

Is Labor in Sport a Commodity? The Case of American and Japanese Professional Baseball

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An important rule that underpins international and domestic labor law is the principle that labor is not a commodity. This principle has interesting application to the labor regulation in professional team sports such as baseball that utilize drafts, salary restraints, the reserve system, and free agency. The article will examine whether these and other labor controls in Major League Baseball in the United States and Nippon Professional Baseball League in Japan commodify labor. Baseball's labor controls and practices will be assessed to determine if labor is treated as a commodity, and if so, whether there is undue commodification. In doing so, a construct will be created of labor practices that commodify labor on a spectrum. These labor practices and controls will also be evaluated in the context of antitrust law and restraint of trade. The article concludes by suggesting ways to improve the treatment of players that will decommodify labor.

Keywords: labor law, regulation, commodity principle, professional baseball

Introduction

In 1969 Curt Flood contested the legality of Major League Baseball's ('MLB') 'reserve' system, a contractual clause that owners claimed gave them control over a player's rights to play baseball in perpetuity upon signing a contract.¹ Flood was traded to the Philadelphia Phillies after 12 years with the St. Louis Cardinals. He was not involved in the trade process and St. Louis advised Flood of the trade through a telephone call and a telegram.² Flood's response was simple: he refused to play for Philadelphia. In a now famous letter to the Commissioner of MLB, Flood stated he

¹ Brad Snyder, *A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS* (2007) 91.

² *Id.* 1.

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was ‘not a piece of property to be bought and sold irrespective of my wishes’.³ Flood unsuccessfully challenged the legality of the reserve system. Multiple courts refused to overturn MLB’s non-statutory exemption from federal antitrust law:⁴ the United States District Court for the Southern District of New York,⁵ the United States Court of Appeals for the Second Circuit,⁶ and the Supreme Court of the United States.⁷ The impact of Flood’s attack on baseball’s unfair labor practices prematurely ended his career and created a sporting legacy matched by few other athletes.⁸ Shortly after the Supreme Court’s ruling, an arbitrator recognized free agency,⁹ which was then

³ Letter from Curt Flood to Bowie Kuhn, *United States of America National Archives*, Dec. 24, 1969, <http://research.archives.gov/description/278312>.

⁴ The Supreme Court in *Federal Baseball Club of Baltimore Inc v National League of Professional Baseball Clubs*, 259 U.S. 200 (1922) ruled antitrust law did not apply to the MLB as the ‘business of baseball’ did not involve interstate trade or commerce (affirmed in *Toolson v New York Yankees*, 346 U.S. 356 (1953)).

⁵ *Flood v Kuhn*, 312 F. Supp. 404 (S.D.N.Y. 1970).

⁶ *Flood v Kuhn*, 443 F.2d 272 (2d Cir. 1971).

⁷ Again, the Supreme Court refused to overturn baseball’s antitrust exemption in *Flood v Kuhn*, 407 U.S. 258 (1972). In the aftermath of the industrial action that saw MLB cancel the 1994 playoffs midway through the regulation season, the *Curt Flood Act of 1998* Pub.L. 105-297 (105th Cong. 1998) modified MLB’s antitrust exemption in its application of antitrust law to the employment of Major League players. However, the *Curt Flood Act* holds little to no practical relevance to Major League player relations as any potential antitrust violation of collective bargaining agreements are protected by a statutory exemption (*Norris-LaGuardia Act of 1932*, ch. 90, § 4, 47 Stat. 70 (1932) and supported by the *National Labor Relations Act of 1935*, (49 Stat. 449) 29 U.S.C. § 151–169, § 151) and non-statutory exemption (see sports, e.g., *National Football League v Mackey*, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977)). McCann identified the basis of the exemption as the belief that working conditions are enhanced when employees negotiate collectively, not individually, and that collective bargaining is likely to improve the leverage of employees to better working conditions. Hence, employers can impose restraints through collective negotiation, rather than negotiate individually and risk breaching section 1 of the *Sherman Antitrust Act*: Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 *YALE L.J.* 726, 741 (2010). For further discussion of the exemptions in the context of sport see, e.g., Jonathan C. Tyras, *Players Versus Owners: Collective Bargaining and Antitrust after Brown v. Pro Football, Inc.*, 1(1) *U. PA J. LABOR & EMPLOYMENT LAW* 297, 298, 318-319 (1998), Kemper C. Powell, *Beyond Brady and Anthony: The Contemporary Role of Antitrust Law in the Collective Bargaining Process*, 14(2) *TEX. REV. ENT. & SPORTS LAW* 147, 152 (2013).

⁸ Bosman’s impact on football (soccer), global sports law, and international labor mobility is undisputable: see *Union Royale Beige des Societes de Football Association ASBL v Bosman* (C-415/93) [1996] CEC 38. The most important Australian sports law case is *Buckley v Tutty* (1971) 125 CLR 353, when the High Court recognized professional rugby players as employees. This monumental decision paved the way for unionization and eventually collectivism in Australian sport: see, e.g., Braham Dabscheck, *The Intercept That Changed the Game Forever: Fifty Years of Buckley v Tutty*, 1(1) *SPORTS LAW & GOVERNANCE J.* 23 (2022).

⁹ *National and American League of Professional Baseball Clubs v MLBPA*, 66 *Labor Arbitration Report* (BNA) 101 (1976) (Seitz, Arb), affirmed in *Kansas City Royals Baseball Corporation v MLBPA*, 532 F.2d 615 (8th Cir. 1976).



collectively bargained in 1976. Free agency is now fundamental to MLB's regulation of labor.¹⁰

Fans and the media rarely raise concerns over the trading of players and other restrictive labor practices. Yet trading a baseball player is equivalent to businesses exchanging employees without their explicit consent. A trade is essentially the exchange of a player between clubs for a player, players, an unidentified player,¹¹ cash,¹² or a combination of these options. These practices raise concerns within labor law as employment contracts are viewed as a 'personal services' agreement for an agreed period of time¹³ or entered on the basis that either party may end the contract at any time.¹⁴ Influencing approaches to employment contracts is that a fundamental freedom in a liberal economy is the right to choose one's employer.¹⁵ Thus, Flood's argument against being traded as being a slave or property of the St. Louis owner¹⁶ relied upon the principle that 'labor is not a commodity,' a key concept that shaped labor law in Europe, North America, and Australia since the early 20th century.¹⁷ Hayter and Ebisui observed the principle operates with social justice to protect workers from the 'vagaries of the market' and to establish minimum labor standards.¹⁸

The regimes of labor regulation in MLB in the United States and Nippon Professional Baseball ('NPB') in Japan provide insight into how player labor is treated in the two premier competitive leagues of baseball. Both leagues represent baseball's largest and best remunerated labor markets. The article focuses on these leagues due to the prevalence of highly restrictive labor practices that operate in a system

¹⁰ W. B. Gould, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15(1) STAN. L. & POL'Y REV. 61, 68-70 (2004).

¹¹ In MLB, such players are commonly referred to as a 'player to be named later.'

¹² Ross observes that 'cash sales' for elite players in MLB gradually disappeared after World War II. The practice largely ended in 1978, when Commissioner Bowie Kuhn blocked the Oakland Athletics 'selling' three of their best players to the Boston Red Sox and the New York Yankees: Stephen F. Ross, *Light, Less-Filling, It's Blue-Ribbon!*, 23 CARDOZO L. REV. 1675, 1693-1695 (2002). Upholding Kuhn's exercise of the 'best interests' power was the Seventh Circuit of the Court of Appeals: *Charles O Finley & Co v Kuhn*, 569 F.2d 527 (7th Cir. 1978). It must be noted that the transfer of players for cash occurs with lower level Major League and Minor League players. Cash transfers indirectly occurs when clubs trade players who entered lucrative long-term contracts and pay a percentage of the remaining value of the contract. Also, some MLB teams sell the rights to players to NPB clubs for sums in the hundreds of thousands of dollars.

¹³ Examples are 'on-going' contracts, 'fixed term' contracts, or 'casual' contracts.

¹⁴ Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone & Shae McCrystal, CREIGHTON AND STEWART'S LABOUR LAW (6th ed, 2016) 235-236.

¹⁵ *Id.* 223.

¹⁶ Snyder, *supra* note 1, 106.

¹⁷ Judy Fudge, *Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law*, in THE IDEA OF LABOUR LAW (Guy Davidov and Brian Langille eds.) 120, 122 (2011).

¹⁸ Susan Hayter & Minawa Ebisui, Negotiating parity for precarious workers, 5(1) INT'L J. LABOUR RESEARCH 79, 80 (2013).



or regulation that heavily relies on self-regulation. Inside these systems of labor regulation exist a multitude of interconnected restrictive labor controls that deal with labor as a commodity.

The question that arises is why is this important? Elite professional team sport is a vital aspect of life in many societies. It is generally accepted that sport has the potential to create positive social, economic, and cultural benefits.¹⁹ An analysis of baseball's labor regulation enables a comparison with general labor practices and those of other sports, and fosters an understanding of how labor can be treated as a commodity. This analysis will focus on using employment law to identify how exploitative labor controls and practice in baseball led to the undue commodification of labor. Proponents of restrictive labor systems in sport point to justifications related to competitive balance, maintaining fan interest, the economic viability of a league,²⁰ and the high remuneration of professional athletes. The degree to which labor is unduly commodified is related to the validity of the first three arguments. But the later argument does not apply to all professional athletes,²¹ as Justice Frank argued the salaries of baseball players is inconsequential because only the totalitarian-minded view high pay as an excuse for virtual slavery.²² This article argues that labor law and collective labor relations are central in the 'decommodification' of labor in sport, thereby demonstrating useful lessons and strategies for sport administrators, sport law lawyers, and academicians in understanding how to improve the treatment of player labor in a fair manner that benefits players, teams, and leagues.

This article is divided into four parts. Part A provides a theoretical basis for the article by setting out the principle that labor is not a commodity, the concept of commodification of labor, and the key features of the principle. Also, the commodity principle will be compared to antitrust law and restraint of trade. Next, Part B will explain how labor in professional baseball is regulated. Part C will then evaluate how specific labor controls and practices treat players as a commodity. An important question in this process is whether there is undue commodification of labor. The article concludes by suggesting ways that decommodify labor in professional baseball and therefore improve the treatment of players.

¹⁹ It is noted that sport can lead to negative effects on athletes, clubs, and society through bad (or no) governance, corruption, abuse of human rights, and avoidance of domestic and international worker rights.

²⁰ James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims after American Needle*, 21(2) MARQ. SPORTS L. REV. 517, 525 (2011).

²¹ In 2021, Minor League players received the following monthly wages: Class Rookie - \$1,600, Class A - \$2,000, Class AA - \$2,400 and Class AAA - \$2,800: Advocates for Minor Leaguers, *So what's the problem?*, <https://www.advocatesforminorleaguers.com/theproblem/> (last visited Jan. 30, 2023).

²² *Gardella v Chandler*, 172 F.2d 402, 410 (2d Cir. 1949).



Part A. The Principle That Labor Is Not a Commodity

The importance of the principle that labor is not a commodity was recognized by Fudge, who stated that resolving the commodity status of labor is a challenge faced by every liberal democracy.²³ This part creates a construct of the principle that labor is not a commodity, and then examines key aspects of what constitutes commodification of labor. A spectrum of how labor can be commodified will be presented to assist in evaluating the impact on labor of different practices. Part A concludes by drawing a distinction between the commodity principle and the restraint of trade doctrine, and explaining how the principle that labor is not a commodity furthers the understanding of sport.

What Is the Principle That Labor Is Not a Commodity?

The history of the principle that labor is not a commodity lies in response to economic theory of the 18th century that viewed labor as just that—a commodity. One of the earliest scholars to hold this position was Adam Smith, who in his 1776 work, the *Wealth of Nations*, analogized labor wages to commodity prices and likened the demand for the labor of men to any other commodity.²⁴ The notion that labor should be treated as a commodity featured prominently in 19th century liberal economic theories that strongly influenced the labor theory of value.²⁵ By the mid-1800s, economists were beginning to challenge this idea. Karl Marx's work in the 1860s²⁶ signified the emergence of the principle that labor is not a commodity, a position reinforced by Lujo Brentano in 1877²⁷ and Dr. John Kells Ingram in 1880.²⁸ At the turn of the 19th century the principle gained the endorsement of the Catholic Church. In 1891 Pope Leo XVII stated that labor is the exclusive property of the worker and that free consent regulates wages.²⁹

²³ Judy Fudge, 'Labour is Not a Commodity': *The Supreme Court of Canada and the Freedom of Association*, 67(2) SASKATCHEWAN L.R. 425, 446 (2004).

²⁴ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), reproduced by The Electronic Classics Series (Jim Manis ed., 2005) 51-53.

²⁵ Joy Paton, *Labour as a (Fictitious) Commodity: Polanyi and the Capitalist Market Economy*, 21(1) ECON. LAB. REL. R. 77, 77 (2010).

²⁶ See Karl Marx, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, VOLUME I, BOOK ONE: THE PROCESS OF PRODUCTION OF CAPITAL* (1867, First English Edition of 1887).

²⁷ Lujo Brentano, *DAS ARBEITSVERHÄLTNISS GEMÄSS DEM HEUTIGEN RECHT: GESCHICHTLICHE UND ÖKONOMISCHE STUDIEN REPRINT*, HRSG. UND EINGELEITET VON THILO RAMM (first published 1877, Keip Verlag 1994).

²⁸ John K. Ingram, *WORK AND THE WORKMAN. BEING AN ADDRESS TO THE TRADES UNION CONGRESS IN DUBLIN, SEPTEMBER 1880* (first published 1880, Reprinted with Introduction by Richard T Ely in 1928).

²⁹ Pope Leo XVII, *THE ENCYCLICAL RERUM NOVARUM ON CAPITAL AND LABOUR* (1891) 43-45.



The principle that labor is not a commodity is a normative statement that sets out an aspirational ideal. It is not a descriptive statement and should not be interpreted literally. After all, people enter contracts to ‘sell’ their labor. Both Fudge and Collins identified this difference in describing labor as a ‘fictive commodity’ that is the object of exchange for money in the marketplace. Labor is differentiated from an actual commodity on the basis that labor cannot be separated from the person.³⁰ The practical question that arises is, what does the principle mean?

In differentiating labor and commodities, O’Higgins attributed three key meanings to the principle. First, the pricing of labor is not the sole domain of the labor market. Wages must be able to provide a reasonable standard of living, a requirement that can be viewed as part of the ‘living wage’ movement. Proponents of a living wage argue that an adequate wage rate allows low-paid workers and their families to lead a life in a material sense without imposing excessive costs on businesses.³¹ Second, a worker must consent to being transferred between employers. Third, the International Labour Organization (‘ILO’) uses the principle to justify the prohibition of trafficking in migrant labor.³² The last two meanings are interconnected and are important in identifying when labor is treated as a commodity. Transferring employees without consent implies that people are capable of ownership and can be exchanged in the same way as any other commodity. Thus, control of one’s own labor is important in labor not being treated as a commodity. A free worker controls his labor, can choose who to work for and for how long, can quit and work for someone else, can work for multiple people, or even decide not to work.³³

Legal Evolution of the Principle That Labor Is Not a Commodity

Debate exists over the origins of the concise terminology that ‘labor is not a commodity’.³⁴ Representing the traditional European view is O’Higgins’ argument that Kells Ingram coined the phrase in an 1880 speech.³⁵ Presenting the American perspective is Evju, who speculated that Samuel Gompers (co-founder of the American Federation of Labor) expressed the phrase during the union’s labor reform campaign

³⁰ Fudge, *supra* note 23, 446; Hugh Collins, *EMPLOYMENT LAW* (2003) 3.

³¹ See, e.g., Robert Pollin, ‘Introduction’ in, *A MEASURE OF FAIRNESS: THE ECONOMICS OF LIVING WAGES AND MINIMUM WAGES IN THE UNITED STATES* 1, 8-9 (Robert Pollin, Mark Brenner, Jeanette Wicks-Lim & Stephanie Luce eds., 2008).

³² Paul O’Higgins, ‘*Labour is not a Commodity*’ – *an Irish Contribution to International Labour Law*, 26(3) *INDUS. L.J.* 225, 230 (1997).

³³ Matt Nichol, *GLOBALIZATION, SPORTS LAW AND LABOUR MOBILITY: THE CASE OF PROFESSIONAL BASEBALL IN THE UNITED STATES AND JAPAN* (2019) 29.

³⁴ *Id.* 30.

³⁵ O’Higgins, *supra* note 32, 226.



between 1908 and 1914. Evju acknowledged a lack of supporting evidence.³⁶ What is certain is the Clayton Antitrust Act of 1914 included the phrase ‘the labor of a human being is not a commodity or article of commerce’.³⁷ It is difficult to imagine that the anti-slavery movement in the United States during the second half of the 1800s had no part in shaping American ideology on labor.³⁸ Glickman noted liberty in the United States in the 1800s was defined as complete ownership of one’s labor and therefore oneself. After emancipation, ‘free labor’ was no longer anything but chattel slavery.³⁹ During the early 1900s the principle that labor is not a commodity influenced the American judiciary. An early baseball case in 1914, *American League Baseball Club of Chicago v Chase*,⁴⁰ saw Bissell J of the New York Supreme Court state baseball’s labor system created ‘a species of quasi peonage unlawfully controlling and interfering with the personal freedom of the men employed.’⁴¹

Creating less debate is the influential role of the principle in the global development of labor law. At the Peace Conference in 1919 that drafted the Treaty of Versailles, the Commission on International Labor Legislation adopted the principle by stating ‘labor should not be regarded merely as a commodity or article of commerce.’⁴² In 1944 the international community implemented the wording of the Clayton Antitrust Act when the Philadelphia Declaration confirmed that ‘labor is not a commodity’⁴³ and annexed this principle to the ILO’s Constitution.⁴⁴

Legal Approaches That Do Not View Labor as a Commodity

Lord Chancellor Viscount Simon expressed the common law’s position that labor is not a commodity in *Nokes v Doncaster Amalgamated Collieries Limited*,⁴⁵ when his honor stated a person’s contract of service is not a company asset that can be bought, sold, or

³⁶ Stein Evju, *Labour is not a commodity: A Reappraisal* (Working Papers in Labour Law No. 6, Arbeitsnotater, 2012) 7-8.

³⁷ *Clayton Antitrust Act of 1914*, 15 October 1914, Pub. L. 63-212, 38 Stat. 730 (15 U.S.C. § 12-27, 29, 52-53).

³⁸ Nichol, *supra* note 33, 31.

³⁹ Lawrence B. Glickman, *A LIVING WAGE: AMERICAN WORKERS AND THE MAKING OF CONSUMER SOCIETY* (1997) 18, 20.

⁴⁰ 149 N.Y.S. 6 (1914).

⁴¹ *Id.* 16.

⁴² Treaty of Versailles, 28 June 1919, Part XII, Article 427. The original wording of the proposed declaration was ‘the principle that in right and in fact the labor of a human being cannot be treated as merchandise or an article of commerce’: EVJU, *supra* note 36, 5-8.

⁴³ International Labour Conference, *Declaration Concerning the Aims and Purposes of the International Labour Organisation* (adopted by the Conference at its Twenty-Sixth Session Philadelphia, 10 May 1944).

⁴⁴ International Labour Organization, *Constitution of the International Labour Organization*, 1 April 1919, Annex I(a).

⁴⁵ [1940] AC 1014.



gifted.⁴⁶ In the context of whether labor is a commodity, the statement demonstrates the interconnection between control, autonomy, and labor power. In the United States, *Nokes* was affirmed in *Tennessee Coal, Iron and Railroad Co v Muscoda Local No. 123*⁴⁷ in 1944 when the Supreme Court held labor is not a chattel or article of trade. Instead, the Court said labor comprises ‘the rights of those who toll and sacrifice a full measure of their freedom and talents to the use and profits of others.’⁴⁸

The operation of labor markets nevertheless raises the question as to whether labor is capable of ownership and control. After all, employers enter contracts with workers to purchase the service of labor for specified or unspecified time periods.⁴⁹ This reality raises a paradox in that the idea that labor is not a commodity ‘asserts as a truth what seems to be false.’⁵⁰ Different approaches to resolving this paradox exist. Collins observed that unlike a commodity, a person is the basis of a labor contract and workers are people and not things.⁵¹ Marx distinguished labor from a commodity as employment contracts involve ‘labor power,’ that is, the mental and physical capabilities of a human.⁵² Paton noted labor cannot sit idly in a warehouse like a commodity and requires income to be transformed into labor.⁵³ Another distinction is that workers can own commodities.⁵⁴

Insight into who owns labor is provided by John Locke, a 17th century English philosopher and theorist, who influenced approaches to the role of government and individual rights. Among Locke’s influential research was his 1689 *Two Treatises of Government*.⁵⁵ According to Locke, the labor of the body and the work of the hands are natural to the person, resulting in citizenship of civil society.⁵⁶ Owens noted Locke’s theory identified the intrinsic connection of labor and property to the person, conceiving the natural right of work as the property of the person.⁵⁷ Central to Locke’s construct of work is that the owner of labor is the autonomous person, who is free to control their body and mind. Locke’s theory provides a theoretical and practical

⁴⁶ *Id.* 1024.

⁴⁷ 321 U.S. 590 (1944).

⁴⁸ *Id.* 597.

⁴⁹ Nichol, *supra* note 33, 167.

⁵⁰ Collins, *supra* note 30, 3.

⁵¹ *Id.* 7.

⁵² Marx, *supra* note 26, 119.

⁵³ Paton, *supra* note 25, 82.

⁵⁴ Nichol, *supra* note 33, 33.

⁵⁵ John Locke, TWO TREATISES OF GOVERNMENT: IN THE FORMER, THE FALSE PRINCIPLES, AND FOUNDATION OF SIR ROBERT FILMER, AND HIS FOLLOWERS, ARE DETECTED AND OVERTHROWN. THE LATTER IS AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT (1689).

⁵⁶ Rosemary J. Owens, ‘Working in the sex market’, in *Sexing the Subject of Law* (1997) 119, 121 Ngaira Naffine & Rosemary J Owens (eds.).

⁵⁷ *Id.* 120-121.



construct that clearly differentiates labor from commodities, forms the basis for the liberal political economy, and contributes to the labor theory of value.⁵⁸ Owens builds upon Locke's work in describing the free worker as involving the self-ownership of labor of the body, and labor itself permits freedom in work in the market.⁵⁹

Marx adopted a slightly different approach to differentiate labor and commodities, and autonomy is far less prominent. The Marxist idea of labor is reliant on the relationship between labor and commodities. Marx believed the value of a commodity is based on being a product of labor, that the labor of a human transforms all commodities into value and that value is measurable in quantities.⁶⁰ Central to Marx's theory is labor 'value' or 'power,' which is only present in humans and is realized when a worker and employer meet in the market and the worker agrees to sell their labor for a definite time period. Wages facilitate the conversion of labor power to labor and are necessary for a worker's subsistence. This last point distinguishes a worker from a slave, and labor from a commodity.⁶¹

The Transfer of Workers and Commodities

An important issue in whether labor is a commodity is if an employer can assign an employee's contract to another employer. The freedom to choose who one works for was identified by Lord Chancellor Viscount Simon in *Nokes* as a fundamental principle of the common law.⁶² Similarly, Lord Atkin highlighted this issue when he stated people attach importance to the identity of the company with whom they deal,⁶³ a right that is the difference between employees and serfs.⁶⁴ This issue engages with the concepts of autonomy and control. Lord Chancellor Viscount Simon held the right to a person's contract of service cannot be transferred between employers unless there is a statutory exception or employee consent.⁶⁵ Contracts can also be assigned if contemplated in the contract.⁶⁶

⁵⁸ Nicholas J. Theocarakis, *Metamorphoses: The Concept of Labour in the History of Political Economy*, 20(2) Econ. Lab. Rel. Rev. 7, 11 (2010).

⁵⁹ Owens, *supra* note 56, 124.

⁶⁰ Marx, *supra* note 26, 26-27.

⁶¹ *Id.* 118-119.

⁶² *Nokes* [1940] AC 1014, 1020.

⁶³ *Id.* at 1030.

⁶⁴ *Id.* at 1026.

⁶⁵ *Id.* at 1020.

⁶⁶ *Tolhurst v the Associated Portland Cement Manufacturers (1900) Limited and the Imperial Portland Cement Company Limited* [1903] AC 414.



The Role of Labor Mobility in Commodifying Labor

Critical to identifying whether labor is commodified is the regulation of labor mobility—the movement of workers from one employer to another.⁶⁷ Orthodox economic theorists view labor mobility as the ‘fluid’ for the efficient operation of labor markets.⁶⁸ Typical examples of labor mobility include a worker moving to a similar job in the same industry, a different occupation in the same industry, starting a new occupation or changing industries, and internal movement in an organization.⁶⁹ Many factors, often highly personal, contribute to the importance of worker mobility. For players in team sports, labor mobility permits an athlete to take advantage of employment opportunities and high-income earning potential, maximize playing time, and increase the ability to be part of competitive teams. Such reasons can be applied to other professions. But in sport, the importance of these factors is heightened by relatively short careers that end at any time due to injury and a multitude of unforeseen circumstances. The regulation of labor mobility is fundamental to the labor regimes of most team sports due to its intrinsic role in controlling player movement and cost.⁷⁰ Both of these points are perceived by leagues and clubs to be determinants of achieving competitive balance.⁷¹ Therefore, regimes of labor regulation in team sports face an extreme risk of commodifying labor through highly restrictive labor controls and practices.

⁶⁷ Nichol, *supra* note 33, 101.

⁶⁸ See William Mitchell, *Labour Mobility and Low-paid Workers* (Research Report No. 5/09, Centre for Full Employment and Equity, 2008) 6.

⁶⁹ Nichol, *supra* note 33, 101.

⁷⁰ Matt Nichol & Keiji Kawai, *The Regulatory Space of Baseball: Is Global Regulation Needed to Govern the International Movement of Players*, 1(1) SPORTS LAW & GOVERNANCE J. 47, 52 (2022).

⁷¹ Multiple approaches exist in sport to defining competitive balance (as distinguished from ‘parity’ or ‘equity’). One of the better concepts was developed by the authors of an MLB-commissioned report on the economics of baseball created a metric that sees every well-run club having a ‘regularly recurring reasonable hope of reaching post-season play’ (‘RRRRPP’): Richard C. Levin, George J. Mitchell, Paul A. Volcker and George F. Will, *The Report of the Independent Members of the Commissioner’s Blue Ribbon Panel Baseball Economics* (July 2000) 8. Ross traces the origins of this definition to the competitive balance concept set out by Justice Higginbotham in the United States District Court for the Eastern District of Pennsylvania as each team having ‘the opportunity of becoming a contender over a reasonable cycle of years and a reasonable chance of beating any other team on any given night’: *Philadelphia World Hockey Club Inc v Philadelphia Hockey Club Inc*, 351 F.Supp 462, 486 (E.D. Pa. 1972). The RRRRPP facilitates fan interest. As such, Ross endorses it as the best metric in MLB to achieve a level of competitiveness and uncertainty that optimizes the appeal of a league to fans. Accordingly, the RRRRPP sets a clear benchmark to assess labor controls that may restrain trade: Ross, *supra* note 12, 1679.



Constructing Labor Practices That Commodify Labor on a Spectrum

One of the limitations of the principle that labor is not a commodity is that there is a tendency in the literature, law, and cases to view the issue in binary ‘black and white’ terms. It may be argued that framing the commodification of labor as a ‘yes or no’ question was an appropriate approach in the development of this legal principle. But the effectiveness of this simplified view is no longer effective due to the different ways that labor can be commodified. Each method of commodification varies as to whether it is legal, the nature of illegality, and the degree to which labor is commodified. Therefore, it is necessary to construct the commodification of labor on a spectrum.

At the extreme end of the commodity spectrum is the treatment of labor as forced or compulsory labor and slavery. Forced labor can be seen as the modern equivalent of slavery. It is defined as all work or service that is not offered voluntarily or results from the threat of penalty.⁷² Penalties include violence, intimidation, debt reduction, and retention of identification documents. Forms of work excluded from this definition are compulsory military service, work related to a criminal conviction, and emergency work.⁷³ Despite the implementation of numerous international laws designed to eradicate forced labor,⁷⁴ the ILO estimates there are 22 million forced laborers.⁷⁵ The polar opposite of the spectrum sits Locke’s free worker. Next to free workers is ‘commodified’ labor. It is necessary to acknowledge that some degree of commodification naturally occurs in the labor market for labor. Moving down the spectrum is ‘undue commodification’ of labor, an important concept in the regulation of elite sport. The undue commodification of labor results in the reduction of a person’s control over their work. Therefore, a worker’s freedom to contract and choose their employer can be severely restricted. Nichol observes that baseball players can sometimes be an extreme example of exploited or commodified labor that leads to undue commodification.⁷⁶

⁷² Forced Labour Convention 1930 (No. 29), Geneva, 14th ILC Session, 28 June 1930, article 2(1).

⁷³ *Id.* article 2(2).

⁷⁴ *Forced Labour Convention 1930; Protocol of 2014 to the Forced Labour Convention 1930*, Geneva, 103rd ILC Session, 11 June 2014; *Abolition of Forced Labour Convention 1957* (No 105), Geneva, 40th ILC Session, 25 June 1957; *Forced Labour (Supplementary Measures) Recommendation 2014*, Geneva, 103rd ILC Session, 11 June 2014.

⁷⁵ *50 million people worldwide in modern slavery*, INTERNATIONAL LABOUR ORGANIZATION, Sept. 12, 2022, https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_855019/lang--en/index.htm.

⁷⁶ Nichol, *supra* note 33, 167-168.



Distinguishing the Commodity Principle From Restraint of Trade Doctrine

It is necessary to now consider the restraint of trade doctrine and whether it is similar to the principle that labor is not a commodity. The restraint of trade doctrine operates at common law and statute. The common law doctrine's origins can be traced to 1602 and the decision of Coke in *Darcy v Allen (The Case of Monopolies)*.⁷⁷ The basis of the modern doctrine is the British judgment of *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*,⁷⁸ which held that a restrictive covenant is legally enforceable if it is in the public interest and reasonable in protecting the covenantee's interests.⁷⁹ Japanese courts apply a similar test to determine the enforceability of non-compete clauses in employment contracts.⁸⁰ The central role of antitrust laws to American industry is demonstrated by their description as the 'Magna Carta of free enterprise' in preserving economic freedom and the American system of free enterprise,⁸¹ the 'gospel of free enterprise,' and the second constitution of the United States.⁸² The question that now arises is whether the commodity principle diverges or converges with the restraint of trade doctrine.

The starting point for differentiating between the doctrine and the principle are the underlying theoretical bases of each approach. Economics informs the restraint of trade doctrine and the emphasis is on contract. The principle that labor is not a commodity takes a broader approach as it is concerned with labor controls and practices that affect the treatment of workers. The different theories are important in delineating relevant legal rights. Dabscheck notes that the restraint doctrine enunciated in *Nordenfelt* focuses on contractual choice and the public policy of the freedom of workers to pursue employment.⁸³ In contrast, the commodity principle is primarily concerned with the treatment of labor and a worker's autonomy and ability to control their labor. The distinction is important when viewed in the context of enforcement. The doctrine deems restraints of trade to be legal if reasonable and in the public interest. However, a labor practice or control that meets certain requirements will still violate the principle that labor is not a commodity. By its very nature, treating labor as a commodity cannot be reasonable or valid. Remedies present another difference. Restraint of trade at common law and statute lead to various remedies, including

⁷⁷ (1602) Moore KB 671, 1219.

⁷⁸ [1894] AC 535.

⁷⁹ *Id.* 548.

⁸⁰ *Foseco Japan Case*, Nara District Court, 23 October 1970, 78 Hanrei Jiho 624.

⁸¹ *United States v Topco Associates Inc*, 405 U.S. 596, 610 (1972).

⁸² Carl Ameringer, *THE HEALTH CARE REVOLUTION: FROM MEDICAL MONOPOLY TO MARKET COMPETITION* (2008) 196.

⁸³ Dabscheck, *supra* note 8, 27-28.



damages, injunctions, and fines. However, no remedy exists for violating the commodity principle according to relevant common law, American law, or international law, a reflection of the abstract and aspirational nature of the principle. A limitation of the restraint of trade doctrine in sport is that it is typically used to determine the legality of a single labor control, for example the draft or restrictions on player salaries. The commodity principle does not have such restraints as it requires analysis of interconnected labor controls and practices to determine whether the combined effect is to treat labor as a commodity.

The principle that labor is not a commodity advances knowledge in sport by assessing the overall treatment of players and not the narrow focus on a single practice used by the restraint of trade doctrine. The commodity principle goes beyond restraints of trade to examine how the labor practices of leagues can devalue, unfairly and at times illegally treat players to the point where they are not viewed as humans but fungible commodities. The undue commodification of player labor impacts a player's autonomy that negatively affects their rights as a worker and human. The principle that labor is not a commodity encourages a starting position that sport is not different to other industries and that the legal basis of practices that in effect view players as commodities should be challenged.

Part B. The Regulation of Labor in Professional Baseball

Part B will begin with a summary of the regulation of athlete labor in sport, followed by an examination of the key labor controls and practices in MLB and NPB. This will allow an analysis in Part C of whether labor is commodified in baseball, and if so, whether there is undue commodification.

Overview of Player Labor Regulation in Sport

The starting point for understanding how labor in sport is regulated is the classification of sport. Until recently the traditional dichotomy of amateur and professional sport⁸⁴ allowed the easy identification of athletes engaged in recreational versus employment activities. Adding a degree of complexity to this dichotomy were

⁸⁴ Corinthian amateur ethos influenced the international amateur values of fairness, participation, and no remuneration in preference to winning and financial reward. Amateurism in the 20th century was connected to the British aristocratic public school system, an approach embraced by Pierre de Coubertin in forming the Olympic values. These values viewed any training or practice that conflicted with amateur ideal to be cheating: Shirley Strachan and Keir Reeves, *Through the Lens of the Trainer-Masseurs: Australia's Incongruous Engagement with the Olympic Amateur Ethos*, 39(6) INT'L J. HISTORY OF SPORT 631, 632 (2022).



semi-professional sports.⁸⁵ Increasingly blurring the clear separation of amateurism and professionalism are payments to athletes in what traditionally were viewed as amateur competitions.⁸⁶ Contemporary approaches to sports governance replaced the three categories of amateur, semi-professional, and professional sports with a more nuanced classification system. Sports in most countries involve sporting activities at three levels: community, grassroots, or recreational sport; elite pathways; and elite competitions.⁸⁷ Within this framework the amateur/semi-professional/professional classification still operates to varying degrees according to the country and sport.⁸⁸

The dominant form of regulation in sport is self-regulation.⁸⁹ Nichol conceptualizes sport's self-regulatory system as being composed of internal and external regulation. Internal regulation consists of various formal, informal, and normative rules and practices.⁹⁰ Within this regime are regulatory actors such as sports governing organizations, leagues, players associations, and agents. Nichol's construct of external regulation in sport primarily encompasses legal rules that include the common law and domestic legislation on contract law, employment law, competition law,⁹¹ and international human rights law. The level of influence of these laws is largely

⁸⁵ Semi-professional sport is prevalent in baseball in many countries. It involves players receiving remuneration that is insufficient to earn a full-time living. Thus, most semi-professional players also have a part-time or full-time job. Depending on the nature of a league and its status within a regulatory regime, semi-professional baseball can be classed as amateur or professional sport: Nichol & Kawai, *supra* note 70, 50.

⁸⁶ American college sport is the most poignant example since the Supreme Court's decision in *National Collegiate Athletic Association v Alston et al*, 141 S. Ct. 2141 (2021) permitted payment to college athletes related to name, image, and likeness ('NIL').

⁸⁷ Theoretically and operationally, elite pathways and elite sport are closely interconnected. Various definitions of elite sport exist but Swann et al. identified that it involves some or all of the following factors: national/international level, experience, professionalism, training, participation in talent development programs, regional representation, sport- or country-specific measures, and university competitions: Christian Swann, Aidan Moran & David Piggott, *Defining elite athletes: Issues in the study of expert performance in sport psychology*, 16 *PYSCHOL. OF SPORT & EXERCISE* 3, 6 (2015). The characteristics of elite sport are access to tangible resources (finance for full-time athletes and coaches, specialist training facilities, sport science, etc.), less tangible resources (importance of sport to government, high level of public support, and a society that values a sporting career), and appropriate processes (funding, athlete selection and performance, etc): Barrie Houlihan & Jinming Zheng, *The Olympics and Elite Sport Policy: where Will It All End?*, 30(4) *INT'L. J. HISTORY OF SPORT* 338, 340 (2013).

⁸⁸ Arguably, amateurism remains most important in the United States due to its role in establishing eligibility for collegiate athletics: NCAA Eligibility Center, *2020-21 Guide for the College-Bound Student Eligibility*, 27. Amateurism is subsequently important for sports operating drafts that are limited to amateurs, for example, the 'first year' or 'amateur' draft in MLB: Major League Baseball, *Major League Rules 2021*, rule 4.

⁸⁹ Nichol, *supra* note 33, 50.

⁹⁰ *Id.* Chapter 5.

⁹¹ *Id.* Chapter 6.



dependent upon the willingness and use (and threat) of external actors (e.g., courts and tribunals) by internal actors.⁹² The level of protection afforded to athletes' human and worker rights in a sport are fundamentally connected to the level of engagement of the internal regime with external regulation and actors. Schwab identifies that most sports governing organizations struggle to protect the international human rights of athletes. Specifically, sporting norms, governance failures, and poor dispute resolution processes leave athletes vulnerable to human rights violations, including abuse of labor rights.⁹³

How Is Labor Regulated in Professional Baseball?

Multiple regulatory tools govern player labor in professional baseball in MLB and NPB. Features of baseball's labor regime (and most other professional team sports) include the size of the labor market, the structure of a labor market, and labor controls on mobility and wages. These factors operate in a diverse, complex, and highly evolutionary system of regulation.⁹⁴ Internal labor regulations in the sphere of professional baseball typically consists of a regulatory mix that includes a league constitution, by-laws or regulations, a collective bargaining agreement, and the uniform player contract.⁹⁵ External regulation of employment is generally dominated by legal rules on contract law, labor law, and competition law.⁹⁶ Interestingly, global sports law⁹⁷ in the context of baseball regulation can be viewed as internal or external regulation. Arguably, MLB and NPB view much of global sports law as

⁹² *Id.* 62, 85.

⁹³ Brendan Schwab, *Protect, Respect and Remedy. Global Sport and Access to Justice*, 3 INT'L SPORTS L. REV. 57, 58 (2020).

⁹⁴ Teubner applied biology theories from the 1970s to describe a legal regulatory system as an autonomous autopoietic system that evolves through variation, selection, and retention and by its relationship with other autonomous systems: Gunther Teubner, *Autopoietic Law: A New Approach to Law and Society*, in *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* 217, 231 (Gunther Teubner ed., 1988), Gunther Teubner, *Autopoiesis in Law and Society: Rejoinder to Blankenburg*, 18(2) LAW & SOCIETY REV. 291, 293 (1984). Nichol and Nichol and Kawai apply evolutionary theories such as autopoiesis to the regulation of sport: see Nichol, *supra* note 33 and Matt Nichol & Keiji Kawai, *The Regulatory Space of Collective Labour Relations in Australian Team Sports*, 14(1) AUSTRALIAN & NEW ZEALAND SPORTS LAW J. 83, 87-88 (2021).

⁹⁵ Nichol, *supra* note 33, 135-136, 139.

⁹⁶ *Id.* 101.

⁹⁷ Global sports law or *lex sportiva* is composed of the regulatory activities of the International Olympic Committee ('IOC'), national Olympic committees, and international sports federations. Specific global sports laws consist of the multitude of rules and principles created by domestic and international sport governing organizations, the cases and jurisprudence of the Court of Arbitration for Sport ('CAS'), and sport-specific legal rules (e.g., the global anti-doping regime): Brendan Schwab, *'Celebrate Humanity': Reconciling Sport and Human Rights Through Athlete Activism*, 28(2) J. LEGAL ASPECTS OF SPORT 170, 173 (2018).



external to its autopoietic system of regulation.⁹⁸ Both leagues protect their system of self-regulation by operating outside the World Anti-Doping Agency's ('WADA') international anti-doping system⁹⁹ and excluding the CAS from dispute resolution.¹⁰⁰ In addition, global sports laws generated through the Olympic movement has little impact as baseball is currently not an Olympic sport.¹⁰¹

Regulating Labor and Market Size

Fundamental to labor regulation in any industry is the size of the labor market. Unlike truly global sports such as soccer and basketball that have numerous professional leagues, baseball has a relatively small number of leagues where players can obtain full-time employment.¹⁰² MLB represents the highest level of baseball and remuneration. Next in status and pay is NPB.¹⁰³ In each league the number of clubs determines the size of the labor market. The majority of the professional labor market is situated in MLB's system of regulation. Its 30 clubs employ 1,200 'major league' players. Clubs also control much of the labor supply of professional players as they contract approximately 5,500 'minor league' players.¹⁰⁴ Since 2021, MLB formally controls and operates Minor League Baseball (MiLB) after it failed to renew the professional baseball agreement with the National Association of Professional

⁹⁸ Nichol, *supra* note 33, 50, 52-53; Nichol & Kawai, *supra* note 94, 87-88.

⁹⁹ MLB and NPB have the political and economic power to not adhere to the WADA Code. Also, baseball is not an Olympic sport, so players are generally not subject to regulation by the IOC or the WADA.

¹⁰⁰ For a discussion on the self-regulation arbitral systems in MLB and NPB, see Josh Chetwynd, *Play Ball? An Analysis of Final-Offer Arbitration, its Use in Major League Baseball and its Potential Applicability to European Football Wage and Transfer Disputes*, 20(1) MARQ. SPORTS L. REV. 109 (2009), Andrew Primm, *Salary Arbitration Induced Settlement in Major League Baseball: The New Trend*, 17 SPORTS LAW. J. 73 (2010), Jeff Monhait, *Baseball Arbitration: An ADR Success*, 4 HARV J. SPORTS & ENT. L. 105 (2013) and David L. Snyder, *Automatic Outs: Salary Arbitration in Nippon Professional Baseball*, 20(1) MARQ. SPORTS L. REV. 79 (2009).

¹⁰¹ After the Beijing 2008 Olympics, baseball lost its status as an Olympic sport. Baseball gained temporary Olympic status for Tokyo 2020. In 2021 the International Olympic Committee ('IOC') failed to permanently reinstate baseball from Paris 2024. The IOC did not publicly state any reasons for its decision.

¹⁰² These leagues are MLB, NPB, the Korean Baseball Organization ('KBO'), the Chinese Professional Baseball League ('CPBL') in Taiwan, Mexico's Liga Mexicana de Béisbol ('LMB') and Liga Mexicana del Pacífico ('LMP'), the Dominican Professional Baseball League, Liga Venezolana de Béisbol Profesional ('LVBP'), Serie Nacional de Béisbol ('Cuban National Series') in Cuba, and Puerto Rico's Liga de Béisbol Profesional Roberto Clemente: Nichol & Kawai, *supra* note 70, 48.

¹⁰³ Nichol & Kawai, *supra* note 70, 51.

¹⁰⁴ Associated Press, Report: *MLB, players reportedly reach minor league union deal*, NBC SPORTS, SEPT. 10, 2022, <https://mlb.nbcsports.com/2022/09/10/report-mlb-players-reportedly-reach-minor-league-union-deal/>. Until the end of the 2020 season over 7,000 players competed on over 240 teams affiliated with MLB clubs in 19 Minor Leagues.



Baseball Leagues.¹⁰⁵ Even though the NPB is the second largest professional baseball league in the world, it is much smaller than the MLB-MiLB system as its 12 clubs each maintain a 70-player roster that comprises all major and minor league players.¹⁰⁶ NPB's major league is known as *ichi-gun* (Division 1) and its only minor league is *ni-gun* (Division 2).

Regulating Labor and Market Structure

Shaping the operation of a labor market is the organization and structure of labor. Baseball rosters¹⁰⁷ have three general classifications: 'total' roster, 'active' roster, and 'development' roster. Total rosters comprise all contracted players controlled under the reserve system. Active rosters are limited to players eligible to participate in an official game.¹⁰⁸ Some leagues also have 'development' rosters that vary in number and limit the ability of players to participate in games.¹⁰⁹ The labor of each of the 30 MLB clubs is controlled through the 40-player roster, a club's list of 'reserved' players.¹¹⁰ Only players on a club's 'active' 26-player roster can play in a game.¹¹¹ NPB is comparatively smaller than MLB as there are only 12 teams. Japanese clubs have a bifurcated labor system as they maintain a 70-player roster that encompasses all *ichi-gun* and *ni-gun* players (a growing number of clubs have *san-gun* or Division

¹⁰⁵ *Why MLB's minor leagues as you know them will end Sept. 30*, ESPN, Sept. 3, 2020, https://www.espn.com/mlb/story/_/id/29795127/why-mlb-minor-leagues-know-end-sept-30.

¹⁰⁶ Clubs typically have 64 to 69 players on a roster to enable flexibility to recruit during the season. Clubs also have an *ikusei* roster that varies in size between clubs: Nichol, *supra* note 33, 18.

¹⁰⁷ Sport has different names for the contracted players eligible to participate in a game: North American sports use the term 'rosters,' Australia has 'player lists,' and soccer has 'squads.'

¹⁰⁸ Active rosters in most professional leagues and international senior competitions are 25 to 28 players.

¹⁰⁹ Nichol & Kawai, *supra* note 70, 52-53. Both NPB and the Australian Baseball League have development rosters.

¹¹⁰ Major League Baseball, *Major League Constitution*, article 2(a)(b)(1)(A).

¹¹¹ Active roster numbers and composition have been the subject of recent changes, in part due to the impact of COVID-19 and collective bargaining. For the 2022 season MLB and MLBPA agreed to expand the 26-player active roster to 28 players from Opening Day to May 1 (29 players for doubleheaders). Other active roster changes included a limitation on the number of pitchers on the active roster and optional assignments prior to May 2 not counting toward the limits on optional assignments in the collective bargaining agreement entered into early 2022: *MLB, MLBPA announce rule changes for 2022 season - New DH Provision Allows Additional Flexibility for Two-Way Players; Temporary Roster Expansion, Extra Innings Rule Resume*, Major League Baseball, Apr. 1., 2022, <https://www.mlb.com/press-release/press-release-mlb-mlbpa-announce-rule-changes-for-2022-season>.



3).¹¹² Active *ichi-gun* rosters consist of 28 players¹¹³ that permit a maximum of four foreign players.¹¹⁴ Some clubs maintain an *ikusei* ('development player') roster with no set limit on the number of players.¹¹⁵

Labor Mobility Practices and Controls in Baseball

A number of interrelated practices in the labor regimes of MLB, NPB, and other professional leagues target controlling the ability of players to freely change teams. Interconnected to this objective is giving clubs the right to determine when players can maximize their income through negotiating a market contract with all teams. Clubs must ensure that labor practices that place extreme limitations on player labor mobility are legally enforceable if subject to challenge in the courts or specialized labor tribunals.¹¹⁶ However, the advent of collectivism, increased financial reliance of clubs on leagues, and the exercise of discretionary powers by many leagues have led to a general decrease in court challenges.¹¹⁷ Instead, controls that may violate restraint of trade and competition laws¹¹⁸ frequently face modification in collective bargaining.

Practices relevant to labor mobility that in turn help to understand whether labor is treated as a commodity are controlling the rights of player to play baseball for a designated time period through the reserve system, terminating the player's employment contract at any time and for any reason, guaranteeing player wages

¹¹² All NPB clubs have a *ni-gun* team that play in the Eastern and Western Leagues. A growing number of clubs have a *san-gun* ('Division 3') team for developing draftees and potentially development players on an *ikusei* roster. *San-gun* teams play informal games against independent league and college teams.

¹¹³ *Japanese Professional Baseball Agreement* 2013, article 81(2).

¹¹⁴ A further restriction is that of the four foreign players there can only be a maximum of three position players or three pitchers: Nippon Professional Baseball, *Japanese Professional Baseball Agreement* 2013, article 82(2).

¹¹⁵ While *ikusei* players cannot be added to the active roster they can be transferred to the 70-man roster: Nippon Professional Baseball, *Nippon Purofessionaru Yakyū Ikusei Senshu Kiyaku* [Rule on Professional Baseball Development Players] 2013, article 1.

¹¹⁶ Internal regulatory actors who may initiate legal action are an individual player, the player's agent, a players' association, and on occasion clubs.

¹¹⁷ Nichol & Kawai, *supra* note 94, 95; Meg Smith & David Moore, *Fairness, Free Agency and Franklin*, 22(1) INT'L J. EMP. STUDIES 5, 9–10 (2014).

¹¹⁸ Leagues can legally benefit from collective bargaining as they can be insulated from competition law. In some countries labor controls contained in collective bargaining agreements are exempt from competition law. See, e.g., the United States has a statutory exemption (*Clayton Antitrust Act of 1914*, 15 October 1914, Pub. L. 63-212, 38 Stat. 730 (15 U.S.C. § 12-27, 29 U.S.C. § 52-53), section 6; Norris-LaGuardia Act, ch. 90, § 1, 47 Stat. 70 (1932)) and non-statutory exemption (stated in *National Football League v Mackey*, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977)) exemption.



in multi-year contracts, trading players, buying players for cash, moving players between a club's major and minor league teams, and limiting a club's ability to 'stockpile' players.¹¹⁹ These labor practices are now supported by various controls on labor mobility. Many fans, commentators, academicians, and internal regulatory actors in sport mistakenly view the following controls in isolation. Due to the risk of undue commodification, controls in sport governing labor mobility must be assessed according to their individual and collective effect on mobility.

The starting point for controlling labor mobility in baseball is setting a designated period of time in which a player cannot perform employment services for any other team. In baseball, the system is infamously known as the 'reserve' clause or system. The reserve system evolved since Arthur Soden introduced it in 1879¹²⁰ to underpin uniform player contracts and the collective agreements in MLB and NPB (despite surviving numerous legal challenges in MLB).¹²¹ A product of the history and financial objectives of professional sports leagues,¹²² the reserve clause in uniform player contracts is now interconnected to a league's bylaws and collective bargaining agreement. The result is a regime of labor regulation that allows clubs to control the cost and movement of labor by giving a club exclusive control of a professional player's services for a designated time period. The reserve clause severely restricts labor mobility as a player can only change clubs as a 'free agent,' is traded to another club, unconditionally 'released' from his contract (termination of contract), or moves via baseball's internal contracting procedures. The United States Court

¹¹⁹ The waiver and 'option' system are designed to prevent the stockpiling of players in the Minor Leagues. In 1931 Commissioner Landis used the 'best interests' powers to prevent the St. Louis Cardinals from retaining Fred Bennett through circumvention of the waiver system. The actions of Landis were affirmed in *Milwaukee American Association v Landis*, 49 F.2d 298 (N.D. Ill. 1931). Reserved players on the MLB active roster can be 'optioned' to the Minor Leagues a designated number of times and 'recalled' without being subjected to the waiver system and potentially being claimed by another club. The collective bargaining agreement entered into in 2022 now limits the number of options to five. The aim is to reduce service time manipulation by clubs: Maury Brown, *With MLB Lockout Over, Here Are All The Details Of New 2022-26 Labor Deal*, FORBES, Mar. 10, 2022, <https://www.forbes.com/sites/maurybrown/2022/03/10/with-mlb-lockout-over-here-are-all-the-details-of-new-2022-26-labor-deal/?sh=287148d723e2>.

¹²⁰ For a historical overview of baseball's reserve clause see Ed Edmonds, *Arthur Soden's Legacy: The Origins and Early History of Baseball's Reserve System*, 5 ALB. GOV'T L. REV. 38 (2012).

¹²¹ There have been numerous legal challenges to the reserve system. Key cases include *Metro Exhibition Co. v Ward*, 9 NYS 779 (Sup. Ct. 1890), *Philadelphia Ball Club v Hallman*, 8 Pa. C. 57 (C.P. 1890), *Metropolitan Exhibition Company v Ewing*, 42 F. 198 (C.C.S.D. N.Y. 1890), *Philadelphia Ball Club v Lajoie*, 202 Pa 210 (Pa. 1902), *American League Baseball Club of Chicago v Chase*, 149 N.Y.S. 6 (N.Y.S. 1914), *Federal Baseball Club of Baltimore Inc v National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), *Toolson v New York Yankees*, 346 U.S. 356, (1953), *Flood v Kuhn*, 407 U.S. 258 (1972).

¹²² *Silverman v Major League Baseball Player Relations Committee*, 67 F.3d 1054, 1060 (2d Cir. 1995).



of Appeals for the Second Circuit described the reserve and free agent systems as making the employment of a baseball player the property of a contracting club that restricts a player's freedom to contract with other clubs.¹²³ The effects of the reserve system on labor mobility and potential to commodify labor effects are heightened by related labor controls: the draft, minimum salaries, salary caps,¹²⁴ trades, and limits on signing bonuses.

Part C. How Does the Regulation of Labor in Professional Baseball Commodify Labor?

Individual labor controls and practices will now be examined to determine whether they violate the principle that labor is not a commodity. It will also be assessed whether there is compliance with the restraint of trade doctrine. The purpose is to identify if labor practices may breach the commodity principle but at the same time be a lawful restraint of trade.

The Reserve System

By giving clubs control over a player's legal right to play baseball for what is now a specified or unspecified period of time,¹²⁵ the reserve system treats labor as a commodity and not Locke's free worker. The reserve system also clearly violates the restraint of trade in antitrust laws due to the limitations placed on a player negotiating a contract and wages in a free market. While it can be argued that the legal exception

¹²³ *Silverman*, 67 F.3d 1054, 1060-1062 (2d Cir. 1995).

¹²⁴ Salary caps are not a feature of baseball. No formal regulation of player wages exists in NPB. In MLB the owners' attempt to introduce a salary cap (among other factors) led to the player strike in 1994 and the owners cancelling the season. However, MLB does have a 'competitive balance tax' that is known as a 'luxury tax': MLB Basic Agreement 2017-2021, Article XXIII. Clubs that exceed designated thresholds must pay penalties of surcharges and/or draft selections depending on the amount exceeded and number of consecutive years the threshold is exceeded. Player concerns that this tax evolved into a de facto salary cap that deflated player salaries and resulted in some clubs paying a small percentage of the pre-tax payrolls saw significant increases in collective bargaining in 2022 - \$230 million in 2022, \$233 million in 2023, \$237 million in 2024, \$241 million in 2025, \$244 million in 2026. A fourth tax level was added for teams that spend \$60 million above the base threshold: Mark Feinsand, *MLB, MLBPA agree to new CBA; season to start April 7*, MLB, Mar. 11, 2022, <https://www.mlb.com/news/mlb-mlbpa-agree-to-cba#:~:text=The%20new%20five%2Dyear%20CBA,system%20to%20prevent%20alleged%20service%2D>

¹²⁵ In 1975, arbitrator Peter Seitz dismissed the owners' claim that the reserve clause in uniform player contracts (and the Major League Rules) acted in perpetuity and held for two players (Andy Messersmith and Dave McNally) who lodged grievances to be free agents. Seitz found that the reserve clause in player contracts was an option that could be exercised for one year if the player did not sign a contract: *National and American League of Professional Baseball Clubs v MLBPA*, 66 Labor Arbitration Report (BNA) 101 (1976) (Seitz, Arb). Free agency eligibility can be based on years on a roster (see MiLB) or service on active roster (calculated as a designated number of days, e.g., MLB and NPB).



of the worker providing consent applies to professional baseball players,¹²⁶ this does not negate treatment of labor as a commodity. The formal consent provided by a player is frequently the product of a major imbalance in negotiating power, that courts sometimes correct with rules drawn from both labor law and contract law,¹²⁷ or that regulatory actors in baseball can be modified in collective bargaining. Players who are not unionized (e.g., Minor League players until 2022) arguably face undue commodification as they possess few methods by which to improve their employment.

Due to its central role in baseball's labor regime, the reserve system is a logical starting place to examine whether baseball players are commodified. Curt Flood expressed player sentiments to Soden's 'innovation' prior to the recognition of free agency in describing his trade in 1969 from St. Louis to Philadelphia as slavery. Former MLB player Dan Peltier's testimony at a Senate hearing in 1997 stopped short of describing the reserve system as slavery. Instead, he said it was similar to indentured servitude of the 1700s.¹²⁸ Player views were echoed by the judiciary.

In *American League Baseball Club v Chase*,¹²⁹ Justice Bissell stated baseball's labor system treats players as a chattel and title is owned by the club.¹³⁰ Bissell J then identified something akin to commodity trading in observing the servitude embedded in the reserve system allows the 'purchase, sale, barter, and exchange of the services of baseball players' that creates a quasi-peonage system that violates the spirit of the Constitution.¹³¹ The comments of Justice Marshall in the dissent in *Flood* can be located in the spectrum of practices that commodify labor, as Marshall J held players were not bound to a club by slavery but by the reserve system, a system that could not be escaped after signing their first professional contract.¹³² Then, in *Silverman v Major League Baseball Player Relations Committee*,¹³³ Newman CJ, Second Circuit Chief Justice of the United States Court of Appeal, described the reserve system as a player's services being the property of a club that limits their freedom to seek employment at another club. Newman CJ added that until the advent of free agency in the 1970s, a player's services remained the property of a club until

¹²⁶ See, e.g., the English case of *Herd v Weardale Steel, Coal and Company Limited* [1914] AC 67.

¹²⁷ See, e.g., the English case of *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 invalidated a one-sided agreement between a young song writer and a music publisher.

¹²⁸ Hearing on Senate 53 Before the Senate Committee on the Judiciary, 105th Cong 13–15 (June 17, 1997) (testimony of Dan Peltier, former baseball player) 7.

¹²⁹ 149 N.Y.S. 6 (1914).

¹³⁰ *Id.* 12.

¹³¹ *Id.* 19.

¹³² *Flood*, 407 U.S. 258, 289.

¹³³ 67 F.3d 1054 (2d Cir. 1995).



traded or ‘released’ from his contract.¹³⁴ These descriptions of the reserve system demonstrate that for more than 100 years the United States judiciary sees the reserve system as treating labor as a commodity to varying degrees. Limiting the free movement of workers is likely to breach restraint of trade laws.

The ‘Waiver’ System

Professional baseball’s ‘waiver’ system is a contractual process that interacts with the reserve system. Despite attempting to prevent the stockpiling of players, waivers tend to commodify labor. Under the 2022 collective bargaining agreement, a club can ‘option’ a player on the MLB active roster to a Minor League affiliate five times.¹³⁵ The change was designed to prevent manipulation of service time for free agency eligibility and indicates clubs see players as commodities capable of control. When a club ‘waives’ its rights to a reserved player or has no more options, other clubs in the league then have a set period of time to ‘claim’ the rights to the player. In the MLB system unclaimed players may be ‘designated’ (reassigned) to an affiliated Minor League team or given their ‘outright’ contractual release. Players who clear waivers are left unemployed, a particular problem for waivers in the MLB labor system as a player can be put on waivers at any time.

While the waiver system is a key feature of MLB labor relations due to the frequent movement of players between the Major and Minor League club and the need to create active roster space when a player is acquired, it is comparably underutilized in NPB. Ownership and labor structure are the key explanations. A Japanese corporation owns the major and minor league teams and there is only one formal minor league. Players do not need to clear waivers when moving between the *ichi-gun* and *ni-gun* teams. Waivers in NPB typically occur at the end of a season when players are released from the 70-man roster through a process called *senryokugai*. It is worth noting that the movement of players within a corporate group is not a foreign concept in Japan, where workers can be transferred among related companies within a corporate structure called a *keiretsu* through the system of lifelong employment.¹³⁶

On the one hand the waiver system, combined with baseball’s internal contracting procedures, facilitates the movement of players to clubs with greater playing opportunities. In this regard, it can be argued waivers promote rather than restrain trade. However, waivers may still commodify labor. Entering the waiver system is at the sole discretion of a club and players have no control over when they enter waivers

¹³⁴ *Id.* 1060.

¹³⁵ Brown, *supra* note 119.

¹³⁶ Matt Nichol, Elisa Shioji & Trevor O’Ryan, *The Regulation of Aged Workers: Lessons from Japan*, 54 J. JAPANESE LAW 121, 140-141 (2022).



or which club selects their contract.¹³⁷ As a player's employment is essentially terminated when entering the waiver system, to not treat labor as a commodity would see the player immediately being declared a free agent so that they negotiate with all clubs in any league.

Trading Baseball Players

The formal ability of MLB and NPB clubs to trade a player to another club at any time treats players as a commodity. However, player trades occur infrequently in NPB. There were only three NPB trades in 2022.¹³⁸ Trading employees to another business for cash or workers does not occur in labor markets but rather commodities market. Trades essentially involve the buying and selling of players. They are legitimized through provisions in league rules and uniform player contracts that permit the 'assignment' of the contract.¹³⁹ The trading of players is an exploitative labor practice that demonstrates that the degree of commodification of labor is connected to variations in the power balance between club and player.

In MLB, clubs that trade an experienced or elite player frequently obtain in exchange Minor League players or fringe Major League players. Lower status players possess trade value as they can be controlled for all or most of the six years of service under the reserve system. These players also represent a cost saving as they

¹³⁷ Nichol, *supra* note 33, 164-165.

¹³⁸ All trades were between Pacific League and Central League clubs. There were no trades between clubs in the same league: NPB season 2022 trade data, compiled by the author from official NPB data available via the NPB English website.

¹³⁹ See, e.g., Major League Rules 2021, rule 6, Major League Baseball and Major League Baseball Players Association, Basic Agreement 2017-2021, Appendix A - Major League Uniform Player's Contract, clause 6(a). The assignment of contracts occurs in soccer and is known as 'third-party ownership' ('TPO') of players. The Court of Arbitration for Sport reviewed the legality of TPO agreements under the Federation International de Football Association regulations in Arbitration CAS 2018/A/6027 *Sociedade Esportiva Palmeiras v Federation Internationale de Football Association (FIFA)*, award of December 30, 2019.



either receive the minimum wage¹⁴⁰ or are salary arbitration eligible.¹⁴¹ Under the collectively bargained ‘five and ten’ rule, veteran players have some control over whether they are traded.¹⁴² High-profile Japanese players can negotiate contractual clauses that prohibit assignment to a Minor League club. Yet most Minor and Major League players have no control over their labor in relation to being traded. While this practice may not violate restraint of trade laws as there is no restriction on the ability of clubs to negotiate a trade, it clearly conflicts with the ideal of not treating labor as a commodity.

Compensation for the Loss of Free Agents

Free agency has the general effect of decommodifying labor by giving a player control over his employment through the right to choose his employer and negotiate a contract and wage with any club. But free agent rules in collective bargaining have evolved to provide compensation for losing free agents. While compensation rules

¹⁴⁰ Minimum wages are governed by the collective bargaining agreement: Major League Baseball and Major League Baseball Players Association, Basic Agreement 2017-2021, article VI. Hereinafter ‘MLB Basic Agreement 2017-2021.’ Note that at the time of writing the new MLB collective bargaining agreement was not publicly available. Collective bargaining in 2022 saw a major increase in the Major League minimum wage and the largest single season increase in history (\$129,500) - \$700,000 in 2022, \$720,000 in 2023, \$740,000 in 2023, \$760,000 in 2025, and \$780,000 in 2026: Feinsand, *supra* note 124. The minimum wage for Minor League players signing their second Major League contract or with Major League active roster service also significantly increased from \$93,000 - \$114,100 in 2022, \$117,400 in 2023, \$120,600 in 2024, \$123,900 in 2025, \$127,100 in 2026: Brown, *supra* note 119.

¹⁴¹ Arbitration-eligible players have between three and six years of MLB service and may submit to arbitration without the consent of their club. ‘Super Two’ players are eligible if they have between two and three years of service, accumulated 86 days of service in the preceding season, and are ranked in the top 22% in total service for eligible Super Two players: MLB Basic Agreement 2017-2021, article VI.E(a)(b). Collective bargaining in 2022 created a new ‘pre-arbitration bonus pool’ of \$50 million for the best 100 players based on awards and statistics that will be distributed according to a new statistical method to be developed by MLB and the MLBPA: Feinsand, *supra* note 124.

¹⁴² A club must receive a player’s written consent to assign a contract if the player has five or more years of Major League service, or if the player has 10 or more years of Major League service, the last five being with the one club: MLB Basic Agreement 2017-2021, article XIX.A(1)(2).



do not engage with restraint of trade laws, they do deal with players as commodities in that a player is valuable property whose loss must be replaced. Losing specified categories of free agents in MLB and NPB mandates compensation for the player's former club. Compensation in MLB is in the form of a draft pick after the Competitive Balance Round B of the next draft. This compensation is limited to when the club makes a 'qualifying offer'¹⁴³ and is now a normative practice to ensure compensation for players that are likely to be lured by lucrative offers. Compared to MLB, NPB's domestic free agent system treats players like an undue commodity. NPB compensation from the new club is a player, cash, or a combination of both. Compensation is determined according to a free agent's rank in club salary in his last season.¹⁴⁴ The rules further commodify labor as clubs who sign a domestic free agent can protect 28 players from compensation.¹⁴⁵

Treatment of Minor League and *ni-gun* Players

Providing insight into whether baseball players are commodities (and possibly undue commodification) is how entry-level and developing players are treated. Similarities in labor controls and practices exist across MiLB and *ni-gun*. Examples include the amateur draft, standardized wages, uniform contracts, the reserve system, and free agency. The practices which restrict competition for the services of players are likely to breach competition laws. While accepted as an integral part of many professional sports leagues, the draft both commodifies labor and restrains trade. The United States Court of Appeals for the District of Columbia in *Smith v Pro Football Inc* described college players subject to the National Football League's draft as 'fungible commodities.'¹⁴⁶ Players selected in the draft in both leagues in effect become the property of that club for one year. MLB's draftees who refuse to play for the selecting club must sit out of professional baseball for one year and wait for the next

¹⁴³ A qualifying offer is a salary equal to the average salary of the highest 125 paid players: MLB Basic Agreement 2017-2021, article XX.B(4)(b).

¹⁴⁴ 'A rank' players were in a team's top three players for salary and compensation is either money (80% of the player's last salary) or money (50% of player's salary) and one unprotected player. 'B rank' players were in a team's top four to 10 salary earners and compensation is either money (60% of the player's last salary) or money (40% of player's salary) and one unprotected player. 'C rank' players are all other players and teams receive no compensation for these players: NPB Agreement 2004, article 10.

¹⁴⁵ *Id.* article 10.

¹⁴⁶ *Smith v Pro Football Inc*, 593 F.2d 1173, 1187 (D.C. Cir. 1978).



draft.¹⁴⁷ Similarly, Japanese amateurs have refused to play for the selecting club¹⁴⁸ or attempted to sign directly with a MLB club by signaling a desire to not be drafted.¹⁴⁹ What complicates the draft in Japan is that any club can select the same player (this triggers a lottery).¹⁵⁰ Draftees then sign a uniform contract that sets a minimum wage and prevents them from changing teams via the reserve system, practices that simultaneously commodify labor and restrain trade.

Notable variations exist in the level and nature of commodification across the two leagues. Key areas of divergence are the restrictions imposed on the signing bonuses of the draftees in the MLB amateur draft¹⁵¹ and international amateurs,¹⁵² development rosters in NPB and the vastly different structure of the player development systems (MiLB has six classifications compared to the one minor league in NPB). Another disparity examined in detail below is the overreliance in MiLB on cheap foreign amateur labor from Latin America. The real value of wages is also higher in NPB as entry-level players receive subsidized accommodation (live in a team dormitory), enjoy relative job security,¹⁵³ do not need to navigate myriad minor league teams or

¹⁴⁷ Major League Baseball, *The Official Professional Baseball Rules Book*, 2021, rule 4(h). Hereinafter ‘Major League Rules 2021’; Nippon Professional Baseball, *Rule of NPB Draft* 2006, article 2. College seniors in the United States are the exception to this rule and subsequently face below value signing bonuses: Jonathon C. Gordon, *Foul Ball: Major League Baseball’s CBA Exploits College Seniors in the MLB Draft*, 16(2) TEX. REV. ENT. & SPORTS LAW 141 (2015).

¹⁴⁸ In MLB, some college players selected in the draft in their freshman or junior year do not sign a contract in preference of completing their university degree. Many of these players are late-round selections but later become high-round draft selections. In NPB, Tomoyuki Sugano refused to sign with the Nippon Ham Fighters when drafted in 2011 in preference for playing for the Yomiuri Giants (his uncle was manager Tatsunori Hara). In 2012, Yomiuri drafted Sugano unchallenged: *Tomoyuki Sugano*, BASEBALL REFERENCE, https://www.baseball-reference.com/bullpen/Tomoyuki_Sugano (last updated Jan. 8, 2021).

¹⁴⁹ In 2009, Yusei Kikuchi and then Shohei Ohtani in 2012 both expressed a desire to not be selected in the NPB draft in preference for directly pursuing a MLB career. Kikuchi changed his mind and was drafted by the Saitama Seibu Lions. The Nippon Ham Fighters selected Ohtani and convinced him to play in the NPB before playing in MLB: Nichol & Kawai, *supra* note 70, 63.

¹⁵⁰ Nippon Professional Baseball, *Rule of NPB Draft* 2006, article 9.

¹⁵¹ Clubs are allocated signing bonus pools for each draft and high-draft selections in the first few rounds are designated with a signing bonus known as ‘slot money.’ For signing bonus values in the 2022 amateur draft see Jim Callis, *Each club’s 2022 MLB Draft bonus pools and pick values*, MLB.COM, July 21, 2022, <https://www.mlb.com/news/mlb-draft-2022-bonus-pools-pick-values>.

¹⁵² MLB Basic Agreement 2017-2021, Attachment 46, B.

¹⁵³ Japanese players do not face contractual release at any time before, during, or after a season. ‘Fringe’ *ichi-gun* and ‘career’ *ni-gun* players are typically on the 70-person roster for at least four to five years.



random trades to other clubs, and enjoy a high social status in Japanese society as professional athletes.¹⁵⁴ *Ni-gun* (and *san-gun* teams for applicable clubs) players are treated comparably well to Minor League players. Overall, the minimum wage in NPB is \$42,000 and the average salary of a *ni-gun* player is \$218,000.¹⁵⁵

Wages of Minor League Players

The regulation of MiLB player labor highlights how labor controls and practices can cause undue commodification of labor when mixed with social, cultural, economic, and normative factors. Restraint of trade and violation of antitrust law also results. Minor League players are only paid to play games during the regular and postseason.¹⁵⁶ Players even ‘work for free’ as they are not remunerated for spring training, extended spring training, employment related travel, or off-season training.¹⁵⁷ Until 2020, the uniform monthly wages set by MLB for each Minor League classification ranged from \$1,300 to \$2,150.¹⁵⁸ These wages were increased in 2021 in response to the work of the Minor League Advocates and the *Senne* class action on federal minimum wages. The following pay scale now exists: Class Rookie - \$1,600, Class A - \$2,000, Class AA - \$2,400 and Class AAA - \$2,800. Annual salaries range from \$4,800 to \$15,400.¹⁵⁹ Despite modest wage increases, signing bonus values still demonstrate the importance of receiving the highest possible signing bonus as they support a player during the course of their MiLB career.¹⁶⁰

Substandard wages and conditions saw retired Minor League players in the 2010s challenge the Minor League pay system in two class actions using antitrust law and labor law. These lawsuits highlight that the principle that labor is not a commodity

¹⁵⁴ Nichol, *supra* note 33, 158-159.

¹⁵⁵ *Id.* 22.

¹⁵⁶ Major League Baseball, Major League Rules 2021, Minor League Uniform Player Contract, Addendum C.

¹⁵⁷ Matt Nichol, ‘*A fair day’s work for a fair day’s pay*’ or ‘*working for love and not money*’? *Using class actions to challenge the labour law exclusion in Minor League Baseball in the United States*, 28(3) *LABOUR & INDUSTRY: A JOURNAL OF THE SOCIAL & ECONOMIC RELATIONS OF WORK* 149, 150, 153 (2018).

¹⁵⁸ *Senne et al.* Complaint, 98; Nichol, *supra* note 157, 151. Experienced professional players and free agents earn between \$60,000 and \$125,000: Nichol, *supra* note 33, 153, Russell Yavner, *Minor League Baseball and the Competitive Balance: Examining the Effects of Baseball’s Antitrust Exemption*, 3 *HARV. J. SPORTS & ENT. LAW* 265, 303-304 (2014).

¹⁵⁹ *ADVOCATES FOR MINOR LEAGUERS*, *supra* note 21.

¹⁶⁰ Based on the amount of their signing bonus, Minor League players are classed as ‘bonus babies’ or ‘penniless players’: Garrett R. Broshius, *Touching Baseball’s Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 *HARV. J. SPORTS & ENT. LAW* 51, 64 (2013).



and restraint of trade can overlap. The fight to earn a living wage¹⁶¹ has profoundly impacted the Minor Leagues. In 2014, former MiLB player Sergio Miranda initiated a class action against MLB and its 30 clubs, alleging the Minor League pay system violated antitrust law as a conspiracy to restrict wages. The United States District Court for the Northern District of California in *Sergio Miranda et al v Allan Huber Selig et al*¹⁶² dismissed the claim on the basis of MLB's exemption from antitrust law and the purported exclusion of Minor League labor from antitrust law in the *Curt Flood Act*.¹⁶³ The players unsuccessfully appealed¹⁶⁴ to the United States Court of Appeals for the Ninth Circuit¹⁶⁵ and the Supreme Court denied the players' application for a writ of certiorari in February 2018.¹⁶⁶

In 2014, another group of retired Minor League players filed suit,¹⁶⁷ claiming they were paid below state and federal minimum wages. MLB lobbying in Washington saw Congress pass the *Save America's Pastime Act*¹⁶⁸ in March 2018.¹⁶⁹ This Act applies the Fair Labor Standards Act of 1938¹⁷⁰ to Minor Leaguers working a 40-hour week during the championship season¹⁷¹ and set weekly wages of \$290 (\$1,160 per month).¹⁷² On the eve of the trial in July 2022, the *Senne* class action settled for \$185

¹⁶¹ Proponents of the living wage argue that an adequate wage allows affected workers and their families to lead a life in a material sense and does not impose excessive costs on businesses. See, e.g., Pollin, *supra* note 31, 8-9; NICHOL, *supra* note 157.

¹⁶² Case No 14-cv-05349-HSG (N.D. Cal. 2015).

¹⁶³ *Sergio Miranda et al*, Case No 14-cv-05349-HSG (N.D. Cal. 2015 September 14), Order Granting Motion to Dismiss, 3-4.

¹⁶⁴ The players argued *Flood* is incorrect law and the exclusions in the *Curt Flood Act* only operate in the context of federal antitrust law related to the labor of Major League players: *Sergio Miranda et al*, Case No 3:14-cv-05349-HSG (9th Cir. 2016 January 6), Appellants' Opening Brief, 2-4.

¹⁶⁵ *Sergio Miranda et al v Allan Huber Selig et al*, No. 15-16938 D.C., No. 3:14-cv-05349-HSG (9th Cir. 2017), Opinion, 14-15.

¹⁶⁶ *Sergio Miranda et al v Allan Huber Selig, Bud et al.*, Supreme Court of the United States, No. 17-453, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-453.html>.

¹⁶⁷ *Senne, Liberto, Odle and Others v Office of the Commissioner of Baseball, Major League Baseball and Others*, Case 3:14-cv-00608-JCS (N.D. Cal. 2014).

¹⁶⁸ H.R. 5580, 114th Congress (2015-2016).

¹⁶⁹ *Consolidated Appropriations Act 2018*, Title II – *Save America's Pastime Act*.

¹⁷⁰ *Fair Labor Standards Act of 1938*, 29 U.S.C. § 201.

¹⁷¹ For a discussion of this Act see Nathaniel Grow, *The Save America's Pastime Act: Special-Interest Legislation Epitomized*, 90(4) U. COLO. L. REV. 1013 (2019).

¹⁷² 29 U.S.C. § 201(2).



million.¹⁷³ During the litigation, the Minor League Advocates formed to give players a ‘voice’ and push for improved working conditions. The activities of the Minor League Advocates saw the MLBPA seek recognition from MLB on Sept. 6, 2022, to represent Minor League players in collective bargaining after a majority of players endorsed the MLBPA as their bargaining representative.¹⁷⁴ On Sept. 10, 2022, MLB voluntarily recognized the MLBPA as the union for Minor League players.¹⁷⁵ At the time of writing, MLB and the MLBPA were negotiating a collective bargaining agreement.

International Movement of Professional Players

The international transfer rules between MLB and the world’s top professional baseball leagues demonstrate the duality of regulations in both commodifying and decommodifying labor. These bilateral transfer agreements are based on the Posting Agreement between MLB and NPB and decommodify labor by allowing reserved players to transfer prior to free agency. But at the same time these players are commodified to some extent as they require their club’s consent to transfer and the payment of a fee (or compensation). Players may be prepared to make these tradeoffs in order to transfer to MLB before becoming a free agent.

The original ‘posting’ system between MLB and NPB permitted Japanese players who were not free agents to request an MLB transfer from their club during a designated transfer period in the offseason.¹⁷⁶ If approved, the player’s details were ‘posted’ to all MLB clubs.¹⁷⁷ Club consent implies that the player is the property of his NPB club and is capable of control like a commodity. Interested clubs had four days to submit to MLB a monetary bid known as a posting fee¹⁷⁸ through a ‘blind auction’ (clubs were not aware of other bidders or bids). The highest bidder received the exclusive and non-assignable rights to negotiate with the player for 30 days,¹⁷⁹ demonstrating that even the rights to employ a player can be controlled and thereby commodify labor. The posting fee is effectively compensation to the NPB club for the player not completing his contract under the reserve system.

¹⁷³ Jeff Passan, *MLB to pay \$185 million in settlement with minor league players over minimum-wage and overtime allegations*, ESPN, July 16, 2022, https://www.espn.com.au/mlb/story/_/id/34249632/mlb-pay-185-million-settlement-minor-league-players-minimum-wage-allegations.

¹⁷⁴ *MLBPA seeks voluntary recognition from MLB to represent Minor Leaguer*, MLBPA, Sept. 6, 2022, <https://www.mlplayers.com/post/mlbpa-seeks-voluntary-recognition-from-mlb-to-represent-minor-leaguers>.

¹⁷⁵ Mark Feinsand, *MLB to recognize Minor League union*, MLB.COM, Sept. 20, 2022, <https://www.mlb.com/news/mlb-to-recognize-minor-league-players-union>.

¹⁷⁶ Major League Baseball and Nippon Professional Baseball, *Agreement between the Office of the Commissioner of Baseball and the Office of the Commissioner of Nippon Professional Baseball* 2000, article 9.

¹⁷⁷ *Id.* article 8.

¹⁷⁸ *Id.* article 10.

¹⁷⁹ *Id.* articles 9, 11.



Changes to setting the transfer fee shifted who sets the fee from the MLB club to NPB club and finally the market. The change in the mechanism for setting the transfer fee represents a gradual decommodification of labor. The inability of the Posting Agreement 2000 to improve access to labor and labor mobility led to a new agreement in 2013.¹⁸⁰ The Posting Agreement 2013 moved the power to set the transfer fee to the NPB club (capped at \$20 million)¹⁸¹ and any MLB club willing to pay the ‘release fee’ could negotiate with the player.¹⁸² As most transfers involved elite pitchers that attracted the maximum \$20 million release fee, further reforms were introduced in the Posting Agreement 2017.¹⁸³ The mechanism for transfer fees again shifted, this time to the market and a percentage of the player’s new contract.¹⁸⁴ This method of calculating the transfer fees decommodified labor as it was no longer an arbitrary amount but a percentage of the player’s market value.

The commodification of labor by the Posting Agreement 2017 now interacts with other regimes of labor regulation. In 2017, the Major League Basic Agreement required the harmonization of foreign player transfer rules.¹⁸⁵ Subsequently, the posting protocols became a de facto global player transfer system or ‘model’ regulation. Between 2018 and 2019, MLB replicated the key posting rules and processes in agreements with the other key professional leagues: the Korean Baseball Organization,¹⁸⁶

¹⁸⁰ Major League Baseball and Nippon Professional Baseball, *Agreement between the Office of the Commissioner of Baseball and the Office of the Commissioner of Nippon Professional Baseball* 2013. Hereinafter the ‘Posting Agreement 2013.’

¹⁸¹ *Id.* article 7.

¹⁸² *Id.* article 9.

¹⁸³ Major League Baseball and Nippon Professional Baseball, *Agreement between the Office of the Commissioner of Baseball and the Office of the Commissioner of Nippon Professional Baseball* 2017, article 7. Hereinafter the ‘Posting Agreement 2017.’

¹⁸⁴ In MLB, the ‘base’ value of a contract is guaranteed as the balance of monies owed are paid to the player if the contract is terminated prior to the expiry of the contract: MLB Basic Agreement 2017-2021, article IX.C. Article 9(d) of the Posting Agreement 2017 defines ‘guaranteed value’ of a Major League contract as salary, signing bonuses, buyout options, and vesting or mutual options. Release fees are now determined according to the following scale: 20% release fee for Major League contracts that guarantee \$25 million or less: Posting Agreement 2017, article 9(a)(i), 20% fee of the first \$25 million plus 17.5% of any amount exceeding \$25 million for Major League contracts that guarantee between \$25,000,001 and \$50 million: Posting Agreement 2017, article 9(a)(ii), 20% of the first \$25 million plus 17.5% of any amount between \$25,000,001 and \$50 million, plus 15% of any guaranteed amount exceeding \$50 million for Major League contracts: Posting Agreement 2017, article 9(a)(iii), 15% ‘supplemental release fee’ for bonuses, salary escalators, or options attract in a Major League contract: Posting Agreement 2017, article 9(b), flat 25% of a signing bonus for Minor League contracts that incur a release fee: Posting Agreement 2017, article 9(d).

¹⁸⁵ MLB Basic Agreement 2017-2021, Attachment 46, clause I(1).

¹⁸⁶ S. Korea, U.S. pro baseball leagues agree on new posting system, Yonhap News, July 12, 2018, <https://en.yna.co.kr/view/AEN20180712010600315>.



the Chinese Professional Baseball League (Taiwan),¹⁸⁷ Liga Mexicana del Pacifico,¹⁸⁸ and the Cuban Baseball Federation.¹⁸⁹ Another important method in which the MLB Basic Agreement 2017-2021 influences the commodification of global labor in baseball is its designation of foreign players subject to posting system agreements as ‘amateurs’ or ‘professionals.’ The MLB regime deems international foreign players as amateurs if they are younger than 25 years and have less than six years of professional experience.¹⁹⁰ Foreign amateurs can only sign a Minor League contract and receive signing bonuses that can be less than \$100,000 and sometimes a maximum of between \$1-2 million.¹⁹¹

Commodification of Latin American Players

The internationalization of professional baseball’s labor supply had significant ramifications on the treatment and commodification of foreign players. Shepherd Bailey and Shepherd argue the introduction of the draft and age restrictions on the recruitment of American players saw MLB clubs abandon the development of African American players (and other Americans) in preference to foreign players.¹⁹² Impoverished Latin American countries fuel this demand for foreign players¹⁹³ as clubs exploit the desperation of families to escape poverty.¹⁹⁴ Influencing the focus on

¹⁸⁷ MLB, CPBL Agreed on Posting System, CPBL Stats, Mar. 9, 2019, <http://cpblstats.com/mlb-cpbl-signs-players-agreement-posting-system/>.

¹⁸⁸ *MLB executes player transfer agreement with Mexican Baseball League; MLBPA approves*, MLB.com, Mar. 5, 2019, <https://www.mlb.com/press-release/mlb-mexican-baseball-league-agree-on-player-transfers>.

¹⁸⁹ *MLB, MLBPA reach deal with Cuban Federation*, MLB.COM, Dec. 19, 2018, <https://www.mlb.com/news/mlb-announces-deal-with-cuban-federation-c302036110>.

¹⁹⁰ MLB Basic Agreement 2017-2021, Attachment 46, clause F(1)(b).

¹⁹¹ Demonstrating this rule’s potential effects on commodifying labor is the transfer of Shohei Ohtani. The Nippon Ham Fighters lobbied NPB to delay the implementation of the Posting Agreement 2017 by one year so that they could post ‘two-way’ (players who are pitchers and hitters) phenomenon Ohtani and receive the \$20 million release fee. Attracting little attention from Ohtani’s rise to MLB superstar is his designation as an amateur when posted to the Los Angeles Angels. Instead of a contract exceeding \$200 million, Ohtani received a \$2.31 million signing bonus after signing a Minor League contract. As a Major League player Ohtani received the league minimum wage of \$535,00 per season until the end of his third season when salary arbitration saw him negotiate a two-year, \$8.5 million deal. Ohtani received a \$30 million salary in 2023 through salary arbitration. Ohtani will not be able to negotiate a contract that represents his market value until he is a free agent in 2024.

¹⁹² Joanna Shepherd Bailey & George B. Shepherd, *Baseball’s Accidental Racism: The Draft, African-American Players, and the Law*, 4(1) CONN. L. REV. 197, 206-210 (2011).

¹⁹³ Renos Vakis, Jamele Rigolini & Leonardo Lucchetti, *Left Behind: Chronic Poverty in Latin America and the Caribbean* (World Bank 2015) 12.

¹⁹⁴ In Latin America, one in five people are ‘chronically poor’: Adam Wasch, *Children Left Behind: The Effect of Major League Baseball on Education in the Dominican Republic*, 11(1) TEX. REV. ENT. & SPORTS LAW 99, 119 (2009).



Latino players are a mix of development and financial factors. International amateurs can be recruited at 16 years of age, there is no risk another club will receive the benefit of the investment through the draft,¹⁹⁵ and the dramatic effect of free agency on salaries requires clubs to find cheap foreign labor. Foreign players are now a core component of the MLB-MiLB labor system, the majority of whom are from the poor Latin American countries of the Dominican Republic, Puerto Rico, Venezuela, Mexico, and Cuba. The largely unregulated labor practices of MLB clubs in Latin America have been described as a ‘free-for-all,’¹⁹⁶ a ‘freewheeling, unpoliced atmosphere,’¹⁹⁷ the ‘Wild, Wild West in Latin America,’¹⁹⁸ and an ‘out of control and exploitative labor system.’¹⁹⁹ Labor practices in the recruitment and development of Latin American players not only commodify labor but Nichol and Kawai argue²⁰⁰ breach international labor law,²⁰¹ American law,²⁰² and ILO conventions on the prohibition of child labor,²⁰³ minimum work age,²⁰⁴ worst forms of child labor,²⁰⁵ and international laws protecting a child’s right to education.²⁰⁶ These practices include the ‘boatload’ approach to

¹⁹⁵ *Id.*

¹⁹⁶ Matt Kalthoff, *Out of Sight, out of Mind: Confronting Legal, Economic and Social Issues Raised by Major League Baseball’s Peculiar Treatment of Foreign Talent*, 29 CONN J. INT’L L. 372 (2014).

¹⁹⁷ Wasch, *supra* note 194, 117.

¹⁹⁸ *Id.* 120.

¹⁹⁹ Angel Vargas, *The Globalization of Baseball: A Latin American Perspective*, 8 IND. J. GLOBAL LEGAL STUD. 21, 33 (2000).

²⁰⁰ Nichol & Kawai, *supra* note 70, 65.

²⁰¹ Treaty of Versailles, June 28, 1919, part XII, article 427; International Labour Conference, Declaration Concerning the Aims and Purposes of the International Labour Organisation (adopted by the Conference at its Twenty-sixth Session Philadelphia, 10 May 1944; International Labour Organization, Constitution of the International Labour Organization, 1 April 1919, annexe 1(a).

²⁰² *Clayton Antitrust Act of 1914*, October 15, 1914, Pub. L. 63-212, 38 Stat. 730 (15 U.S.C. § 12-27, 29, 52-3).

²⁰³ International Labour Organization, Declaration on *Fundamental Principles and Rights at Work and Its Follow Up*, adopted by the International Labour Conference at its Eighty-sixth Session at Geneva, June 18, 1998 (Annex revised 15 June 2010), article 2(c).

²⁰⁴ International Labour Organization, Minimum Age Convention, 1973 (No. 138), adopted on June 26, 1973, by the General Conference of the International Labour Organisation at its fifty-eighth session, entry into force June 19, 1976.

²⁰⁵ International Labour Organization, Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 (No. 182), adopted by the 87th ILC session in Geneva, entry into force 17 June 1999.

²⁰⁶ United Nations, Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of November 20, 1989, entry into force September 2, 1990, article 28; United Nations, Declaration of the Rights of the Child, adopted and opened for signature, ratification, and accession by General Assembly resolution 44/25 of November 20, 1989 entry into force September 2, 1990, 19; United Nations, Convention Against Discrimination in Education, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on December 14, 1960, entry into force May 22, 1962, article 5.



recruitment,²⁰⁷ poor living conditions, and limited education for the hundreds of children living in the ‘academy’ system in the Dominican Republic and Venezuela,²⁰⁸ the ‘skimming’ of signing bonuses by *buscone* (player agent) and some MLB scouts,²⁰⁹ *buscone* giving children banned performance enhancing drugs or fraudulent paper work to prove age,²¹⁰ and ‘assigned contract agreements’ where player agents and ‘investors’ work with *buscone* to loan large amounts of money to Dominican players in exchange for up to 50% of a future signing bonus.²¹¹ While abhorrent to labor law and the commodity principle, the activities of MLB clubs in Latin America do not necessarily conflict with antitrust law.

The only league outside of MLB to actively recruit Latin American players is NPB. Japanese clubs have also faced accusations of exploitative labor practices in Latin America.²¹² Cost and cheap labor are not the sole factors stimulating demand for Latinos. NPB clubs believe Latin Americans have a greater chance of success in Japan than Americans as they are more likely to accept Japan’s style of baseball education and training and adjust to local culture through their previous experiences in the United States.²¹³ Shaping the salaries of academy recruits are a mix of exploitative and normative wage-setting practices. The Hiroshima Toyo Carp have operated a Dominican academy since the 1990s. As Carp academy recruits have few options after being released from an MLB club and possess little bargaining power, they are signed to contracts on reduced wages. Two key norms in setting wages in the NPB are a player’s circumstances prior to employment and any expected post-employment relationship (e.g., contribution to Japanese baseball). Foreign players who are recruited from the Carp academy or a club in the Japanese independent leagues will receive lower than market wages as they are a product of Japanese baseball. Thus, players recruited from within Japanese baseball face salary discrimination as they receive wages lower than a Dominican player of equivalent skill recruited from an MLB club.²¹⁴ The treatment of Latino players in NPB also differs from MLB in terms of age and remuneration. Latino players tend to be older than those in the MiLB system as they are recruited from the Minor Leagues or Dominican Republic

²⁰⁷ A boatload of Dominican or Venezuelan players are signed to below market value contracts that are viewed to be the same cost as one or two American players: Nichol & Kawai, *supra* note 70, 65-66.

²⁰⁸ *Id.*

²⁰⁹ *Id.* 67-68.

²¹⁰ *Id.* 68.

²¹¹ *Id.* 67-68.

²¹² Snyder, *supra* note 100, 90.

²¹³ Author Interview with Yoshinori Hasegawa, MLBPA Certified Agent and Director of Pacific Rim, Octagon Baseball (Online, December 3, 2021).

²¹⁴ *Id.*



baseball academies. Therefore, the average age of foreign players was 26.1 years in 2022 and 30.03 years in 2021. Wages are higher than those produced by the boatload approach to recruiting Latinos. Latin American players in NPB in 2021 and 2022 received salaries ranging from \$184,610 to \$2.77 million.²¹⁵

Human Trafficking of Cuban Baseballers

The trafficking of Cuban baseball players to a third country so they can pursue a Major League career is an example of how MLB policies literally commodify labor. Violent gangs, drug cartels, smugglers, and human traffickers facilitate the escape of players in exchange for a percentage of a player's MLB contract (potentially millions of dollars). Trafficking encompasses a multitude of legal, political, ethical, and sport-specific issues²¹⁶ and is the product of the Congressional embargo on trade between the United States and Cuba,²¹⁷ foreign asset regulations²¹⁸ that prohibit American businesses contracting with Cuban nationals, and MLB's amateur recruitment rules disincentivizing Cubans to seek asylum in the United States as they would be subject to the amateur draft and low signing bonuses.²¹⁹

Part D. Can Labor in Professional Baseball be Decommodified?

Multiple regimes of labor regulation in professional baseball have a long history of viewing players as commodities. This article will now conclude by looking at how the labor of professional baseball might be 'decommodified.' Part D will suggest methods by which labor might not be treated as a commodity, or at the very least, be treated better than it currently is.

Can Labor in Baseball be Decommodified?

Improving the treatment of professional baseball players is not easy as many of the labor controls and practices that commodify labor are embedded in the regulatory systems that govern player labor. Regulatory actors such as MLB and NPB that developed regulatory regimes that commodify labor are likely to resist change. One of the key challenges in decommodifying labor is balancing the labor rights of players with the needs of clubs to protect their investment in players, a challenge acknowledged

²¹⁵ Nichol & Kawai, *supra* note 70, 71-72.

²¹⁶ Drew M Goorabian, *Baseball's Cuban Missile Crisis: How the United States and Major League Baseball Can End Cuban Ballplayer Trafficking*, 20 UCLA J. INT'L L. & FOREIGN AFF. 425, 430 (2016).

²¹⁷ *Foreign Assistance Act of 1961*, 22 U.S.C. 2151 et seq., § 2370(a)(2).

²¹⁸ *Cuban Assets Control Regulations*, 31 C.F.R. §515.505 (2016).

²¹⁹ Major League Baseball, Major League Rules 2021, rule 3(a)(1)(B).



by Marvin Miller during the MLBPA's efforts to implement free agency.²²⁰ Player development in modern baseball is an uncertain and expensive process that begins with extensive scouting, playing in minor leagues, and further training in the major leagues. This process involves significant investment of finances, resources, and time. This challenge is heightened by the need to have economically sustainable and viable leagues, factors that gave rise to the birth of the reserve clause in the 1800s.

Legal and non-legal methods can be used to decommodify labor. In MLB unionization, collective bargaining and litigation were the tools used by players to force owners to improve player rights and working conditions. Rapp argues the development of player unions (as well as lawyers, player agents, and financial advisers) in the 1960s and 1970s in the United States (and in subsequent decades) altered the 'pro-management days' of professional sport.²²¹ It will be interesting to see if the unionization of Minor League players leads to similar decreases in the commodification of labor and generally better treatment. The internet age and social media adds to the effectiveness of non-legal methods to decommodify labor, for example the Minor League Advocates work in creating political pressure and public awareness over the poor working conditions of Minor League players.

Controlling a Player's Right to Work

Clubs controlling a player's right to work as a baseball player can unfairly impede labor mobility, ability to work, and capacity to be the autonomous worker envisioned by Locke. An illustrative example is the right of a club to unconditionally release a player, a right that can be exercised at any time. MLB clubs frequently release Minor and Major League players during spring training, on the eve of a new season and even during a season. Such timing makes it difficult for players to obtain a position on another club as rosters are finalized. Similar issues exist for players exploring opportunities in foreign leagues. For example, foreign signings for NPB rosters tend to be finalized by the end of December. The only option for many players is the less prestigious and lower paying independent leagues in North America.

A deadline for releasing players in the offseason would help players obtain another job by giving them more time before the start of a season to secure a contract. Nichol and Kawai suggest a 'transfer window' as part of a global player transfer system.²²² The deadline could be at least two months before the start of a season (preferably longer), allowing clubs time to release players at the end of the season and assess players at or before spring training. An early deadline is advantageous as

²²⁰ Snyder, *supra* note 1, 78.

²²¹ Geoffrey Christopher Rapp, *Affirmative Injunctions in Athletic Employment Contracts: Rethinking the Place of the Lumley Rule in American Sports Law*, 16(2) MARQ. SPORTS L. REV. 261, 278-279, 281 (2006).

²²² Nichol & Kawai, *supra* note 70, 75.



it would give players more time to market themselves to potential employers. Also, contracted players would have some level of job security for the forthcoming season. An additional advantage of a deadline is that uncontracted players would have time to seek employment in foreign leagues. Such a system operates in NPB. In the autumn after the end of a season, rosters for the following year are finalized and there are two *senryokugai* periods for releasing players: early October and early November. At these times, released players attend trials at other clubs and players with interest are offered a contract by late December. Players without a contract can explore options in MLB, Asia, or the independent leagues in the United States and Japan.

NPB clubs controlling players through the need to provide consent to be posted tends to commodify labor. Amendments to posting protocols in 2013 and 2017 de-commodified labor by decreasing the transfer fee and allowing players to negotiate with all MLB clubs. However, the need to obtain consent from the player's club to be posted remains problematic. If consent is given, it is typically the year prior to the player's eligibility for international free agency,²²³ although there have been some recent exceptions to this practice.²²⁴ Also, the posting system generally transfers elite players. The autonomy of NPB players could be improved by designating a set number of years of service required for a player to be posted. Players would still require the consent of their club to be posted. Setting a minimum number of years for posting eligibility would give players a greater level of control over their labor and de-commodify their labor. Such a modification is likely to benefit fringe ichi-gun players and career *ni-gun* players.

Increasing the Level of Player Control in Trades

Another method to de-commodify labor in baseball is to give players greater control over the assignment of their contract in trades. Some sports require players to be consulted in a trade.²²⁵ In MLB, the 'five and ten' rule grants a similar right to players with at least 10 years of MLB service, the last five with the same club, to provide consent to a trade. But few players meet the criteria for the five and ten rule. Interestingly, the five and ten rule would have given Flood control to block his trade to Philadelphia. Granting lower-skilled or experienced players greater control over the assignment of their contract, perhaps through the expansion of the five and ten rule or limits on waiver transactions, would help to de-commodify labor.

²²³ Nichol & Kawai, *supra* note 70, 60.

²²⁴ Contracting practices play an increasing important role for the posting of players at some clubs. In 2019 Yomiuri posted Shun Yamaguchi after contractually agreeing to a future posting when recruited as a free agent in 2016: *id.*

²²⁵ See, e.g., the Australian Football League: Australian Football League and Australian Football League Players' Association Incorporated, *Collective Bargaining Agreement* "2017-2021", clause 22.2(a).



Simultaneous Decommodification and Recommodification of Labor in Baseball

The complexity of labor regulation in professional baseball makes it possible for labor to simultaneously be commodified and decommodified through labor controls and practices in multiple regimes. The recognition of free agency in collective bargaining in MLB and NPB had the immediate impact of decommodifying labor by allowing eligible players to choose their employer and maximize their market value. The evolution of free agency shows how labor can be decommodified over time through collectivism. When introduced in NPB in 1993, free agent qualification required 10 years of service. It was then reduced to nine years in 1997. Further collective bargaining in 2008 saw international free agency remain at nine years and the introduction of domestic free agency (eight years for high school players and seven years for college or industrial players).²²⁶ At the same time, MLB and NPB free agency systems commodify labor by requiring compensation for some free agents. A similar effect can be attributed to the Posting Agreement 2017, which decreased commodification of NPB players by greatly reducing the value of transfer fees but commodified a large proportion of the international professional labor market by subjecting players in South Korea, Taiwan, Mexico, and Cuba to transfer protocols that require club consent and a transfer fee to move to an MLB club. Formal labor controls such as free agency or the right to be posted that decrease commodification can be undermined by the normative operation of labor regulation through the conduct of regulatory actors. Only 34 players have been posted (12 of whom did not move to an MLB club) in the over 20-year history of the Posting Agreement²²⁷ and

²²⁶ Nippon Professional Baseball, *Rule of Free Agent* 2009, article 2; Keiji Kawai & Matt Nichol, *Labor in Nippon Professional Baseball and the Future of Player Transfers to Major League Baseball*, 25(2) MARQ. SPORTS L. REV. 491, 497-498 (2015).

²²⁷ Nichol & Kawai, *supra* note 70, 57-58.



recent manipulation of free agent service time by MLB clubs²²⁸ resulted in changes in the latest collective bargaining agreement.²²⁹

The Urgent Need to Decommodify Latin American Baseball Labor

A major step toward decommodifying baseball labor is to dramatically improve the treatment of Latin American players. The Dominican Republic, Venezuela, and Cuba are three countries where players (and their families) are exploited due to extreme poverty. Players are treated as commodities through practices such as the boatload recruitment policy, assigned contract agreements, the academy system, and human trafficking in Cuba. MLB has the capacity to reduce the need for trafficking to allow Cubans to sign with a club in the United States and not be subjected to the amateur draft. Also, MLB can increase the regulation of both club academies in Latin America and *buscone*. Nichol and Kawai argue MLB and other professional leagues need to protect international human rights²³⁰ through the implementation of the United Nations ('UN') Guiding Principles on Business and Human Rights.²³¹

²²⁸ Evidence of the problem of service time manipulation was the Chicago Cubs adding Kris Bryant to the active roster in his rookie year of 2015 one day short of obtaining a full year of free agent service: Jesse Rogers, *The end of MLB service time manipulation? How Kris Bryant paved way for the next Kris Bryant*, ESPN.com, Apr. 19, 2022, https://www.espn.com.au/mlb/story/_/id/33761266/the-end-mlb-service-manipulation-how-kris-bryant-paved-way-next-kris-bryant. Bryant filed a grievance and an arbitrator upheld the Cubs' conduct as no rule was violated: Mike Axisa, *Bryant will become free agent after 2021, per report*, CBS, Jan. 30, 2020, <https://www.cbssports.com/mlb/news/cubs-win-kris-bryant-service-time-case-bryant-will-become-free-agent-after-2021-per-report/>. The Cubs in effect reserved Bryant for seven years.

²²⁹ Service time manipulation became a major issue in collective bargaining in 2022. To combat manipulation, the new collective bargaining agreement awards a full year of service to players who finish first or second in Rookie of the Year voting (regardless of when they are called up from the Minor Leagues), clubs who promote top prospects on Opening Day receive extra draft picks and there is a new pre-arbitration bonus pool for top performing players who are not eligible for salary arbitration: Feinsand, *supra* note 117.

²³⁰ Nichol & Kawai, *supra* note 70, 73-74.

²³¹ United Nations Human Rights Commission, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 2011.



External regulation is needed to reduce the commodification of Latin American players. Unfortunately, governments in these countries are unlikely to address the unethical and at times illegal treatment of players due to the economic influence of MLB.²³² Similarly, MLB appears more interested in reducing the cost of Latin American labor through its 20-year campaign to introduce an international draft than changing labor practices.²³³ External regulation of international labor could be created by establishing human rights remedies as required by the UN Guiding Principles and establishing independent dispute resolution that is governed by an independent global baseball regulator.²³⁴

The Role of Unionization and Collectivism in Decommodifying Labor

The labor of baseball in the United States and Japan demonstrates the risk of commodification when there is a major power imbalance between employee and employer. This risk is exacerbated in industries such as baseball when employers act as a cartel to exercise monopolistic power.²³⁵ MLB and NPB are examples of how unionism and collectivism can effectively decommodify labor. But decommodification is not instantaneous. Rather, decommodification can be a long process as it occurs during multiple rounds of collective bargaining. While formal rights and rules do reduce the level of commodification, the recent manipulation of service time in MLB and the operation of the Posting Agreement show that normative practice plays an influential role in whether there is undue commodification of labor. Whether the unionization of Minor League players in 2022 will improve working conditions and treatment related to decommodification is unknown. But the National Labor Relations Act now mandates that MLB must engage in collective bargaining

²³² In 2014, MLB clubs annually spent \$1 billion in salaries to professionals in Latin America and \$100 million a year operating academies. The academies then employ thousands of people and the 2,000 to 3,000 *buscone* in the Dominican Republic hire hundreds (potentially thousands) of workers: Jeffrey J. Tiedeman, *MLB International Player Draft: Home Run or Headache?*, 21 *SPORTS LAW J.* 255, 272 (2014). In 2009, MLB's activities in the Dominican created 1,200 full-time jobs and another 900 indirect job: Wasch, *supra* note 194, 119. These numbers are likely to have increased in recent years as MLB clubs increase their focus on foreign players.

²³³ For a discussion on an international draft in MLB, see Tideman, *supra* note 223. Since 2002, MLB has had a clause on creating an international draft in collective bargaining agreements. However, the MLBPA is yet to agree to an international draft prior to the deadline created in collective agreements: Associated Press, *MLB Players' Union Rejects International Draft Proposal*, *US NEWS*, July 25, 2022, <https://www.usnews.com/news/sports/articles/2022-07-25/mlb-players-union-rejects-international-draft-proposal>.

²³⁴ Nichol & Kawai, *supra* note 70, 73-74, 76-77.

²³⁵ See, e.g., Stephen F. Ross, *Monopoly Sports Leagues*, 73 *MINN. L. REV.* 643 (1989).



over Minor League working conditions. The hope of decommodification will be aided by the experience of the MLBPA and its new membership of the AFL-CIO.²³⁶

Conclusion

Curt Flood's description of his employment as that of a slave was obviously an exaggeration. Professional baseball players earn an income, have the freedom to enter and terminate a contract, and can work in other professions. But they are far from the free and autonomous workers envisaged by Locke. Instead, baseball players in the United States and Japan are treated as commodities, and the level of undue commodification is shaped by the status of a player, the stage of his career, and the league for which he plays. While commonalities exist between how MLB and NPB clubs commodify labor, the level of commodification is greater in MLB. Most players are prevented from choosing (or leaving) their employer, have limited capacity to negotiate salary and employment terms, and possess little control over their career. A lack of job security is another byproduct of commodification in the MLB-MiLB system, though it is less problematic in NPB. The labor controls in these leagues violate the legal principle that 'labor is not a commodity' and this is heightened in light of the exploitative practices visited on young players. The treatment of players could be improved without radically changing key labor controls. For example, Minor League players could be paid a wage that includes overtime, training, and offseason work. Players in MLB could be given greater control over their labor by expanding the rights of players to have a say in the transfer of their contract. Major and Minor League players could be given improved job security by limiting when a player can be released from his contract (particularly before a season). In NPB, players wishing to transfer to an MLB club could be required to meet minimum service requirements as opposed to normative practice. Decommodifying labor need not be a controversial matter as, at its core, it is giving players control over their labor that results in worker and human rights.

²³⁶ *MLBPA joins AFL-CIO with goal of helping strengthen labor movement*, MLBPA, Sept. 7, 2022, <https://www.mlbplayers.com/post/mlbpa-joins-afl-cio-with-goal-of-helping-strengthen-labor-movement>.

