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The Need for a Worldwide Draft To Level The Playing Field and Strike Out The National Origin Discrimination in Major League Baseball

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THE NEED FOR A WORLDWIDE DRAFT TO LEVEL THE PLAYING FIELD AND STRIKE OUT THE NATIONAL ORIGIN DISCRIMINATION IN MAJOR LEAGUE BASEBALL

I. INTRODUCTION

In June 2009, Bryce Harper was introduced to the baseball world via a *Sports Illustrated* cover story that anointed him as "Baseball's Chosen One."[1] The article describes the teenager as "a scouting director's perfect prospect," as Harper "has size, speed, power, intelligence, a lefthanded bat, an appetite for work, a strong arm, the ability to catch and the athleticism to play almost any other position."[2] As a result of those desirable characteristics, the seventeen-year-old catcher from Las Vegas, Nevada is widely regarded as a surefire top pick in a future Major League Baseball (MLB) First-Year Player Draft.[3]

Under MLB rules, a baseball player is eligible to be drafted and signed to a major league contract upon graduation from high school, as long as the player has not attended a college or junior college.[4] College players are eligible to be drafted if they have completed either their junior or senior years at a four-year institution, or are twenty-one years of age.[5] In addition, junior college players can be drafted without requiring completion of a specified number of years.[6]

If Harper proceeded through high school in a typical four-year period, he would be eligible to be selected in the 2011 draft.[7] However, Harper

1. Tom Verducci, *Baseball's LeBron,* SPORTS ILLUSTRATED, June 8, 2009, at cover (article at page 62).

2. *Id.* at 67.

3. Matt Youmans, *Harper Ready to Give College Try,* LAS VEGAS REVIEW-JOURNAL, June 14, 2009, http://www.lvrj.com/sports/48018907.html.

4. MAJOR LEAGUE BASEBALL OFFICE OF THE COMMISSIONER, FIRST-YEAR PLAYER DRAFT OFFICIAL RULES 4 (2009), *available at* http://mlb.mlb.com/mlb/draftday/rules.jsp [hereinafter DRAFT RULES].

5. *Id.*

6. *Id.*

7. *Id.* (stating that a player, like Harper, is eligible to be drafted once he has graduated from

accelerated his inevitable path towards professional baseball, and after just two years at Las Vegas High School, Harper earned his GED and enrolled in the College of Southern Nevada for the 2009–2010 academic year.[8] The baseball prodigy is playing on the junior college's baseball team for the 2010 season,[9] and the consensus belief is that Harper is pursuing this rare route with the hopes of being drafted as the number one overall pick in the 2010 draft, rather than in the 2011 draft.[10]

There is also discussion that Harper's parents are considering taking their son to the Dominican Republic in an effort to establish residency overseas and consequently make him a free agent.[11] Harper's parents have denied this rumor,[12] and, as seen below, a move to another country would not garner Harper free agency status in MLB.[13] Nevertheless, it is clearly evident why Harper—or any superstar prospect in his position—would have a desire to enter baseball via free agency, as free agency would give Harper the option to choose which major league team would be his employer.[14] On the other hand, entry into MLB through the draft does not allow a player to choose his employer and there is no free market of teams bidding to acquire his services.[15] This lack of competition results in

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high school).

8. *See* Conor Glassey, *Harper Passes GED*, BASEBALL AMERICA, Dec. 3, 2009, http://www.baseballamerica.com/blog/draft/?p=1916/ (stating that Harper passed his GED, which he needed to do to be eligible to play baseball for the College of Southern Nevada in 2010); *see also* Youmans, *supra* note 3 (stating that Harper was registered for the GED and planned to attend the College of Southern Nevada for the following year).

9. Todd Dewey, *Harper Shows Flair in CSN Debut,* LAS VEGAS REVIEW-JOURNAL, Jan. 30, 2010, http://www.lvrj.com/sports/harper-shows-flair-in-csn-debut-83143447.html (estimating that about 100 major league scouts watched Harper's first game at the College of Southern Nevada on January 29, 2010).

10. Youmans, *supra* note 3; *see also* Glassey, *supra* note 8 ("Playing at CSN should make Harper eligible for the 2010 draft, where he would be the top talent in the class.").

11. Verducci, *supra* note 1, at 65.

12. *Id.* ("'I heard one of the things they're considering is taking him to the Dominican Republic to make him a free agent,' says one AL executive. 'No,' Sheri says. 'We are not taking our son out of the country.'").

13. *See* DRAFT RULES, *supra* note 4, at 4; *see also* Glassey, *supra* note 8 (stating that Harper is attending a junior college in Nevada).

14. *See* 2007–2011 Basic Agreement Between the Major League Clubs and the Major League Baseball Players Association,70–71 (effective Dec. 20, 2006), http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf [hereinafter] ("Players who otherwise become free agents under this Agreement shall be eligible to negotiate and contract with any Club without any restrictions or qualifications . . . ."); *see also* Tyler Kepner, *Free Agency Means Free Choice*, NYTIMES.COM BATS BLOG, Nov. 21, 2009, http://bats.blogs.nytimes.com/2009/11/21/free-agency-means-free-choice/ (explaining that "'Free agency means free choice'" is one of the fallback expressions of Brian Cashman, the general manager of the New York Yankees).

15. *See* DRAFT RULES, *supra* note 4, at 4 ("A Club generally retains the rights to sign a selected player until . . . August 15th, or until the player enters, or returns to, a four-year college

limited earning potential for a draftee, especially when compared to the escalating rookie contracts signed by foreign-born free agents.[16]

Under current MLB rules, if a player is a resident of the United States, Canada, Puerto Rico or other territory of the U.S., he can sign with a major league team only after being selected by the team in the annual entry draft—or sign with any team after not being selected in a draft in which the player is eligible.[17] "Also considered residents are players who enroll in a high school or college in the United States, regardless of where they are from originally."[18] However, all international players who are residents of countries other than those listed above are not eligible for the draft and are free to sign with any team when they reach the age of seventeen years old (sixteen if the player will turn seventeen by the end of the baseball season).[19]

As a result of Harper's enrollment in a high school and a junior college in the U.S., he would be considered a U.S. resident for draft purposes.[20] Therefore, the creative option of switching his country of residence from the U.S. to another nation to become ineligible for the draft is no longer a viable option.[21] Harper might have been able to pursue this unique path if he and his family had moved to a foreign country and established residency prior to enrolling in school in the U.S., but that

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or junior college on a full-time basis.").

16. *See, e.g.*, Chico Harlan, *Strasburg, The Japan Possibility, and A Comparison*, WASH. POST, July 3, 2009, http://voices.washingtonpost.com/nationalsjournal/2009/07/strasburg_the_japan_possibilit.html (comparing the salary potential for 2009 number one overall pick, Stephen Strasburg, to rookie contracts signed by foreign-born free agents); David Waldstein, *Nationals Sign Top Draft Pick, but Need $15 Million to Do So*, N.Y. TIMES, Aug. 17, 2009, http://www.nytimes.com/2009/08/18/sports/baseball/18draft.html?_r=1/ (stating that Stephen Strasburg signed a rookie contract with the Washington Nationals worth $15.1 million over four years, the largest contract ever given to a drafted baseball player); Erik Manning, *Are First Round Draft Picks Overpaid?*, FANGRAPHS.COM, Aug. 21, 2009, http://www.fangraphs.com/blogs/index.php/are-first-round-draft-picks-overpaid/ ("Even with the relatively high failure rate, first round draft picks are incredibly valuable and actually have proven to be quite a bargain.").

17. *See* DRAFT RULES, *supra* note 4, at 4 ("A player who is eligible to be selected and is passed over by every Club becomes a free agent and may sign with any Club until the player enters, or returns to, a four-year college full-time or enters, or returns to, a junior college.").

18. *Id.*

19. Melissa Segura, *In International Market, MLB Teams are Buying Costly Lottery Tickets*, SI.COM, July 2, 2009, http://sportsillustrated.cnn.com/2009/writers/melissa_segura/07/02/international.signing/index.html.

20. *See* DRAFT RULES, *supra* note 4, at 4 (stating that an amateur player who enrolls in a U.S. high school or college is considered a U.S. resident for MLB draft purposes).

21. *See id.*

window is now closed for Harper.[22]

Moreover, MLB publishes an annual handbook clarifying the league's definition of residency for official use by team executives and scouting directors.[23] MLB considers the following factors when determining residency for draft purposes: "length of stay at the current address, where the player intends to live long-term, where he has lived previously, where he obtained his passport and his place of birth . . . ."[24] "These factors are intended to weed out . . . shams."[25]

A recent example of the successful exploitation of the residency loophole was exhibited in the case of Aroldis Chapman, a twenty-one-year-old Cuban defector who migrated to Europe instead of coming to the U.S.[26] In August 2009, Chapman, a prized pitching prospect, defected from the Cuban national team during a tournament in the Netherlands.[27] He moved to Spain and, one month later, his representatives announced that Chapman had established residency in Andorra, a tiny country next to Spain.[28] Chapman pursued this path solely to avoid being eligible to be selected in MLB's amateur draft,[29] because under MLB Rule 3 governing contracts, a player is considered a U.S. resident if he "establishes a legal residence in the U.S. on the date of the player's contract or within one year prior to that date."[30] MLB granted Chapman his very valuable free agent status less than one week after he established residency in Andorra.[31]

In contrast to Chapman's situation, the non-U.S. residency loophole is not currently available to Harper, because he would be considered a U.S. resident for MLB draft purposes.[32] Furthermore, Harper has no standing to sue MLB under federal antitrust laws, because MLB's "[a]ntitrust

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22. *See id.*

23. Dave Sheinin, *Boras May Explore Japan for Strasburg,* WASH. POST, July 3, 2009, at D1.

24. *Id.*

25. *Id.*

26. Jorge Arangure Jr., *Cuban Defector Chapman Fires Agent*, ESPN.COM, Nov. 21, 2009, http://sports.espn.go.com/mlb/news/story?id=4677068; *see also* Scott M. Cwiertney, Comment, *Need for a Worldwide Draft: Major League Baseball and Its Relationship with the Cuban Embargo and United States Foreign Policy*, 20 LOY. L.A. ENT. L. REV. 391, 403 (2000) ("Major League agents who represent players want Cuban players to reside in a country other than Cuba or the U.S. so teams can sign the players as free agents when they move to the U.S.").

27. Arangure Jr., *supra* note 26.

28. Jorge Arangure Jr., *Pitcher Chapman Awaits MLB's Ruling*, ESPN.COM, Sept. 21, 2009, http://sports.espn.go.com/mlb/news/story?id=4491904.

29. *Id.*

30. Sheinin, *supra* note 23, at D1.

31. Arangure Jr., *supra* note 26.

32. *See* DRAFT RULES, *supra* note 4, at 4.

exemption leaves MLB free from federal oversight with respect to potential draftees."[33] Accordingly, as analyzed below, Harper's only realistic recourse would be to bring an employment discrimination lawsuit against MLB.[34]

The major hurdle that Harper would encounter when mounting a legal challenge to the draft would be overcoming the collective bargaining agreement (CBA) that governs MLB.[35] In the 1960s, the Major League Baseball Players Association (MLBPA) became a "bona fide labor union."[36] According to the MLBPA web site, "the successful founding of the MLBPA changed the landscape of professional sports forever, serving notice that highly skilled athletes would seek the same basic employment rights that people in other professions had long taken for granted."[37] Beginning in 1968, when the MLBPA and MLB owners negotiated the first-ever CBA in professional sports, the rules and regulations of the sport as they pertain to labor have been established in the form of successive collective bargaining agreements.[38]

At the beginning of the CBA it is stipulated that the MLBPA "represents that it contracts for and on behalf of the Major League Baseball Players and individuals who may become Major League Baseball Players during the term of this Agreement."[39] Furthermore, "[b]y virtue of the CBA, most aspects of the relationship between teams and players fall under the auspices of national labor law."[40] While almost all of the players selected in the draft do not immediately enter onto the forty-man rosters of MLB teams,[41] and therefore are not members of the MLBPA,[42] "the

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33. Rick J. Lopez, Comment, *Signing Bonus Skimming and a Premature Call for a Global Draft in Major League Baseball*, 41 ARIZ. ST. L.J. 349, 355–56 (2009).

> In 1922, MLB was ruled to be exempt from antitrust laws. Recent legislation, the Curt Flood Act of 1998, limited MLB's antitrust exemption to provide major league players with the same protection as athletes in other major professional sports. . . . The statutory protection gives *major* league players the right to sue for any "conduct, acts, practices, or agreements" that have injured their chance to sign a subsequent MLB contract. *Minor* league baseball players, including every new draftee, are explicitly denied standing to sue under the statute.

Id.

34. *See infra* Part IV.A.

35. *See infra* Part IV.B.

36. History of the Major League Baseball Players Association, http://mlbplayers.mlb.com/pa/info/history.jsp (last visited Feb. 6, 2010).

37. *Id.*

38. *Id.*

39. 2007–2011 CBA, *supra* note 14, at 1.

40. Timothy Davis, *Tort Liability of Coaches for Injuries to Professional Athletes: Overcoming Policy and Doctrinal Barriers*, 76 UMKC L. REV. 571, 590 (2008).

41. MLB Miscellany: Rules, Regulations and Statistics,

MLBPA has a voice in draft issues because the current collective bargaining agreement stipulates a system by which draft picks are used to compensate teams for the loss of players who sign with other clubs via free agency."[43] This tangential connection to the draft enables MLBPA to have some control over the draft,[44] but the union does not wield nearly as much power as it does over key labor issues wholly involving major leaguers, such as free agency and arbitration.[45]

Although this lack of power over the draft is evidenced by the fact that the rules regulating the draft are not established within the CBA,[46] drastic changes to the draft system were conditionally accepted by both sides in an attachment to the 2003–2006 CBA.[47] The addendum illustrated the desire of both parties to implement a global draft in the near future.[48] However, in the subsequent—and current—CBA that expires in December 2011, a worldwide draft is not mentioned, and there is no indication of any intention to alter the draft-eligibility rules.[49]

As exhibited in the analysis below, Harper's chances of successfully challenging the MLB draft would likely depend on the strength of his argument that MLB's drafting system violates a federal or state employment discrimination law.[50] In addition, he would need to establish that the employment discrimination law prohibiting the drafting process is not preempted by national labor law that oversees the CBA and generally encourages owners and unions to collectively bargain all terms and

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http://mlb.mlb.com/mlb/official_info/about_mlb/rules_regulations.jsp (last visited Feb. 6, 2010) ("A Club's 40-man roster is a list of all the players currently reserved by a Club at the Major League level. The Major League Rules permit each Club to reserve a maximum of 40 players (excluding players on the 60-day disabled list) at any one time.").

42. Major League Baseball Players Association: Frequently Asked Questions, http://mlbplayers.mlb.com/pa/info/faq.jsp (last visited Feb. 6, 2010) ("All players, managers, coaches and trainers who hold a signed contract with a Major League club are eligible for membership in the Association[,] . . . [which] represents around 1,200 players, or the number of players on each club's 40-man roster, in addition to any players on the disabled list.").

43. Lopez, *supra* note 33, at 356–57.

44. *Id.* at 355–56.

45. History of the Major League Baseball Players Association, *supra* note 36.

46. *See generally* 2007–2011 CBA, *supra* note 14.

47. *See generally* 2003–2006 Basic Agreement Between the Major League Clubs and the Major League Baseball Players Association, Attachment 24, 202–04 (effective Sept. 30, 2002), http://www2.bc.edu/~yen/Sports/mlbpa_cba.pdf [hereinafter 2003–2006 CBA].

48. *Id.* (stating that the Office of the Commissioner of Baseball and the MLBPA "agreed that the First-Year Player Draft should be expanded to cover all players . . . regardless of a player's residence").

49. *See generally* 2007–2011 CBA, *supra* note 14.

50. *See infra* Part IV.A.

conditions of employment.[51]

Part II of this Comment will focus on the history of the MLB draft—as well as drafts in other professional sports—and will define the elements of national origin discrimination. Part III dissects the legal history of federal and state employment discrimination laws, as well as details the purposes and preemption power of national labor law. These laws are applied to Harper's case in Part IV. Part V concludes by explaining how a successful challenge by Harper could inspire MLB to do something that it should have done long ago: institute a global draft where all players from all countries are treated equally and are eligible to be drafted.

II. BACKGROUND

A. The History of the MLB Draft

The MLB Amateur Draft was first conducted in 1965, and in 1998 was renamed the First-Year Player Draft.[52] The draft was devised to give weaker organizations the first crack at top talent, and as a result, teams select players essentially in reverse order of their previous season's finish.[53] The drafting system has undergone several modifications since 1965, including changes in eligibility requirements and the number of drafts per year,[54] but with the exception of a separate and short-lived draft experiment in 1985, the draft pool has only consisted of prospects from the United States, Canada, and U.S. territories.[55] "In spring 1985, after Major League Baseball experimented with a draft of Dominican Republic amateurs, the record-keeping of eligible prospects was so haphazard that several players were selected by more than one team."[56] Although the addition of players from the Dominican Republic to the draft pool led to "administrative chaos," a permanent worldwide draft and closer scrutiny of visa information following the September 11, 2001 terrorist attacks[57] could possibly help quell the confusion that doomed the 1985 draft.

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51. *See infra* Part IV.B.

52. Gary Rausch, *Evolution of the Draft: Selection Process Has Seen Many Phases Since 1965*, MLB.COM, May 16, 2002, http://mlb.mlb.com/news/article.jsp?ymd=20020516&content_id=26646&vkey=news_mlb&fext=.jsp&c_id=null/.

53. *Id.*

54. *Id.*

55. *See* Alan Schwarz, *Pressure Building for Draft of Players from Outside U.S.*, N.Y. TIMES, July 13, 2008, at SP4; *see also* DRAFT RULES, *supra* note 4, at 4.

56. *Id.*

57. *Id.*

Four years after the failed Dominican experiment, MLB permanently expanded the draft to include players from Puerto Rico and other U.S. territories.[58] Players from those territories could previously sign as free agents when they reached the age of seventeen, but beginning in 1989 they became eligible for the draft after their high school class graduated.[59] "In 1991 Canadian players were taken off the open market and added to the draft."[60] Two years later, all Cuban defectors who had migrated to the U.S. were added to the growing draft-eligibility pool.[61]

The addition of Puerto Rican amateurs to the MLB draft has had a devastating impact on the game of baseball on the island.[62] Puerto Ricans have to compete for draft spots with North American players, "many of whom benefit from organized high school baseball programs as well as summer club programs."[63] On the other hand, "Puerto Rico's public school system does not offer baseball on a state level. High school students get noticed in Puerto Rico because big league scouts watch American Legion, Connie Mack, Little League and Puerto Rico's Superior League junior program."[64] By contrast to the superior organization of amateur baseball in the U.S. and Canada, "Puerto Rico's system makes it tough for the scouts to even find the talent."[65]

As exhibited in a 2003 study by Emory University School of Law professors Joanna M. Shepherd and George B. Shepherd, statistics reflect the damaging consequences to Puerto Rican baseball after MLB added the island's players to the draft in 1989.[66] The Shepherds observed:

> Teams quickly cut back their scouting and development efforts in Puerto Rico. One sports reporter noted that because of the draft, "As scouts lament, there is no incentive to beat the bushes for players with long-term potential in Puerto Rico as was the case with Sammy Sosa in the Dominican Republic." Another

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58. *See* Rausch, *supra* note 52.

59. *Id.*

60. *Id.*

61. *Id.*

62. *See* Joanna M. Shepherd & George B. Shepherd, *U.S. Labor Market Regulation and the Export of Employment: Major League Baseball Replaces U.S. Players with Foreigners* 20 (Emory Law & Econ. Research, Research Paper Series No. 7, 2003), *available at* http://ssrn.com/abstract=370422.

63. Gabrielle Paese, *Baseball School Aims to Place More Puerto Rican Players in Major Leagues,* PUERTO RICO HERALD, Dec. 13, 2002, http://www.puertorico-herald.org/issues/2002/vol6n50/PRSportsBeat0650-en.html.

64. *Id.*

65. *Id.*

66. *See* Shepherd & Shepherd, *supra* note 62, at 20.

> suggested, "Major league teams have bypassed Puerto Ricans in favor of younger players from the Dominican Republic and Venezuela who can be developed earlier on."
>
> In less than a decade after 1989, the number of Puerto Rican players signed per year had dropped more than [forty percent].[67]

The findings in the Shepherds' draft study are echoed by a recent proposal made by the Puerto Rican government to MLB.[68] In September 2007, David Bernier, Puerto Rico's Secretary of Sports and Recreation, met with MLB officials and outlined a proposal that he thought would propel the revival of baseball on the island.[69] Bernier's plan focused on "a 10-year moratorium to the application of the First-Year Player Draft for Puerto Rican baseball players."[70] Bernier expressed these beliefs to MLB officials:

> "The sudden establishment of the Draft, without previous notice nor trial period, did not allow Puerto Ricans to transform their development model to make it compatible with the new statutory reality . . . ."
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> . . . .
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> "The investment in Puerto Rico is not a cost-effective one for Major League teams and has lost charm for the recruiter. This reality is substantiated by the decrease in numbers of [Puerto Rican] players selected through the Draft and active in the Major Leagues."
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> . . . .
>
> "Why invest in Puerto Rico if 70 miles west and 500 miles south, in Dominican Republic and Venezuela respectively, I can invest directly in the detection and development without going through the Draft process . . . ."
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> . . . .
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> "This creates a domino effect [in Puerto Rico], less players at the top, less enthusiasm at the base."[71]

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67. *Id.*

68. *See, e.g.*, Jesse Sanchez, *Puerto Rico Wants Out of the Draft: Island's Sport Secretary Proposes 10-Year Hiatus*, MLB.COM, Sept. 12, 2007, http://mlb.mlb.com/news/article.jsp?ymd=20070912&content_id=2204904&vkey=news_mlb&fext=.jsp&c_id=mlb/.

69. *Id.*

70. *Id.*

71. *Id.*

Bernier's "less enthusiasm at the base"[72] observation was in reference to the announcement, made in the previous month, that the Puerto Rico Winter League would be suspending league play after sixty-nine years.[73] The league shut down because of financial reasons, and Bernier suggested that the demise of the winter league was related to Puerto Rico's inclusion in the MLB drafting process.[74] Today, Puerto Rico's new professional winter league, the Puerto Rico Baseball League, has completed two seasons of play;[75] Bernier is now president of the Puerto Rico Olympic Committee;[76] and two years after Bernier made his ten-year draft hiatus proposal, Puerto Rican players can still only enter professional baseball via the draft,[77] and there is no indication that change is on the MLB horizon.

B. The Globalization of Major League Baseball

While Puerto Rican baseball has suffered in the past two decades, baseball in other Latin American countries is flourishing.[78] For example, in 2007, "players from the Dominican Republic and Venezuela alone comprised a peak of [eighteen] percent of opening day rosters."[79] That same season, twenty-nine percent of major league players hailed from Latin American nations (Cuba, Mexico, Puerto Rico, Venezuela and the Dominican Republic), more than double the thirteen percent rate in 1990.[80] This trend has coincided with the fact that, "[a]ccording to MLB, the amount major league clubs spend each year on signing international players has more than tripled in the last five years, to nearly $71 million. And more than half has been spent in the Dominican."[81]

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72. *Id.*

73. *Id.*

74. Sanchez, *supra* note 68.

75. *See* Baseball-Reference.com, *Puerto Rico Baseball League*, http://www.baseball-reference.com/bullpen/Liga_de_Béisbol_Profesional_de_Puerto_Rico (last visited Feb. 6, 2010).

76. Press Release, City of New York, Mayor Bloomberg Hosts Reception in Celebration of the National Puerto Rican Day Parade (June 11, 2009), http://www.nyc.gov/html/om/html/2009a/pr265-09.html.

77. DRAFT RULES, *supra* note 4, at 4.

78. *See, e.g.*, Schwarz, *supra* note 55.

79. *Id.*

80. Richard Lapchick, *The 2008 Racial and Gender Report Card: Major League Baseball* app. 1 at 16 (Apr. 15, 2008), *available at* http://www.tidesport.org/RGRC/2008/2008_MLB_RGRC_PR.pdf; *see also* Baseball-Almanac.com, Major League Baseball Players by Birthplace, http://www.baseball-almanac.com/players/birthplace.php (last visited Feb. 6, 2010) (chronicling the birthplace of all major league players every year since 1876).

81. Kevin Baxter, *The Shortcuts: Deeply Entwined MLB Investigates Steroid Use, Document Fraud and Skimming as Dominican Prospects Seek Rich U.S. Contracts*, L.A. TIMES,

Baseball teams are also spending a greater percentage of their scouting and development budgets on running baseball academies in Latin American countries.[82] In the Dominican Republic, all thirty major league teams currently operate elaborate training academies, with an estimated $100 million per year pouring into the economy.[83] Until November 2009, the Milwaukee Brewers were the only team that did not have a Dominican baseball academy.[84] The team's executives closed the academy in 2003 after they "noticed that many of their best Latin American prospects arrived to play in the United States almost as undeveloped as when they first joined the organization."[85] Six years later, the Brewers admitted their mistake and re-opened a training academy in the Dominican Republic.[86] As Gord Ash, Milwaukee's assistant general manager, explained: "What we thought might be a competitive advantage, wasn't."[87]

In retrospect, this spending trend—Latin American countries receiving money that in the past presumably would have been spent on developing and paying American players—began when the MLB draft was instituted in 1965.[88] "After a few years of experience with the draft, teams recognized that scouting/development resources were no longer well-spent in the United States. Beginning in the 1970s, teams increasingly moved their scouts from the U.S. to Latin America."[89] In their draft study, the Shepherds analyzed the percentage difference of U.S. and foreign players in the major leagues since the advent of the draft.[90] The authors concluded that the draft "has led to large growth in the number of foreign MLB

Sept. 22, 2009, at C5.

82. *See id.*

83. *See id.* (stating that in September 2009, twenty-nine of thirty teams had training academies in the Dominican Republic); *see also* Adam McCalvy, *Inbox: Can Brewers Ink Fielder Long Term?*, MLB.COM, Nov. 30, 2009, http://milwaukee.brewers.mlb.com/news/article.jsp?ymd=20091128&content_id=7724664&vkey=news_mil&fext=.jsp&c_id=mil/ [hereinafter McCalvy, *Can Brewers*] (stating that the Brewers opened up a training academy in the Dominican Republic in November 2009).

84. McCalvy, *Can Brewers*, *supra* note 83 ("[O]n Nov. 1, the Brewers opened their own training facility north of the Dominican capital of Santo Domingo, the first time since 2003 that Milwaukee has a standalone presence in Latin America.").

85. Jorge Arangure Jr., *The Brewers' Stunning Move,* ESPN.COM, Mar. 10, 2009, http://insider.espn.go.com/mlb/insider/news/story?id=3974539.

86. *See* McCalvy, *Can Brewers*, *supra* note 83; *see also* Adam McCalvy, *Brewers May Re-Open Dominican Camp,* MLB.COM, Jan. 12, 2009, http://mlb.mlb.com/news/article.jsp?ymd=20090112&content_id=3740907&vkey=news_mlb&fext=.jsp&c_id=mlb&partnerId=rss_mlb/ [hereinafter McCalvy, *Dominican Camp*].

87. McCalvy, *Dominican Camp*, *supra* note 86.

88. *See* Shepherd & Shepherd, *supra* note 62, at 10–11.

89. *Id.*

90. *See generally id.* at 1–2.

players and a similar decrease in the number of U.S. players."[91] Furthermore, the Shepherds stated that "a worldwide draft would slow the increase in the numbers of foreign players; no longer would foreign players enjoy the advantage that the draft now creates."[92]

Since the 1980s, baseball has discussed conducting a worldwide draft.[93] In addition to equalizing the entry rules for U.S. and international players, a global draft would address the significant competitive issue of large-market teams outbidding others for top foreign talent.[94] "[MLB and the MLBPA] actually agreed to the concept of a worldwide draft during the labor deal of August 2002."[95] Attachment 24 to the 2003–2006 CBA is a memorandum that was signed by officials from both parties.[96] The addendum states that both sides "agreed that the First-Year Player Draft should be expanded to cover all players who are first entering Major League or Minor League baseball, regardless of a player's residence."[97] The memorandum further explains that "[i]n the course of those discussions, however, it became apparent that there was insufficient time for the type of deliberation and negotiation necessary to reach agreement on the many issues posed by such a significant change in the First-Year Player Draft."[98] As a result, both sides agreed that "[n]o later than October 15, 2002" a worldwide draft subcommittee comprised of an equal number of representatives from MLB and the MLBPA would begin deliberations to "consider all issues relating to the acquisition of players through a worldwide draft system."[99]

MLB officials believed that a worldwide draft would be implemented by 2004 at the latest, but the subcommittee scarcely met and the issue was hardly discussed during the 2006 labor negotiations.[100] However, there has been recent MLB support for an expanded draft.[101] In July 2008, MLB Commissioner Bud Selig stated that management had an increased interest in a worldwide draft.[102] "But, Rob Manfred, his executive vice president

91. *Id.* at 29.

92. *Id.*

93. Schwarz, *supra* note 55.

94. *Id.*

95. *Id.*

96. 2003–2006 CBA, *supra* note 47, at 202.

97. *Id.*

98. *Id.*

99. *Id.*

100. Schwarz, *supra* note 55.

101. Ronald Blum, *MLB Likely to Defer Worldwide Draft to 2012*, USA TODAY, July 15, 2008, http://www.usatoday.com/sports/baseball/2008-07-15-2471318374_x.htm.

102. *Id.*

for labor relations, indicated owners probably wouldn't push for the [MLBPA] to reopen the [CBA] over the issue."[103] Manfred said that although baseball is "not near making any decision" on a worldwide draft, he thought that "the most likely course of events is that it would be handled in the next round of bargaining" in 2011.[104] Manfred and Selig represent the interests of MLB and the team owners, and "[t]he owners would like to control spending on amateur players by subjecting international players to the draft."[105]

In a rare meeting of the minds, the MLBPA agrees with MLB concerning the need to expand the draft globally.[106] In a radio interview on WFAN in New York in December 2009, Michael Weiner, the executive director of the MLBPA, explained why the players were in favor of a global draft in 2002, and why they were supportive of instituting a worldwide draft today:

> The owners proposed [an international draft] to the players in 2002 and [the players] immediately said, "Fine." The players stand very firm when there is a principle to stand upon, and nobody stands on the principle that a kid from Texas should be treated differently than a kid from Venezuela or from the [Dominican Republic] as they enter professional baseball. So, the concept of an international draft or common rules for all players entering the game makes a lot of sense to us. The devil could be in the details, that is what happened in 2002.[107]

Although complex details need to be resolved before a worldwide draft is finally implemented, the shared belief of both negotiating sides should hopefully propel the creation of a global draft. Moreover, competitive issues[108] and suspected legal wrongdoings involving foreign-born prospects[109] further exemplify why an expanded draft is a much-needed priority for the sport of baseball.

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103. *Id.*

104. *Id.*

105. Bill Shaikin, *Baseball Players Suggest Changes,* L.A. TIMES, Dec. 3, 2009, at C3.

106. *See, e.g.,* Podcast: Interview by Mike Francesa with Michael Weiner, Executive Director, MLBPA, on WFAN Radio (Dec. 2, 2009), http://podcast.wfan.com/wfan/2089981.mp3 (expressing the players' support of a global draft 8:00 into recording).

107. *Id.*

108. Schwarz, *supra* note 55 (discussing the trend of more teams entering into bidding wars and consequently driving up prices of foreign-born free agents).

109. *Id.* (detailing a recent rash of foreign players who have been caught lying about their ages, and discussing a 2008 "F.B.I. investigation into whether scouts and major league executives pocket[ed] money that was earmarked for Latin prospects").

C. *Worldwide Drafts in Other Professional Sports*

While MLB has struggled with the unequal and unfair consequences of its regionalized draft, the National Basketball Association (NBA)[110] and National Hockey League (NHL)[111] have conducted global drafts for many years. In the NBA, the first international player was selected in the 1970 draft,[112] and the last decade has witnessed a dramatic influx of foreign-born draftees.[113] In 2003, eight foreign players were taken in the first round.[114] In addition, the 2004 and 2006 first rounds each featured six international prospects being selected.[115] Today, NBA teams employ full-time scouts stationed overseas, and "[t]he shrinking of the game globally has made it easier for players to be scouted and for possible flaws to be exposed earlier."[116]

The San Antonio Spurs epitomize the internationalization of the NBA. The Spurs have won four titles since 1999, and two key players during their title run are foreign (Argentina's Manu Ginóbili and France's Tony Parker).[117] Neither player played college basketball in the U.S., but the Spurs selected both stars in the global NBA draft (Ginobili in the second round in 1999, Parker in the first round in 2001).[118] In addition, Tim Duncan, San Antonio's superstar power forward, grew up in the U.S. Virgin Islands (although he attended Wake Forest University).[119]

In contrast to the unequal entry rules currently instituted in MLB, the same draft-eligibility requirements apply to all prospects in the NBA.[120]

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110. *See, e.g.*, NBA.com Lifting the Torch, http://www.nba.com/firsts/dirk_firsts_050526.html (last visited Feb. 6, 2010) ("The first international players ever drafted by the NBA were . . . Mexico's Manuel Raga in the 10th round and Italy's Dino Meneghin in the 11th round during the 15 round 1970 Draft.").

111. *See, e.g.*, NHL.com, Hockey in Europe, http://www.nhl.com/futures/europe.html (last visited Feb. 6, 2010) (stating that in 1969, Finnish-born forward Tommi Salmelainen was the first European-trained prospect to be drafted in the NHL draft).

112. NBA.com Lifting the Torch, *supra* note 110.

113. Jonathan Abrams, *N.B.A. Looks Overseas for Draft Prospects, and Doesn't See Much*, N.Y. TIMES, June 20, 2009 at SP11.

114. *Id.*

115. *Id.*

116. *Id.*

117. Hoopedia, *San Antonio Spurs*, http://hoopedia.nba.com/index.php?title=San_Antonio_Spurs (last visited Feb. 6, 2010); *see also* Spurs 2009–10 Roster, http://www.nba.com/spurs/roster/ (last visited Feb. 6, 2010) (showing that Manu Ginobili is from Argentina and Tony Parker is from France).

118. Hoopedia, San Antonio Spurs, *supra* note 117.

119. Hoopedia, *Tim Duncan*, http://hoopedia.nba.com/index.php?title=Tim_Duncan (last visited Feb. 6, 2010).

120. *See generally NBA Collective Bargaining Agreement Ratified and Signed*, NBA.COM,

Beginning with the 2006 NBA draft, the minimum age requirement to enter the draft increased from eighteen to nineteen years old.[121] "United States players must be at least one year removed from high school [and nineteen] years of age (by the end of that calendar year) before entering the draft. International players must turn [nineteen] during the calendar year of that draft."[122]

Similarly, in the NHL, identical drafting rules apply to North American and non-North American hockey prospects.[123] Through the years, nearly all of the NHL players have come from Canada (approximately fifty-five percent today), Europe (approximately twenty-four percent today), and the U.S. (approximately twenty-one percent today).[124] Correspondingly, the NHL has held an annual global draft since 1963.[125] The rules have slightly changed since the advent of the NHL draft, but "[b]eginning with the 1980 Entry Draft and continuing today, all [eighteen-, nineteen-, and twenty-year-]old North American and non-North American born players have been eligible to be drafted."[126]

D. Federal and State Employment Laws Prohibiting National Origin Discrimination

If Harper is going to be successful in his legal challenge, he would most likely need to state a case that MLB is acting in violation of a federal or state employment discrimination law.[127] Also, he must establish that the employment law is not preempted by national labor law that oversees and encourages collectively bargained agreements.[128]

On the federal level, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on "race, color, religion, sex

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July 30, 2005, http://www.nba.com/news/CBA_050730.html.

121. *Id.*

122. *Id.*

123. NHL.com, NHL Draft History, http://www.nhl.com/futures/drafthistory.html (last visited Feb. 6, 2010).

124. NHLNumbers.com, Nationalities, http://www.nhlnumbers.com/countries.php?season=0910 (last visited Feb. 6, 2010) (showing that over the last three NHL seasons (2007–2008, 2008–2009, 2009–2010): fifty-two to fifty-five percent of players were from Canada, twenty-four to twenty-six percent of players were from Europe, and twenty-one to twenty-two percent of players were from the U.S.).

125. *See* NHL.com, NHL Draft History, *supra* note 123 (stating that in the first NHL draft in 1963, "[a]ll amateur players, 17 years of age and older who were not already sponsored by an NHL club, were eligible to be drafted").

126. *Id.*

127. *See infra* Part IV.A.

128. *See infra* Part IV.B.

[and] national origin."[129] "Title VII prohibits not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex."[130] Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees."[131] The statute defines "industry affecting commerce" as "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce."[132]

The broad wording of the "Unlawful Employment Practices" section of the statute makes it evident that the legislators intended Title VII to cover all types of employment discrimination:

> (a) Employer Practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[133]

In addition to prohibiting private employment discrimination, Title VII also created the Equal Employment Opportunity Commission (EEOC) to implement the statute.[134] "Since its creation in 1964, Congress has gradually extended EEOC powers to include investigatory authority, creating conciliation programs, filing lawsuits, and conducting voluntary assistance programs."[135] An employee or potential employee is required to

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129. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000e *et seq.* (2006)).

130. Federal Laws Prohibiting Job Discrimination Questions and Answers, http://www.eeoc.gov/facts/qanda.html (last visited Feb. 6, 2010).

131. 42 U.S.C. § 2000e-(b).

132. *Id.* § 2000e-(h).

133. *Id.* § 2000e-2(a).

134. Teaching with Documents: The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission, http://www.archives.gov/education/lessons/civil-rights-act (last visited Feb. 6, 2010); *see also* 42 U.S.C. § 2000e-4.

135. Teaching with Documents: The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission, *supra* note 134.

file a charge with the EEOC before filing a private lawsuit in court.[136] "If a charge is filed with EEOC and also is covered by state or local law, EEOC 'dual files' the charge with the state or local [Fair Employment Practices Agencies], but ordinarily retains the charge for handling."[137]

According to the EEOC, "[n]ational origin discrimination means treating someone less favorably because he or she comes from a particular place."[138] "It is illegal to discriminate against an individual because of birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group."[139] Prohibited national origin discriminatory practices that may apply to Harper's case include recruitment, compensation, or assignment of an employee.[140]

Most states have enacted their own fair employment practices laws in addition to Title VII.[141] "They often resemble Title VII, but sometimes they sweep in smaller employers, cover a larger variety of minorities, or in other respects have broader coverage. Title VII expressly permits the states to enact such laws so long as they do not conflict."[142] Here, Harper would likely bring his case in New York, as MLB's headquarters are located in New York City.[143] In New York, the state employment discrimination laws mirror the federal laws passed in Title VII of the Civil Rights Act of 1964.[144]

In 1945, nineteen years before Congress passed the Civil Rights Act of 1964, New York became the first state in the U.S. to enact a Human Rights Law.[145] "This law prohibit[ed] discrimination in employment, housing, credit, places of public accommodations, and non-sectarian educational institutions, based on age, race, national origin, gender, sexual orientation, marital status, disability, military status, and other specified classes."[146] As stated below, section 296 of New York's Human Rights

136. Filing a Charge of Employment Discrimination, http://archive.eeoc.gov/charge/overview_charge_filing.html (last visited Feb. 6, 2010).

137. *Id.*

138. National Origin Discrimination, http://archive.eeoc.gov/origin/index.html (last visited Feb. 6, 2010).

139. Federal Laws Prohibiting Job Discrimination Questions and Answers, *supra* note 130.

140. *See id.* (listing the discriminatory practices prohibited under Title VII and other federal employment discrimination laws).

141. 1 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 1.02[1] (2d ed. 2009).

142. *Id.*

143. *See* MLB.com: Official Info, http://mlb.mlb.com/mlb/official_info/about_mlb/index.jsp (last visited Feb. 6, 2010).

144. N.Y. EXEC. LAW § 296 (Supp. 2009); *Cf.* 42 U.S.C. § 2000e-2(a).

145. Museum of Disability History - Disability History Week, http://www.museumofdisability.org/disabilityhistoryweek.asp (last visited Feb. 6, 2010).

146. New York State Division of Human Rights, Mission Statement,

Law prohibits employment discrimination and contains language that is very similar to the wording in Title VII:

> 1. It shall be an unlawful discriminatory practice:
>
> (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment. [147]

Regardless of whether a court uses New York state law or federal law, Harper must prove that MLB unfairly discriminates against prospective employees based on the national origin of the class of players. [148] In MLB's current entry system, players born in the U.S., Canada, and Puerto Rico are treated differently—and worse—than players born in all other countries. [149] As analyzed below, after examining the legal history of cases involving "reverse" national origin discrimination, Harper has a strong likelihood of prevailing in his potential case against MLB. [150]

III. LEGAL HISTORY

A. "Reverse" National Origin Discrimination

The Civil Rights Act of 1964 was enacted—and the EEOC was created—to ensure that all workers have equal employment opportunities. [151] The objective of Title VII was "to prevent arbitrary employment discrimination." [152] These objectives "cannot be accomplished if employers are allowed to discriminate against employees on the basis of immutable characteristics or factors over which individuals have no

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http://www.dhr.state.ny.us/mission.html (last visited Feb. 6, 2010).

147. N.Y. EXEC. LAW § 296.

148. *See infra* Part IV.A.

149. *See* DRAFT RULES, *supra* note 4, at 4 (stating that a player is eligible for selection in the First-Year Player Draft if he is a resident of the U.S., Canada, Puerto Rico or other U.S. territory); *see also infra* Part IV.A.

150. *See infra* Part IV.A–B.

151. *See* 42 U.S.C. § 2000e-2(a); *see also* Thomas v. Rohner-Gehrig & Co., 582 F. Supp. 669, 675 (N.D. Ill. 1984); *see also* Federal Laws Prohibiting Job Discrimination Questions and Answers, *supra* note 130.

152. *Thomas*, 582 F. Supp. at 675.

control, such as country of birth."[153] Consistent with this line of thinking, "reverse" national origin discrimination is also prohibited.[154] In *Thomas v. Rohner-Gehrig & Co.*, the U.S. District Court for the Northern District of Illinois held that the plaintiffs' complaint alleging that they "were discharged solely because they were born in the United States" was "sufficient to state a Title VII cause of action based on national origin discrimination."[155] The court reasoned that "employment discrimination against American citizens based merely on country of birth, whether that birthplace is the United States or elsewhere, contradicts the purpose and intent of Title VII, as well as notions of fairness and equality."[156]

It is important to note that the U.S. Supreme Court draws a distinction between discrimination based on national origin, which is prohibited in Title VII, and discrimination based on citizenship or alienage, which is not prohibited.[157] In 1973, the Court in *Espinoza v. Farah Manufacturing Co.* stated that "[t]he term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came."[158] The Court explained:

> Congress has assumed that the ban on national-origin discrimination in § 701(b) [of Title VII of the Civil Rights Act of 1964] did not affect the historical practice of requiring citizenship as a condition of employment. And there is no reason to believe Congress intended the term "national origin" in § 703 [of Title VII of the Civil Rights Act of 1964] to have any broader scope.[159]

Based on this ruling in *Espinoza*, courts reject claims of "reverse" discrimination when the claim involves discrimination on the basis of American citizenship.[160] This is justified by the theory that "if discrimination in favor of American citizens is not covered [under Title VII], the same must of course be true in reverse."[161] However, in cases involving a claim of national origin discrimination, courts have consistently addressed the claim based on the merits of the case.[162]

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153. *Id.* (citing Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980)).
154. *See generally id.*
155. *Id.*
156. *Id.*
157. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973).
158. *Id.* at 88.
159. *Id.* at 91.
160. 3 EMPLOYMENT DISCRIMINATION, *supra* note 141 § 59.03.
161. *Id.*
162. *Id.*

Recently, the U.S. Supreme Court decided a "reverse" racism case in a similar manner to how it would potentially rule in a "reverse" national origin case.[163] In 2009, the Court in *Ricci v. DeStefano* reversed a Second Circuit ruling and held in favor of white and Hispanic firefighters from New Haven, Connecticut.[164] "In 2003, 118 New Haven firefighters took examinations to qualify for promotion to the rank of lieutenant or captain."[165] When results of the examination "showed that white candidates had outperformed minority candidates . . . [s]ome firefighters argued the tests should be discarded because the results showed the tests to be discriminatory."[166] The City of New Haven agreed with the minority firefighters who protested the results and threatened to sue had the examinations counted. Subsequently, the examinations were voided, and some "white and Hispanic firefighters who likely would have been promoted based on their good test performance sued the City and some of its officials."[167] On Title VII grounds, the Court ruled against the City of New Haven.[168] The Court held that "race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[169] The Court concluded that the City could not meet the disparate-impact threshold standard, and "as a result, the City's action in discarding the tests was a violation of Title VII."[170]

As stated by the Court in *Ricci*, "Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')."[171] Disparate-treatment cases are "'the most easily understood type of discrimination' . . . and occur where an employer has 'treated [a] particular person less favorably than others because of' a protected trait."[172] In order to be successful, a plaintiff alleging disparate-treatment discrimination "must establish 'that the defendant had a discriminatory

163. *See* Ricci v. DeStefano, Nos. 07-1428 and 08-328, slip op. at 2 (U.S. June 29, 2009), http://www.supremecourtus.gov/opinions/08pdf/07-1428.pdf.

164. *See id.* at 2, 34.

165. *Id.* at 1.

166. *Id.* at 2.

167. *Id.*

168. *Id.* at 2–3.

169. *Ricci*, Nos. 07-1428 and 08-328, slip op. at 2.

170. *Id.* at 2–3.

171. *Id.* at 17.

172. *Id.* (citations omitted).

intent or motive' for taking a job-related action."[173]

In 1973, the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green* established a four-part formula for a plaintiff to use when making a prima facie case for disparate-treatment employment discrimination.[174] The petitioner alleging a Title VII complaint "must carry the initial burden under the statute of establishing a prima facie case of racial discrimination."[175] The Court said that this may be done if the complainant is able to show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[176]

Although the *McDonnell Douglas* case involved an African-American employee, the Court's formula also applies to national origin discrimination.[177] The use of the term "minority" in the *McDonnell Douglas* formula "does not imply that whites are excluded from the protection of Title VII or from the application of this formula."[178] In addition, while the formula, on its face, deals with refusal to hire, it has been held to apply to other acts such as refusal to promote or discharge.[179]

It is noteworthy that at the complaint stage, the *McDonnell Douglas* formula does not require the plaintiff to show that the employer intended to discriminate.[180] This omission "is dictated by the Court's determination to keep the standards non-subjective and even mechanical."[181] While direct evidence of a discriminatory motive behind an employment decision is very helpful to a plaintiff's case, such evidence is rare and hard to come by.[182] The Court in *McDonnell Douglas* recognized that in most instances the plaintiff relies on circumstantial evidence, and, accordingly, the formula does not require proof of direct evidence of discriminatory intent

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173. *Id.* at 18 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988)).
174. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
175. *Id.*
176. *Id.*
177. 1 EMPLOYMENT DISCRIMINATION, *supra* note 141 § 8.01[1] n.3.
178. *Id.*
179. *Id.* § 8.01[1].
180. *Id.*
181. *Id.*
182. *Id.*

when making the prima facie showing. [183]

Similarly, twenty years after creating the *McDonnell Douglas* formula, the U.S. Supreme Court held that in a Title VII case, "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'" [184] Although the Court made this ruling in *Desert Palace, Inc. v. Costa*, a "mixed-motive case, i.e., where both legitimate and illegitimate reasons motivated the decision," the Court said "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." [185]

According to the *McDonnell Douglas* formula, if the plaintiff satisfies the burden and establishes a prima facie case of discrimination, then the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." [186] If the employer is able to satisfy this burden, then the burden shifts back to the plaintiff to prove "that the reason given by the employer was not legitimate and nondiscriminatory, but was 'pretextual,' that is, a sham to cover the real discriminatory motivation." [187]

Unlike disparate-treatment discrimination, which was specifically outlawed in the Civil Rights Act of 1964, the statute did not expressly prohibit "policies or practices that produce a disparate impact." [188] However, twenty-seven years later, Congress enacted the Civil Rights Act of 1991, [189] which "included a provision codifying the prohibition on disparate-impact discrimination." [190] The *Ricci* court interpreted the 1991 codification as follows:

> Under the disparate-impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42

183. 1 EMPLOYMENT DISCRIMINATION, *supra* note 141 § 8.01[1].

184. Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003) (quoting 42 U.S.C. § 2000e-2(m)).

185. *Id.* at 100 (quotations omitted).

186. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

187. 1 EMPLOYMENT DISCRIMINATION, *supra* note 141 § 8.01[1].

188. Ricci v. DeStefano, Nos. 07-1428 and 08-328, slip op. at 2 (U.S. June 29, 2009), http://www.supremecourtus.gov/opinions/08pdf/07-1428.pdf.

189. Civil Rights Act of 1991, Pub. L. No. 88-352, § 105(a), 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2(k) (2006)).

190. *Ricci*, Nos. 07-1428 and 08-328, slip op. at 18.

> U.S.C. § 2000e-2(k)(1)(A)(i). An employer may defend against liability by demonstrating that the practice is "job-related for the position in question and consistent with business necessity." *Ibid.* Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs. [191]

While the *Ricci* case involved discriminatory actions by a public employer, private employers are also subject to the disparate-treatment and disparate-impact statutory prohibitions. [192]

B. The Tension Between Collective Bargaining Agreements Governed by National Labor Law and Employment Discrimination Claims Under Federal and State Laws

In 1935, Congress passed the National Labor Relations Act (NLRA) [193] "to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy." [194] The NLRA was passed under the guise of the Wagner Act, which was the first federal law that formally recognized and legalized the important process of collective bargaining. [195] Section 8(a) of the NLRA states: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . ." [196] Section 157 addresses the rights of employees:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have

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191. *Id.* at 18–19.

192. 42 U.S.C. § 2000e-2 (governing the actions of employers in general, without differentiating between private and public employers).

193. National Labor Relations Act, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2006)).

194. National Labor Relations Board, National Labor Relations Act, http://www.nlrb.gov/about_us/overview/national_labor_relations_act.aspx (last visited Feb. 6, 2010).

195. 1 LEX K. LARSON, LABOR AND EMPLOYMENT LAW § 1.01[1] (2009).

196. 29 U.S.C. § 158(a)(1).

> the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) . . . .[197]

Correspondingly, section 158(a)(3) prohibits an employer from engaging in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[198]

When the NLRA was enacted in 1935, Congress had not yet passed Title VII of the Civil Rights Act of 1964.[199] Interestingly, although several federal appeals circuits in the late 1960s and early 1970s[200] ruled "that racially discriminatory practices by an employer constituted unfair labor practices under [s]ection 8 of the [NLRA]. . . . [L]ater developments in the law significantly limited the availability of the [NLRA] as a tool for eliminating invidious discrimination by an employer on account of race or national origin."[201] Today, section 8(a)(1) of the NLRA prohibits employment discrimination "only if the discrimination is unjustified and interferes with the affected employees' rights to act concertedly for their own betterment."[202] By contrast, Title VII is much broader because it prohibits such discrimination "without reference to its effect on the employees' right to unite."[203] As a result, a claimant can bring both NLRA and Title VII claims, or can elect to bring only one claim.[204]

This distinction between the statutes is illustrated by the 1981 holding in *Walker v. Harrison Radiator Division*.[205] In *Walker*, an African-American employee of Harrison Radiator Division—and member of the Local 686 union—alleged that her employer and her union discriminated against her because of her race.[206] The District Court from the Western

197. *Id.* § 157.

198. *Id.* § 158(a)(3).

199. National Labor Relations Board, National Labor Relations Act, *supra* note 195 (stating that the NLRA was enacted in 1935, twenty-nine years before the Civil Rights Act of 1964 was passed).

200. *See, e.g.*, United Packinghouse, Food & Allied Workers Int'l Union v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969); Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971).

201. 4 LEX K. LARSON, LABOR AND EMPLOYMENT LAW § 114.02[1] (2009).

202. *Id.*

203. *Id.*

204. *See e.g.*, Walker v. Harrison Radiator Div., 27 FEP Cases 1437 (W.D.N.Y. 1981) (stating that the employee brought Title VII and 42 U.S.C. § 1981 claims against the employer).

205. *Id.*

206. *See generally id.*

District of New York stated that a claim need not be dismissed for failing to exhaust the contractual and intra-union remedies inherent in the collective bargaining agreement.[207] The court held that "[a]rbitral and contractual remedies are complementary to and separate from rights guaranteed under the civil rights laws.[208] Accordingly, "[i]t has been repeatedly held that exhaustion of contractual and/or intra-union remedies is not a prerequisite to bringing suit under Title VII."[209]

This holding is reinforced by the Sixth Circuit Court of Appeals ruling in *Tipler v. E.I. duPont deNemours & Co.*[210] In 1971, the court compared the two discrimination statutes:

> Although these two acts are not totally dissimilar, their differences significantly overshadow their similarities. Absent a special consideration, a determination arising solely under one statute should not automatically be binding when a similar question arises under another statute.... Hence certain discriminatory practices that are valid under the [NLRA] may be invalid under Title VII.[211]

Collectively, these holdings exhibit that a claimant can successfully challenge an employer's discriminatory practices under Title VII, even where the employee works in a collectively bargained environment agreed to by management in conjunction with the employee's union.[212]

Twelve years after the NLRA was passed, Congress enacted the Labor Management Relations Act (LMRA), which effectively amended the NLRA.[213] "Although the LMRA did not change the stated basic policy of the [NLRA], it recognized that the free flow of commerce might also be impeded by the actions of employees and labor organizations, as well as those of employers."[214] As a result, the LMRA gave protection to employers by prohibiting certain conduct of unions and employees and by declaring specified conduct of employers and unions as unlawful.[215]

If Harper attempts to establish a state-law claim of national origin discrimination against MLB, then the evolving meaning of section 301 of

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207. *Id.* at 1438.

208. *Id.*

209. *Id.*

210. *See* Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971).

211. *Id.* at 128–29 (citation omitted).

212. *See, e.g.*, *Walker*, 27 FEP Cases 1437; *Tipler*, 443 F.2d 125.

213. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–97 (2006)).

214. 1 LEX K. LARSON, LABOR AND EMPLOYMENT LAW § 1.01[2] (2009).

215. *Id.*

the LMRA could be vital to his case.[216] Section 301(a) addresses the jurisdictional aspect of suits by and against labor organizations:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[217]

In 1985, the U.S. Supreme Court in *Allis-Chalmers Corp. v. Lueck* applied section 301(a) broadly, stating that "Congress has mandated that federal law govern the meaning given [labor] contract terms. Since the state tort purports to give life to these terms in a different environment, it is pre-empted."[218] Furthermore, the Court held "that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a section 301 claim, or dismissed as pre-empted by federal labor-contract law."[219] However, the Court was emphatic in stating: "Clearly, section 301 does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law."[220]

Three years later, the U.S. Supreme Court in *Lingle v. Norge Division of Magic Chef, Inc.* clarified and limited the impact that section 301 has on preemption of state tort claims.[221] The Court cited a 1962 decision in *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, which held that "in enacting section 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules."[222] The 1962 ruling further stressed how different meanings of contract terms under state and federal law could have a disruptive influence on the bargaining and application of collective agreements:

> The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the

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216. *See infra* Part III.B.

217. 29 U.S.C. § 185(a).

218. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 218–19 (1985).

219. *Id.* at 220 (citation omitted).

220. *Id.* at 212.

221. *See* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988).

222. Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 369 U.S. 95, 104 (1962).

> keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.[223]

In *Lingle*, the Court used this reasoning to establish that section 301 preempts a state-law claim "only if such application requires the interpretation of a collective-bargaining agreement."[224] As a result, federal courts would preempt state-law national origin claims where the CBA specifically prohibits discrimination based on national origin.[225] "Thus the state-law claim would hinge on the interpretation of the collective bargaining agreement. However, where the state-law claim arises independent of the provisions of the CBA, the courts will allow it."[226]

Recently, in two suits against large organizations, the Eighth Circuit Court of Appeals used a two-step approach to analyze section 301 preemption.[227] In September 2009, the court in *Williams v. National Football League* affirmed a district court ruling that two Minnesota Vikings football players in the National Football League (NFL) had valid state law claims after being suspended by the league for failing a banned substance test.[228] The court held that both Minnesota's Drug and Alcohol Testing in the Workplace Act—which prohibits Minnesota employers from disciplining or discharging a first-time offender[229]—and Minnesota's Consumable Products Act[230] were not preempted by an NFL rule that a first-time offender of the league's banned substance policy would automatically receive an unpaid, four-game suspension.[231] The Eighth Circuit applied a two-part test to determine whether the state-law claims were sufficiently independent from the rule in the NFL CBA to avoid being preempted by section 301:

> First, a state-law claim is preempted if it is based on a provision of the CBA, meaning that the CBA provision at issue actually sets forth the right upon which the claim is based.
>
> Second, section 301 preemption applies where a state-law claim

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223. *Id.*

224. *Lingle*, 486 U.S. at 413.

225. 4 LEX K. LARSON, LABOR AND EMPLOYMENT LAW § 114.02[3][b] (2009).

226. *Id.*

227. *See generally* Williams v. Nat'l Football League, 582 F.3d 863 (8th Cir. 2009); *see also* Bogan v. Gen. Motors Corp., 500 F.3d 828 (8th Cir. 2007).

228. *Williams*, 582 F.3d at 868, 870.

229. MINN. STAT. ANN. §§ 181.950–181.957 (West 2006).

230. *Id.* § 181.938.

231. *Williams*, 582 F.3d at 868–69.

> is dependent upon an analysis of the relevant CBA, meaning that the plaintiff's state-law claim requires interpretation of a provision of the CBA. [232]

The court concluded that the state-law claims were not preempted because "[t]he NFL does not point to a specific provision of either the CBA or the Policy which must be interpreted." [233]However, the *Williams* judgment is not final, as the NFL is considering appealing the Eighth Circuit ruling to the U.S. Supreme Court. [234] Also, in November 2009, NFL Commissioner Roger Goodell took the unusual step of testifying in front of the Energy and Commerce Committee in an attempt to have Congress "change federal labor laws to prevent states from interfering with the league's efforts to enforce its banned substances policy." [235] If the *Williams* verdict is affirmed, the ramifications could be monumental, as the verdict may preclude the NFL and other professional sports leagues from implementing a drug-testing policy if any part of it contradicts any state law. [236] Peter Ginsberg, an attorney for the two Vikings players, responded to the Eighth Circuit decision, saying, "[i]t's a terrific ruling for us and it's a terrific ruling for unionized employees everywhere.... [E]ven an $8 billion business cannot ignore liberty rights and protections established by state legislatures." [237] Similarly, after the ruling in *Williams*, "Scott Boras, an agent for many of the top players in baseball, said an adherence to state workplace laws would reshape the collective bargaining process.... 'The parties will now have to consider the limitation of employment rights....'" [238]

The two-step approach that was implemented in *Williams* was also used two years earlier by the Eighth Circuit in *Bogan v. General Motors Corp.* [239] In *Bogan*, a former employee filed a state-law claim of intentional infliction of emotional distress after General Motors fired

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232. *Id.* at 874 (internal quotations and citations omitted).

233. *Id.* at 877.

234. Steve Karnowski, *Appeals Court Declines to Rehear Williamses Case*, WASH. EXAMINER, Dec. 14, 2009, http://www.washingtonexaminer.com/sports/Appeals-court-declines-to-rehear-Williamses-case-79248932.html

235. Ken Belson, *N.F.L. Seeks Help in Enforcing Its Drug Policy*, N.Y. TIMES, Nov. 4, 2009, at B15.

236. *See* Michael S. Schmidt, *In Blow to Antidoping Efforts, Athletes Gain Leeway in Court*, N.Y. TIMES, Sept. 19, 2009, at A1 ("A federal court ruling has jeopardized the National Football League's ability to enforce its drug-testing program and raised significant doubts about the programs of other professional sports in the United States.").

237. Amy Forliti, *Appeals Court: Vikings DTs Can Play*, ABC NEWS, Sept. 11, 2009, http://abcnews.go.com/Sports/wireStory?id=8547868.

238. Schmidt, *supra* note 237.

239. *Bogan v. Gen. Motors Corp*, 500 F.3d 828, 832 (8th Cir. 2007).

her.[240] The Eighth Circuit reversed the district court's ruling, holding that the woman's claim was not preempted by section 301.[241] In the first step of its section 301 analysis, the court held that the state-law claim was not based on the CBA provision that gave General Motors the "right to hire; promote; discharge or discipline for cause; and to maintain discipline and efficiency of employees."[242] In the second part of the test, the court ruled that the state-law claim was not "inextricably intertwined with consideration of the terms of the labor contract [because] a jury will not have to concern itself with [General Motors'] right to hire, promote, discharge, or discipline in order to resolve the alleged emotional distress claim."[243] In addition, the court expressed its belief that a narrow approach to LMRA preemption, "which asks only whether the claim itself is necessarily grounded in rights established by a CBA, is more faithful to [Supreme Court precedent]" than a broader approach which considers an employer's relevant defenses.[244]

IV. ANALYSIS

A. Harper's Valid "Reverse" National Origin Discrimination Claim Against Major League Baseball

When applying federal and state national origin discrimination laws to Harper's case, it is evident that Harper and all draft-eligible U.S. baseball players (as well as Canadians and Puerto Ricans) could successfully state a claim of "reverse" national origin discrimination inherent in the drafting system.[245] "A professional sports organization's relationship with its players and potential players is, at base, an employer's relationship with its employees and, like other employer-employee relationships, is regulated under state and federal law."[246] As a result, the league and its thirty baseball teams must comply with the provisions of Title VII of the Civil Rights Act of 1964, as well as state laws prohibiting

240. *Id.* at 829.

241. *Id.*

242. *Id.* at 832.

243. *Id.* at 833.

244. *Id.*

245. *See supra* Part III.A.

246. N. Jeremi Duru, *Fielding a Team for the Fans: The Societal Consequences and Title VII Implications of Race-Considered Roster Construction in Professional Sport*, 84 WASH. U. L.R. 375, 376–77 (2006).

employment discrimination based on national origin.[247] All employers with at least fifteen employees are regulated by Title VII,[248] and "the law offers no distinction between the half-billion-dollar sports franchise to which millions of fans are devoted and the modest, fifteen-employee, convenience store of which only a few hundred patrons are aware. Both organizations must comply with Title VII."[249]

As stated above, "reverse" national origin discrimination against people born in the U.S. is strictly prohibited under Title VII and many state discrimination laws, and this unfair labor practice has been occurring in baseball since the inception of the draft in 1965.[250] Title VII explicitly states that an employer is not allowed to discriminate against any individual with respect to "compensation, terms, conditions, or privileges of employment."[251] Harper's recruitment into MLB is undeniably being affected here, as well as his privileges of employment.[252] Harper can only enter MLB through the draft,[253] while an international player can sign with any team of his choosing for any negotiated amount once he reaches the age of seventeen (and possibly sixteen depending on the player's birthday).[254]

Furthermore, compensation is not equal for players drafted in the draft and foreign-born baseball players who are able to sign with any baseball team for any amount.[255] In 2002, MLB established salary guidelines for each draft slot that teams are strongly encouraged to follow.[256] Although clubs are not bound to observe the slotting suggestions made by the commissioner's office, that may not be the case much longer.[257] When the current CBA expires in 2011, some baseball experts expect that MLB will be successful in establishing a mandatory signing system for draftees.[258] MLB may adopt a slotting system similar to

247. *See* 42 U.S.C. § 2000e-2(a).

248. 42 U.S.C. § 2000e-(b).

249. Duru, *supra* note 247, at 377.

250. *See* 42 U.S.C. § 2000e-2(a); *see generally* Rausch, *supra* note 52.

251. 42 U.S.C. § 2000e-2(a)(1).

252. *See generally id.* § 2000e-2(a).

253. *See supra* Part I.

254. *See supra* Part I; *see also* Segura, *supra* note 19.

255. *See, e.g., supra* note 16.

256. David Waldstein, *N.B.A. Could Be Model for New Baseball Draft,* N.Y. TIMES, Aug. 19, 2009, at B10.

257. *See id.*

258. *Id.* ("[E]xperts say they believe baseball will succeed in implementing the NBA model during the next round of negotiations, particularly because many veteran players tend to have little or no solidarity with unproven players, and could direct the union to give in on that issue in favor of something else.").

the one instituted in the NBA, where each draft pick slot is assigned a salary figure, and a corresponding rookie contract cannot be more than twenty percent below or above that figure.[259] MLB could also follow the NFL's lead and institute a rookie salary pool in which each team has the choice of how to divide up money to draft picks, as long as the annual spending does not exceed the allotted total.[260]

While Rob Manfred, MLB's executive vice president for labor relations, believes that adding a draft salary scale will be important in future CBA negotiations, he disagrees with the notion that the current system is being ignored.[261] Manfred cites these statistics for the 2009 draft class: sixty-five percent of the draft picks signed at or below MLB's recommended figure, and seventy-six percent of rookie contracts fell within five percent of the slotting suggestions.[262] However, further research shows that in the same 2009 draft "all [thirty] teams went over the recommended slot amount, which was lowered by [ten] percent across the board [compared to the previous year], with at least one signee."[263]

On the other hand, there is no maximum amount that international players are allowed to sign for, and historically, elite foreign free agents have signed for more money than U.S. players selected at the top of the draft.[264] This system has received much criticism, and before the 2009 draft there were rumors that Scott Boras, the agent for Stephen Strasburg, the eventual number one overall pick, was looking to establish foreign residency for the San Diego State pitcher in order to obtain free agency.[265] Boras has been an outspoken opponent of the current drafting system as he believes that it suppresses the incomes of U.S. players to "[twenty] cents on the dollar."[266] However, as discussed above, establishing foreign residency would not garner free agency for a baseball player who has already enrolled in a high school or a college in the U.S.[267]

Boras is no stranger to exploiting draft loopholes. In 1996, four draftees who did not receive contract offers within fifteen days of being selected were granted free agency; and in 1997, Boras advised J.D. Drew to sign with an independent professional team instead of signing with the

259. *Id.*
260. *Id.*
261. *Id.*
262. Waldstein, *supra* note 257.
263. *Id.*
264. *See, e.g., supra* note 16.
265. Sheinin, *supra* note 23.
266. *Id.*
267. *See supra* Part I.

team that drafted him.[268] "That year, the draft was still called the 'amateur' draft, and its eligibility rules applied only to players who had never signed a contract with a major or minor league team."[269] Boras believed that Drew would play for an independent minor league team for a year and would then become a free agent a week before the next year's draft.[270] However, before the 1998 draft, "MLB revised the rule, renaming the draft the 'first-year player draft' and stating that independent league players were still subject to the draft."[271] As a result, Boras' free agency plan backfired, and Drew re-entered the draft in 1998, where he was selected by the St. Louis Cardinals.[272]

As illustrated above, entry into the draft is not beneficial to U.S. players, as it restricts their options and potentially limits their compensation.[273] By not allowing U.S. amateur baseball players to sign with major league teams as free agents, these prospects are being discriminated against by MLB.[274] Courts have consistently held that disparate treatment is found when "an employer has 'treated [a] particular person less favorably than others because of' a protected trait."[275] This is precisely the case for Harper and other U.S. prospects because the current baseball drafting system results in less favorable treatment on the face of the MLB rules.[276] Furthermore, this disparate treatment is based on national origin, a trait explicitly targeted by the authors of Title VII.[277]

While it may be difficult for Harper to find direct evidence to "establish 'that the [league] had a discriminatory intent or motive' for taking a job-related action,"[278] the *McDonnell Douglas* formula does not require proof of direct evidence of discriminatory intent at the prima facie stage.[279] As stated by the U.S. Supreme Court in *Desert Palace*, "a plaintiff need only present sufficient evidence for a reasonable jury to

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268. Sheinin, supra note 23.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *See supra* Part I.

274. *See supra* Part IV.A.

275. Ricci v. DeStefano, Nos. 07-1428 and 08-328, slip op. at 17 (U.S. June 29, 2009), http://www.supremecourtus.gov/opinions/08pdf/07-1428.pdf (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985–86 (1988)).

276. *See* DRAFT RULES, *supra* note 4, at 4.

277. *See* 42 U.S.C. § 2000e-2(a).

278. *Ricci*, Nos. 07-1428 and 08-328, slip op. at 18.

279. 1 EMPLOYMENT DISCRIMINATION, *supra* note 141 § 8.01[1].

conclude, by a preponderance of the evidence, that . . . 'national origin was a motivating factor for any employment practice.'"[280] Using circumstantial evidence, Harper has a strong likelihood of satisfying the *McDonnell Douglas* factors because he is a U.S. player who is as qualified as a non-U.S. player and yet is treated differently only because of where he was born.[281] The burden would then shift to MLB "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[282] It does not appear that there are any legitimate reasons for the disparity of draft rules. If there were valid reasons, then Commissioner Bud Selig and baseball management would not be publicly supportive of a global draft.[283]

Using the U.S. Supreme Court's reasoning from *Ricci*, MLB's "reverse" national origin discrimination against U.S. players would be considered "impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[284] Employment practices that have a disproportionately adverse effect on minorities, even though there is no intent to discriminate, are prohibited under disparate-impact discrimination.[285] Here, there is no valid argument that foreign players would be able to bring a claim of disparate-impact discrimination because they are the class that is benefiting from not being eligible for the MLB draft.[286]

Puerto Rican baseball players are a prime example of the negative effects of being included in the draft pool.[287] Before becoming eligible for the draft, baseball in Puerto Rico was flourishing.[288] Since 1989, when MLB began including Puerto Ricans in the draft, there has been a stark

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280. Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003).

281. *See* 1 EMPLOYMENT DISCRIMINATION, *supra* note 141 § 8.01[1].

282. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

283. *See* Blum, *supra* note 101.

284. Ricci v. DeStefano, Nos. 07-1428 and 08-328, slip op. at 2 (U.S. June 29, 2009), http://www.supremecourtus.gov/opinions/08pdf/07-1428.pdf

285. *Id.* at 17 ("Title VII [of the Civil Rights Act of 1964] prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact').").

286. *See supra* Part IV.A (illustrating that U.S. players are treated less favorably than non-U.S. players because of the drafting requirement in MLB).

287. *See generally* Sanchez, *supra* note 68 (stating that "in 1989, 47 players were signed, compared to only 21 in 2003"); *see also* Shepherd & Shepherd, *supra* note 62, at 20 ("In less than a decade after 1989, the number of Puerto Rican players signed per year had dropped more than 40%.").

288. *See* Shepherd & Shepherd, *supra* note 62, at 20 ("The large majority of MLB players born in the U.S. territories are from Puerto Rico. . . . The percentages of players from U.S. territories increased until 1993, and then began decreasing.").

decline in Puerto Rican players in the major leagues,[289] and baseball in Puerto Rico has also been suffering.[290]

In addition to disparate-treatment discrimination, U.S. players such as Harper could also state a claim for disparate-impact discrimination.[291] As stated in *Ricci*, "a plaintiff establishes a prima facie violation by showing that an employer uses a 'particular employment practice that causes a disparate impact on the basis of... national origin.'"[292] Even if an employer is able to prove that the practice at issue is job-related and consistent with business necessity, a plaintiff may prevail by showing that there is an "available alternative employment practice that has a less disparate impact and serves the employer's legitimate needs."[293] Statistics detailing the declining percentage of U.S. major leaguers since the advent of the draft in 1965, coupled with the tremendous rise in the percentage of international players in the MLB today,[294] should sufficiently exhibit the disparate impact on U.S. players. Also, evidence confirming Scott Boras' "[twenty] cents on the dollar"[295] contention would effectively prove that U.S. players are significantly devalued as a result of this disparate impact.

Lastly, MLB would not be able to refute a disparate-impact claim because the creation of a worldwide draft would undoubtedly be an alternative employment practice that serves the employer's legitimate needs and has less disparate impact on Harper and other U.S. players compared to the current unfair labor practice instituted in MLB.[296]

B. Section 301 Would Not Preempt Harper's Federal or State Employment Discrimination Claim

If Harper is able to state a successful claim of national origin discrimination under Title VII or a similar state law, he would still have to overcome potential preemption by section 301 of the LMRA.[297] Current

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289. *See supra* note 288.

290. Sanchez, *supra* note 68 ("Last month, the Puerto Rico Winter league announced it was suspending play after 69 years because of financial problems.").

291. *See, e.g.*, Ricci v. DeStefano, Nos. 07-1428 and 08-328, slip op. at 18 (U.S. June 29, 2009), http://www.supremecourtus.gov/opinions/08pdf/07-1428.pdf (citing 42 U.S.C. § 2000e-2(k)(1)(A)(i)).

292. *Id.* (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)).

293. *Id.* at 18–19.

294. Shepherd & Shepherd, *supra* note 62, at 29.

295. Sheinin, *supra* note 23.

296. *See* Shepherd & Shepherd, *supra* note 62, at 29 ("A worldwide draft would slow the increase in the numbers of foreign players; no longer would foreign players enjoy the advantage that the draft now creates.").

297. *See supra* Part III.B.

and future players are governed by the rules established in baseball's CBA, and the LMRA (and NLRA) encourages the formation of collective bargaining agreements.[298] However, as illustrated above in the *Walker* and *Tipler* decisions, a claimant can successfully challenge an employer's discriminatory practices under Title VII, even when the employee is governed by rules that were collectively bargained.[299] The reasoning behind this principle is that section 301 is aimed at preventing inconsistent state laws from effectively nullifying the terms agreed upon during the collective bargaining process.[300] Consequently, section 301 only applies to state-law claims, not federal claims, and Harper's potential Title VII claim would not be preempted.[301]

On the other hand, if Harper brings a state-law employment discrimination claim against MLB, a federal court would have to analyze whether the state-law claim is preempted by section 301.[302] If the state-law claim hinges on the court's interpretation of the CBA, the claim would be preempted by section 301.[303] But if the state-law claim exists independent of the terms agreed upon in the CBA, it would not be preempted by national labor law.[304]

When applying the two-part test that the Eighth Circuit recently implemented in *Williams* and *Bogan*, it is likely that neither part of the preemption test is satisfied in Harper's case.[305] In Article XV (titled "Miscellaneous") of the 2007–2011 MLB CBA, section (A) contains a "No Discrimination" clause which states that:

> The Clubs will not interfere with, restrain or coerce Players because of membership in or lawful activity on behalf of the Association, nor will they discriminate because of Association activity in regard to hire, tenure or employment or any term or condition of employment.
>
> The provisions of this Agreement shall be applied to all Players

298. *See* National Labor Relations Board, National Labor Relations Act, *supra* note 195.

299. *See supra* Part III.B.

300. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209–10 (1985).

301. *See* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 413 (1988) (stating that section 301 only preempts a state-law claim "if such application requires the interpretation of a collective bargaining agreement").

302. *See supra* Part III.B.

303. *See generally* Williams v. Nat'l Football League, 582 F.3d 863, 874 (8th Cir. 2009); *see also* Bogan v. Gen. Motors Corp., 500 F.3d 828, 832 (8th Cir. 2007).

304. 4 LEX K. LARSON, LABOR AND EMPLOYMENT LAW § 114.02[3][b] (2009).

305. *See Williams*, 582 F.3d at 874 ("First, a 'state-law claim is preempted if it is "based on" [a] . . . provision of the CBA[,]' meaning that '[t]he CBA provision at issue' actually sets forth the right upon which the claim is based."); *see also Bogan*, 500 F.3d at 832.

> covered by this Agreement without regard to race, color, religion or national origin.[306]

In dissecting the wording of the first part of this clause, major league teams cannot discriminate against a player based on the player's membership in the MLBPA.[307] The second part of the "No Discrimination" section specifies that the CBA applies to all players equally, irrespective of any discriminatory characterization.[308] However, if a MLB rule inherently applies differently to players from varying countries of national origin, there does not appear to be a right of action in the CBA upon which a national origin claim would be based.[309] As a result, a state-law claim would not be preempted.[310]

The second part of the two-step approach states that "section 301 preemption applies where a state-law claim is dependent upon an analysis of the relevant CBA, meaning that the plaintiff's state-law claim requires interpretation of a provision of the CBA."[311] Similar to the analysis above, because the CBA does not address a current or prospective player's right to bring a discrimination claim, there is no interpretation of the CBA that needs to be done by a court.[312] When applying a narrow approach to section 301 preemption—as favored by the Eighth Circuit in *Bogan*—the state-law claim would not be preempted because "[a] jury would not have to concern itself with" MLB's "No Discrimination" policy in order to resolve Harper's claim.[313] In echoing the proclamation made by the winning lawyer in *Williams*: "[E]ven [a billion-dollar] business cannot ignore liberty rights and protections established by state legislatures."[314]

V. CONCLUSION

If Bryce Harper is successful in fighting for his equal rights while blazing a trail towards free agency, his valuable contribution to the sport of

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306. 2007–2011 CBA, *supra* note 14, at 48.

307. *Id.*

308. *Id.*

309. *See generally id.*

310. 4 LEX K. LARSON, LABOR AND EMPLOYMENT LAW § 114.02[3][b] (2009) (stating that a state-law claim that exists independent of the terms agreed upon in the CBA would not be preempted by national labor law).

311. Williams v. Nat'l Football League, 582 F.3d 863, 874 (8th Cir. 2009) (quoting Bogan v. Gen. Motors Corp., 500 F.3d 828, 832 (8th Cir. 2007)) (internal quotations omitted).

312. *See id.* (stating that "section 301 preemption applies where a state-law claim is dependent upon an analysis of the relevant CBA, meaning that the plaintiff's state-law claim requires interpretation of a provision of the CBA" (internal citations omitted)).

313. *Bogan*, 500 F.3d at 833.

314. Forliti, *supra* note 238.

baseball would be everlasting on a global scale. As exhibited in the analysis above, Harper's chances of winning a "reverse" national origin discrimination case would be more likely than not.[315] Harper and all other U.S. baseball prospects are being treated unfairly solely based on where they were born.[316] The trend of baseball teams spending more and more money cultivating prospects in Latin American countries is only growing,[317] and the time is ripe for a player in Harper's position to challenge baseball's drafting system. If Harper had been born in any country besides the U.S., Canada or Puerto Rico, teams would enter a bidding war to obtain his potentially invaluable services.[318] He would be able to negotiate a rookie contract for as much money as the highest suitor would be willing to pay him, and more importantly, he would have the choice as to what city he would live in and what baseball uniform he would put on during at least his first six seasons in the major leagues.[319]

While it is noteworthy that Harper is being advised by Scott Boras,[320] who has a well-established reputation as baseball's most famous loophole-seeking agent,[321] it is not known whether Boras will push Harper towards free agency by filing a lawsuit against MLB for "reverse" national origin discrimination. However, if Harper were to win an employment discrimination lawsuit against MLB, it is possible that the league and the MLBPA would re-open the CBA and implement a worldwide draft.[322] Both sides have tentatively agreed to an international draft in the past,[323] and losing a lawsuit would likely give the parties the impetus to open up the draft pool to all players from all countries with uniform eligibility rules.

It is unfortunate that there have been forty-five years of baseball entry drafts in which U.S. amateurs have been treated worse than foreign players, but the past cannot be changed, and only baseball's future can be altered. If Harper is not the player to change baseball, then maybe some other

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315. *See supra* Part IV.

316. *See supra* Part IV.A.

317. *See generally* Baxter, *supra* note 81.

318. *See, e.g., supra* note 16.

319. *See* 2007–2011 CBA, *supra* note 14, at 70–71 ("[A]ny Player with 6 or more years of Major League service who has not executed a contract for the next succeeding season shall be eligible to become a free agent . . . [and] negotiate and contract with any Club without any restrictions or qualifications . . . .").

320. Verducci, *supra* note 1, at 64–65.

321. *See supra* Part IV.A.

322. Blum, *supra* note 101 (stating that re-opening the CBA is an option, but noting that a MLB official in 2008 did not think that the owners would push for the MLBPA to re-open the current CBA over the worldwide draft issue).

323. *See* 2003–2006 CBA, *supra* note 47, at 202.

American (or Canadian or Puerto Rican) teenager will come along someday soon and fight for fairness in the MLB draft. Of course, there would be no need to resort to litigation if MLB and the MLBPA were to finally come together and institute a global draft with equality for all.

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