist, or restrictive gender roles result in restriction, devaluation, or violation of others or self."[172] "For men, the personal experience of [Gender Role Conflict] represents the negative consequences of conforming to, deviating from, or violating the gender role norms of masculinity ideology."[173] Yet society insists on imposing archaic stereotypes on professional athletes despite the identified and empirically proven consequences.[174]

The state of our culture begs the question: why are professional sports the last holdouts against discarding hyper-masculine male stereotypes? Perhaps people fear that establishing a level of dignity within professional

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168. *See* Chase Goodbread, *Michael Sam, NFL Draft Prospect, Announces He's Gay*, NFL.COM (Feb. 10, 2014, 8:18 PM), http://www.nfl.com/news/story/0ap2000000324603/article/michael-sam-nfl-draft-prospect-announces-hes-gay.

169. Ebony L. Holliday & John McCarthy, *Help-Seeking and Counseling Within a Traditional Male Gender Role: An Examination From a Multicultural Perspective*, 82 J. COUNSELING & DEV. 25, 29 (2004), *available at* http://isites.harvard.edu/fs/docs/icb.topic551850.files/McCarthy%20and%20Holliday.pdf.

170. *See Male Sexual Assault*, RAPE, ABUSE & INCEST NAT'L NETWORK, http://www.rainn.org/get-information/types-of-sexual-assault/male-sexual-assault (last visited Mar. 2, 2014); *When Men Are Raped*, IND. COALITION AGAINST SEXUAL ASSAULT, http://www.incasa.org/advocacy/survivor-resources/when-men-are-raped/ (last visited Mar. 2, 2014); *Male Survivors*, BROWN U. HEALTH EDUC., http://brown.edu/Student_Services/Health_Services/Health_Education/sexual_assault_&_dating_violence/male_survivors.php (last visited Mar. 2, 2014).

171. James M. O'Neil, *Gender Role Conflict Research 30 Years Later: An Evidence-Based Diagnostic Schema to Assess Boys and Men in Counseling*, J. COUNSELING & DEV. 490, 490 (2013), *available at* http://go.galegroup.com/ps/i.do?id=GALE%7CA346006912&v=2.1&u=txshracd2548&it=r&p=AONE&sw=w&asid=abb4bc1234f8c2a092068850729734b8 (Gale Doc. No. A3460006912).

172. *Id.*

173. *Id.*

174. *See id.*

sports will alter the nature of the game—that if players cannot bully one another, then competition will suffer. But, as Homer wrote in *The Iliad*, "It is skill not mere strength that makes the better woodsman."[175] Ruthlessly wielding power over others does not make one a better competitor.[176] In fact, evidence supports the opposite: bullying leads to "decreased productivity."[177] Implementing an anti-bullying policy in professional sports will lead not to decreased competition but to cleaner competition. And cleaner competition might even connote higher quality competition. Would you rather watch a team of eleven Peyton Mannings or a team of eleven Richie Incognitos?

Perhaps some would argue that professional sports is actually a healthy outlet for men's testosterone-driven inclinations, such as aggression and the urge to compete. To the extent that one competes aggressively while maintaining at least a base level of humaneness, that may be true. But when those inclinations cross the line into causing health-harming psychological or emotional trauma to others, it can no longer be said that sports is a "healthy outlet." Likewise, the author has heard it said that in a culture of increasing feminization, we need to let men be men. The question hinges on one's definition of what makes a "man." The author, for one, would argue that one can be a man without threatening to slap another man's mother across the face.[178]

Perhaps some perpetuate the hyper-masculine stereotype of athletes simply out of a "this is the way things are" mentality. As Randy Starks said, "You can't have thin skin around here."[179] But the author shudders to think what today's workplace would look like had we so complacently settled with respect to racial discrimination or sexual harassment of women in the workplace. Change is not easy, but it often, as here, is necessary. And "this is the way it's always been," without more, seldom justifies resisting change.

C. The Healthy Workplace Bill Provides a Solution to Workplace Bullying in Professional Sports

Law is the most effective weapon in the battle for social reform. Slavery in the United States did not end with a war; it ended with an effective combination of laws.[180] Compensation discrimination did not enter the public discourse the second that women proved themselves equal to men in the workplace; rather, it became part of the discourse when the law

175. Homer, *supra* note 20, at 262–361.
176. *See* Canty, *supra* note 56, at 502.
177. *Id.*
178. *See* Ryan Van Bibber, *Richie Incognito's Threatening Voicemail Message for Jonathan Martin Surfaces*, SB Nation (Nov. 4, 2013, 1:05 PM), http://www.sbnation.com/nfl/2013/11/4/5065238/richie-incognito-voicemail-text-message-jonathan-martin-dolphins (exposing a voicemail in which Incognito threatened to "slap [Martin's] real mother across the face").
179. Mihoces, *supra* note 3.
180. *See* U.S. Const. amend. XIV; U.S. Const. amend. XIII; Civil Rights Act, 42 U.S.C. § 1981 (2012).

challenged it.[181] Likewise, the country's bullying epidemic will end only when the law ceases to tolerate it.

Legal pressure must be assigned, and it must be assigned to the appropriate party: employers. The Workplace Bullying Institute summarizes the reasoning behind placing liability on employers in words that were not consciously aimed at professional sports teams but could be a direct indictment of their tolerance of bullying among athletes:

> Stopping bullying requires nothing less than turning the workplace culture upside down. Bullies must experience negative consequences for harming others. Punishment must replace promotions. And only executives and senior management can reverse the historical trend. *To stop bullying requires employers to change the routine ways of 'doing business' that have propped up bullies for years* . . . . Employers can alter the work environment by changing how jobs are designed and how bullying is treated when exposed . . . . In conclusion, the ultimate solution fixes responsibility for both the cause and cure squarely on the shoulders of senior management and executives. They put people in harm's way and *they can provide safety by undoing the culture which may have inadvertently allowed bullying to flourish.*[182]

Because the Healthy Workplace Bill places the majority of responsibility on the employer, it is the ideal solution to bullying in professional sports.[183] "Locker-room tradition" may mandate that veteran players set the tone and help regulate team, but veteran players are not supervisors and wield no actual authority over other players. It is the employers—the teams—that must be held accountable for what happens to employees on their watch.

Under the Healthy Workplace Bill, a professional athlete–employee who experienced workplace bullying could bring a claim of "Intentional Infliction of a Hostile Work Environment" against his team–employer.[184] As stated above, the plaintiff would have to show by a preponderance of the evidence that his "employer, its agent, or both intentionally subjected the plaintiff to a hostile work environment," the hostility of which is determined by both objective (reasonableness standard) and subjective (player's actual belief) tests.[185] A finding of "hostile work environment" will be appropriate "[w]hen the workplace is permeated with . . . intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter

181. *See* Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (amending 42 U.S.C. § 626 (2012) and 42 U.S.C. § 2000e-5(e) (2012)). *But see* Debra Cassens Weiss, *Is There a Gender Pay Gap? Most Surveyed Law Firms Wouldn't Provide the Data*, ABA JOURNAL, Feb. 26, 2014, *available at* http://www.abajournal.com/news/article/is_there_a_gender_pay_gap_most_surveyed_law_firms_wouldnt_provide_the_data/ (urging that despite progress, this country has not truly achieved equal pay).

182. *How Bullying Happens*, WORKPLACE BULLYING INST., http://www.workplacebullying.org/individuals/problem/how-bullying-happens/ (last visited Mar. 2, 2014) (emphasis added).

183. *See* Yamada, *supra* note 58, at 523–26.

184. *Id.* at 524–26.

185. *Id.* at 524.

the conditions of the victim's employment."[186] Within these parameters, a player may not bring a claim against his team for every harsh word uttered, criticism of his performance, or passionate shout in the throes of a game. Rather, the Healthy Workplace Bill would provide a "baseline for minimal dignity" for athletes under which psychologically harmful bullying, such as that endured by Jonathan Martin, would not be tolerated.[187]

A team could protect itself from liability under the Bill by exercising "reasonable care to prevent and correct promptly any actionable behavior" and showing that "the [player] unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[188] In this way, the Bill provides teams with the incentive to inculcate a policy of dignity among its employees and safeguards those that do so, accomplishing two of the Bill's four policy goals: prevention and self-help.[189]

The Bill's other two policy goals, compensation and punishment, are implicated when a team fails to protect its players against workplace bullying.[190] For a player who suffers bullying at the hands of a teammate (or trainer, coach, or other agent of the team), the law will offer various remedies.[191] A bullied player whose team does not establish an affirmative defense could receive back pay for time lost due to an adverse employment action (such as suspension or release from the team), front pay, reinstatement (in the event of termination), injunctive relief, and punitive damages in especially egregious cases.[192] The availability of broad remedies serves not only to compensate wronged players but also to punish offending teams, bolstering the incentive to take intra-team bullying seriously.

The research is unequivocal: workplace bullying disserves employees and employers alike. Employees suffer psychological and emotional harm, and employers feel the blow to productivity and the bottom line. In an atmosphere where teamwork is everything—where dependence on one another is the key to success—one would think that workplace bullying, in fact, has no place. A person need only look at the turmoil that has beset the Miami Dolphins since the Martin–Incognito fiasco took place. The Dolphins lost two players and endured months of media and fan criticism, essentially falling into public disgrace. Society has too much information about the consequences of workplace bullying to continue to bury its head in the sand. The United States' culture is primed, and the Healthy Workplace Bill is ripe for enacting. What better frontier for at-

186. *Id.* at 525 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

187. *See* Dan Calvin, *Workplace Bullying Statutes and the Potential Effect on Small Businesses*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 167, 183 (2012).

188. Yamada, *supra* note 58, at 527.

189. *See id.* at 524.

190. *See id.* at 528.

191. *See id.*

192. *See id.*

tacking workplace indignities than where employees most depend on one another for success: the fifty yard line.

VII. CONCLUSION

Many times in history, the United States has faced change that, at first, seemed impossible, but in hindsight, proved invaluable. With the movement against workplace bullying, the nation is on the cusp of another such change. Moreover, the recent explosion concerning bullying in professional sports has set the ideal stage for this change to play out. We cannot afford to look the other way as the world of sports and the culture around it perpetuate an archaic, hyper-masculine stereotype, setting a dangerous example for men of the next generation. The evidence demonstrates that bullying breeds bullying and that only the law can effectuate lasting social change. Therefore, let us adopt the Healthy Workplace Bill, apply it to professional sports, and end workplace bullying in this country so that we become in reality the progressive culture we purport to be.[193]

193. After this Comment was written, information surfaced that Jonathan Martin had retaliated against Richie Incognito with bully-like comments of his own. Rather than negating the issue, this information further illustrates the cycle of bullying and emphasizes the immediate need for action against bullying in sports. *See Why Do People Bully?*, BULLYING STATISTICS, http://www.bullyingstatistics.org/content/why-do-people-bully.html (last visited Mar. 2, 2014). Bullies create bullies because victims do not want to remain victims. The law must intervene and end the cycle on a systemic level.


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