

Protecting and Promoting the **Health of NFL Players:** Legal and Ethical Analysis and Recommendations

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ABOUT THE AUTHORS

Christopher R. Deubert is the Senior Law and Ethics Associate for the Law and Ethics Initiative of The Football Players Health Study at Harvard University. Previously, Deubert practiced commercial litigation, sports law, securities litigation, and labor/employment litigation at Peter R. Ginsberg Law, LLC f/k/a Ginsberg & Burgos, PLLC in New York City. His sports practice focused primarily on representing National Football League (NFL) players in League matters, including appeals for Commissioner Discipline, under the NFL's Policy and Program on Substances of Abuse and under the NFL's Policy on Anabolic Steroids and Related Substances (now known as the Policy on Performance-Enhancing Substances), and related litigation. Deubert also previously worked for Sportstars, Inc., one of the largest NFL-player representation firms, performing contract, statistical, and legal analysis, and he performed similar work during an internship with the New York Jets. Deubert graduated with a joint J.D./M.B.A. degree from Fordham University School of Law and Graduate School of Business in 2010, and a B.S. in Sport Management from the University of Massachusetts in 2006.

I. Glenn Cohen is a professor at Harvard Law School; Faculty Director of the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics; and, Co-Lead of the Law and Ethics Initiative of The Football Players Health Study. His award-winning work at the intersection of law, medicine, and ethics—in particular, medical tourism and assisted reproduction—has been published in leading journals, such as the *Harvard Law Review*, *Stanford Law Review*, *New England Journal of Medicine*, *Journal of the American Medical Association*, *American Journal of Bioethics*, and *American Journal of Public Health*. He was previously a fellow at the Radcliffe Institute for Advanced Study and a faculty scholar in bioethics with the Greenwall Foundation. He is the author, editor, and/or co-editor of several books from Oxford, Columbia, John Hopkins, and MIT University Presses. Prior to joining the Harvard faculty, Cohen served as a clerk to Chief Judge Michael Boudin, United States Court of Appeals for the First Circuit, and as an appellate lawyer in the Civil Division of the Department of Justice. He graduated from the University of Toronto with a B.A. (with distinction) in Bioethics (Philosophy) and Psychology and earned his J.D. from Harvard Law School.

Holly Fernandez Lynch is Executive Director of the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics; Faculty at the Harvard Medical School Center for Bioethics; and, Co-Lead of the Law and Ethics Initiative of The Football Players Health Study. Her scholarly work focuses on the regulation and ethics of human subjects research and issues at the heart of the doctor-patient relationship. Her book, *Conflicts of Conscience in Health Care: An Institutional Compromise*, was published by MIT Press in 2008; she is also co-editor with I. Glenn Cohen of *Human Subjects Research Regulation: Perspectives on the Future* (MIT Press 2014), and *FDA in the 21st Century: The Challenges of Regulating Drugs and New Technologies* (Columbia University Press 2015). Lynch practiced pharmaceuticals law at Hogan & Hartson, LLP (now Hogan Lovells), in Washington, D.C., and worked as a bioethicist in the Human Subjects Protection Branch at the National Institutes of Health's Division of AIDS. She served as senior policy and research analyst for President Obama's Commission for the Study of Bioethical Issues. Lynch is currently a member of the Secretary's Advisory Committee on Human Research Protections at the U.S. Department of Health and Human Services. She graduated Order of the Coif from the University of Pennsylvania Law School, where she was a Levy Scholar in Law and Bioethics. She earned her master's degree in bioethics from the University of Pennsylvania's School of Medicine, and her B.A. with a concentration in bioethics, also from the University of Pennsylvania.

ENSURING INDEPENDENCE AND DISCLOSURE OF CONFLICTS

The 2011 Collective Bargaining Agreement between the National Football League Players Association (NFLPA) and the National Football League (NFL) set aside funds for medical research. The NFLPA directed a portion of those funds to create The Football Players Health Study at Harvard University, of which this Report is a part. Our analysis has been independent of any control by the NFLPA, the NFL, or any other party; this independence was contractually protected in Harvard's funding agreement with the NFLPA. Per that contract, the NFLPA was only entitled to prior review of the Report to ensure that no confidential information was disclosed.^a

This report is the principal component of the Law and Ethics Initiative of The Football Players Health Study at Harvard University. Additional background information about The Football Players Health Study is provided in the Preface. We provide more specific information about the Law and Ethics Initiative here.

The Statement of Work agreed to between the NFLPA and Harvard included as one of the Law and Ethics Initiative's projects to "Develop Ethical Framework and Accountability Structure for Player Health and Welfare." More specifically, Harvard described the work to be done as follows:

We will conduct a research project regarding the relative primacy of players' health among potentially competing goals, and clarifying the roles of medical staff and healthcare providers, team owners, pre-professional schools and institutions (e.g., college, high school, Pop Warner, etc.), equipment manufacturers and suppliers, the media, and players themselves in protecting and advancing player health and welfare. More specifically, we will create recommendations applicable to each of these parties, supported for the first time by an overarching ethical framework and accountability structure for player health and welfare. We will also generate recommendations toward a preliminary baseline set of legally and ethically relevant protections that ought to be afforded to all players.

This project description was intended to be preliminary. The actual scope of the final Report developed over time, as expected, as the result of considerable research, internal discussion, and conversations with experts. Beyond agreeing to the Statement of Work, the NFLPA did not direct the scope or content of this Report.

As is typical with sponsored research, we provided periodic updates to the sponsor in several formats. Pursuant to the terms of Harvard-NFLPA agreement, the NFLPA receives an annual report on the progress of The Football Players Health Study as well as one Quad Chart progress report each year. Additionally, on two occasions (August 22, 2014, and January 23, 2015), we presented a summary of the expected scope and content of the Report to The Football Players Health Study Executive Committee, comprised of both Harvard and NFLPA personnel. Those meetings did not alter our approach in constructing the Report, the conclusions reached, or the recommendations made. Indeed, the only comment from the Executive Committee meetings that resulted in a change to the content of the Report was the suggestion at the beginning of the writing process to include business partners as a stakeholder, which we agreed was important.

In the Introduction, Section (D)(2): Description of Legal and Ethical Obligations, we discuss our research process for the Report. Additional information about our communications with the NFLPA and NFL is also relevant here. During the course of our research, we had multiple telephone and email communications with both NFLPA and NFL representatives to gain factual information. As will be indicated where relevant in the Report, sometimes the parties provided the requested information and sometimes they did not. These communications were not about the progress, scope, or structure of our Report.

We also concluded that it was essential to allow for substantive review of the Report by applicable stakeholders, including the NFLPA and NFL. This was necessary to ensure that we have fully accounted for the realities at hand, avoided factual errors, and fairly considered all sides. Accordingly, we provided each stakeholder group discussed in this Report and that has a clearly identified representative the opportunity to review the parts of this Report applicable to them (in draft form). A list of the stakeholders that reviewed the Report appears in Appendix N. Stakeholders had the opportunity to

^a The applicable contract language provides that the NFLPA is permitted to review publications 30 days in advance "for the sole purpose of identifying any unauthorized use of Confidential Information."

identify any errors, provide additional information, comment on what we planned to expect from them going forward, and raise further suggestions or objections. Sometimes these comments led to valuable changes in the Report. Other comments we found unpersuasive, and did not result in any changes. While both the NFLPA and NFL provided comments on the Report, it is critical to recognize that no external party, including the NFLPA and NFL, had the ability to direct or alter our analysis or conclusions. Finally, as part of our effort to collaboratively engage with key stakeholders, we invited both the NFLPA and NFL to write a response to the Report, which we offered to publish on The Football Players Health Study website alongside the Report. The NFL took us up on this offer while the NFLPA did not.^b

As an additional check on our independent analysis, we engaged a Law and Ethics Advisory Panel (LEAP) with expertise in health law, bioethics, and player issues to review our work, comprised of several academics, players, a player family member, and a retired NFL coach. Additional information about the LEAP, its members, and its role in reviewing the Report is included in Appendix N. We consulted with the LEAP early in the drafting process for the Report, and members were given the opportunity to comment on its organization, selection of stakeholders, and relevant ethical principles. The LEAP also had the opportunity to review a complete draft of the Report and provide detailed feedback.

In addition, we subjected the draft Report to robust peer review by outside experts. We engaged six independent experts in fields relevant to the Report to review it for accuracy, fairness, comprehension, and its ability to positively affect the health of NFL players. Additional information about the reviewers and review process is included in Appendix N. None of these individuals had any declared conflicts of interest. To ensure that we carefully considered the comments of the reviewers and made appropriate changes, we also retained Gabriel Feldman, Associate Professor of Law and Director, Sport Law Program, Tulane University Law School, to serve as a lead peer reviewer. Professor Feldman reviewed the Report and provided comments, while also reviewing the comments of the other reviewers and any changes made by us in response to their comments. Professor Feldman's role and approval of the review process is further provided in Appendix O.

Finally, the Report's content is solely the responsibility of the authors and does not represent the official views of the NFLPA or Harvard University.

^b In declining the opportunity to write a response, the NFLPA stated as follows: "[O]ur primary objective in funding Harvard is to advance independent research on the many complex issues facing our members. Harvard's publications further that objective without formal comment by the PA."

DISCLOSURES:

- The Law and Ethics Initiative's allocated budget is a total of \$1,257,045 over three years, which funds not only the present Report, but also several other projects.^c
- Deubert's salary is fully supported by The Football Players Health Study at Harvard University. From August 2010 to May 2014, Deubert was an associate at the law firm of Peter R. Ginsberg Law, LLC f/k/a Ginsberg & Burgos, PLLC. During the course of his practice at that firm, Deubert was involved in several legal matters in which the NFL was an opposing party, including several discussed in this Report. The matters discussed in this Report include the representation of: a former NFL player interested in seeking benefits pursuant to the proposed settlement in the Concussion Litigation, discussed at length in Chapter 7: The NFL and NFLPA; players disciplined pursuant to the NFL's Policy and Program on Substances of Abuse and the Policy on Anabolic Steroids and Related Substances (now known as the Policy on Performance-Enhancing Substances), discussed in Chapter 7: The NFL and NFLPA; Kevin Williams and Pat Williams in the "StarCaps" case, discussed in Chapter 7: The NFL and NFLPA; and, Jonathan Vilma in the "Bounty"-related legal proceedings, discussed at length in Chapter 9: Coaches. Deubert also was involved in the representation of former Miami Dolphins offensive line coach Jim Turner in the Jonathan Martin "bullying" situation, discussed at length in Chapter 9: Coaches, which was the result of an NFL investigation but did not involve litigation with the NFL. Additionally, Deubert was involved in the representation of both contract advisors and players in litigation and arbitrations under the NFLPA's Regulations Governing Contract Advisors, discussed at length in Chapter 12: Contract Advisors. Last, since 2007 Deubert has provided research assistance to the Sports Lawyers Association, whose Board of Directors includes many individuals with interests related to this work.
- Twenty percent of Cohen's salary is supported by The Football Players Health Study at Harvard University. Cohen has no other conflicting interests to report.
- Thirty percent of Lynch's salary is supported by The Football Players Health Study at Harvard University. Lynch has no other conflicting interests to report.

^c Other Law and Ethics projects include: (1) a qualitative interview study ("listening tour") with players and their families to better understand their legal and ethical concerns related to health and well-being; (2) a comparative legal and organizational policy analysis of various professional sports leagues to identify best policies in protecting player health; (3) an analysis of the legal and ethical implications of current and potential medical tests and devices that might be used by NFL clubs and players; and, (4) an examination of how traditional workplace health and safety laws would apply to professional sports; among others.

PREFACE:

THE FOOTBALL PLAYERS HEALTH STUDY AT HARVARD UNIVERSITY

There are an estimated 20,000 men alive today who at one time played professional football in the National Football League (NFL).^a Some of these men played in “The Greatest Game Ever Played” in 1958,^b the first Super Bowl in 1967, for the undefeated Miami Dolphins in 1973, the Chicago Bears’ 46 defense in the 1980s, and so on through the course of the NFL’s history. They were there when television made the game accessible to the masses, when the NFL merged with the American Football League (AFL) to create the modern NFL, and through the lawsuits of the late 1980s and early 1990s that brought us to today’s NFL. And there are thousands more still playing today or about to join this elite fraternity. NFL players have always been men of seemingly supernatural physical ability, heroes to cities and sometimes the nation. Through it all, the players experience not only the benefits, but also the physical, mental, emotional, and financial tolls of their NFL careers. In the last decade or so it has become impossible to avoid accounts of how those careers affect NFL players, in particular the detrimental health effects many of them experience in the short and long term.

In response to these accounts and related concerns, the 2011 Collective Bargaining Agreement (CBA) between the NFL and the National Football League Players Association (NFLPA) added a number of new health, safety, and welfare provisions. One of these provisions sets aside \$11 million per year through 2021 to be dedicated to medical research.¹ Thus, in the summer of 2012, the NFLPA issued a request for proposals to conduct original research and scientific exploration to be supported by these funds, focusing on “new and innovative ways to protect, treat, and improve the health of NFL players.” The NFLPA’s request for proposals specified a number of areas of particular interest, including sports medicine, repetitive brain trauma, wellness, aging, and cardiovascular disease, as well as

“Medical Ethics (*e.g.*, examination of health care contexts to obtain a better understanding of internal morality of these practices, accountability, new interventions that avoid harms currently incurred, appropriate informed consent in the context of professional athletics, and consideration of medical care in the labor-management context of professional football).”²

To meet the challenge of protecting and improving player health, it is necessary to move beyond clinical issues to simultaneously address structural and organizational issues as well. This is true for healthcare more generally, where it is essential to invest not only in scientific research and development to create new clinical interventions, but also to invest in systems to efficiently administer those interventions to patients in need, as well as in public health approaches that can minimize the need for intervention in the first place. Likewise, to make headway in protecting and improving the health of NFL players, we must go beyond a single-minded focus on their clinical care and instead implement a more comprehensive strategy capable of addressing the myriad of stakeholders and contextual factors (past, present, League-wide, and individual) that play a role in their health. These include not only players’ physical issues and risk factors, but also their relationships with clinicians, their professional motivations, their financial pressures, their family responsibilities, and the centrality of their health to their careers. Add to this mix the competitive nature of the business, constraints on alternative career opportunities for many players, and the like. The relevant stakeholders in player health are similarly varied and extensive.

Thus, when submitting its proposal to the NFLPA, our Harvard team included a variety of critical clinical projects alongside an equally robust set of law and ethics proposals. We agreed from the outset that a focus on diagnosing and treating player health issues—while essential—would be insufficient on its own to comprehensively resolve those issues. Instead, our approach has been to also address precisely those structural and organizational factors that are so important to player health but would be neglected by pursuing a purely clinical approach.

a Included as Appendix P is a Glossary of Terms and Relevant Persons and Institutions which may help readers.

b In 1958, the Baltimore Colts and New York Giants played in the NFL Championship Game (before the Super Bowl), in front of a national television audience and in front of 64,000 fans at Yankee Stadium. The game was a back and forth battle that wound up becoming the first ever overtime playoff game in NFL history. The Colts, led by Hall of Fame quarterback Johnny Unitas, eventually won 23–17, in what became known as “The Greatest Game Ever Played.” See *Greatest Game Ever Played*, Pro Football Hall of Fame, http://www.profootballhof.com/history/release.aspx?release_id=1805 (last visited Aug. 7, 2015), archived at <http://perma.cc/35UZ-AZRQ>.

The NFLPA ultimately agreed, selecting Harvard to receive the funding after a multi-round competitive process involving several universities. In February 2014, Harvard Medical School entered into an agreement with the NFLPA to create the “Football Players Health Study at Harvard University,” a transformative research initiative with the goal of improving the health of professional football players across a broad spectrum. The Football Players Health Study initially included three main components:

- (1) A Population Studies component, which entails research using questionnaires and testing to better understand player health status, wellness, and quality of life, including the largest ever cohort study of living former NFL players;
- (2) A Pilot Studies program aimed to develop new prevention strategies, diagnostics, and treatments by funding researchers working on innovative and promising developments that have the potential to impact the health of football players; and,
- (3) A Law and Ethics component, led by the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at Harvard Law School (“Law and Ethics Initiative”), which encompasses a variety of distinct projects with the primary goal of understanding the legal and ethical issues that may promote or impede player health, and developing appropriate responsive recommendations.^c

The existence of the Law and Ethics component differentiates The Football Players Health Study from other studies concerning NFL player health. While there have been many important studies concerning the medical aspects of player health, we are not aware of any that have conducted a comprehensive analysis of the relevant legal and ethical environments.

Additionally, in the Section: Ensuring Independence and Disclosure of Conflicts, we discuss the ways in which the Law and Ethics Initiative interacted with, but was independent of, both the NFLPA and NFL in creating this Report.

In the chapters that follow, we describe the scope of the Report, its goals, and guiding ethical principles. First, however, it is essential to explain the guiding principles of The Football Players Health Study as a whole.

Most importantly, The Football Players Health Study is interested in health issues beyond concussions and neurological trauma. Although we recognize that concussions and their possible long-term sequelae are on the minds of many, and are among the most critical health issues facing players today, we simultaneously recognize that player health concerns are broader than concussions alone. Players also have concerns about cardiac health, arthritis and other joint damage, pain management, and a wide variety of other issues. Moreover, their primary concerns are likely to change over time as they transition from their playing days to retirement to old age. Thus, we have adopted the following mantra for our work: “The Whole Player, The Whole Life.” Rather than a myopic approach, we are taking a wide and long view in order to make players as healthy as they possibly can be over every conceivable dimension for the entirety of their lives.

To meet the challenge of protecting and improving player health, it is necessary to move beyond clinical issues to simultaneously address structural and organizational issues as well.

We approached this project as scholars and social scientists whose goal is to improve NFL player health. We are independent academic researchers first and foremost, regardless of the source of our funding. We have no “client” in this endeavor, other than players themselves, and we have no agenda other than to improve the lives of players, former, current, and future. Indeed, The Football Players Health Study is funded pursuant to funds set aside under the 2011 CBA for research designed to help players. Because of the way the clubs and players split revenues from NFL games and other operations, the funds used for The Football Players Health Study can reduce the amount of money available

^c Other Law and Ethics projects include: (1) a qualitative interview study (“listening tour”) with players and their families to better understand their legal and ethical concerns related to health and well-being; (2) a comparative legal and organizational policy analysis of various professional sports leagues to identify best policies in protecting player health; (3) an analysis of the legal and ethical implications of current and potential medical tests and devices that might be used by NFL clubs and players; and, (4) an examination of how traditional workplace health and safety laws would apply to professional sports; among others.

current players in the form of salary.^d Thus, the clubs and players have chosen to pay for The Football Players Health Study. In addition, although our contractual relationship is with the NFLPA, that very same contract protects our academic integrity without exception; no external party has any control whatsoever over our conclusions.

One of our primary concerns is that too little is known about player health. Specifically, too little is known from a rigorous scientific perspective about the risks and benefits of playing professional football because available data are insufficient in a variety of respects. For example, “[w]e do not know what factors exacerbate or mitigate an individual’s risk, including genetics, nutrition, lifestyle, as well as length of time and position played, and injuries sustained during playing years.”³ Professional football players are an elite and unique group of men who must be studied directly and often in large numbers before we can really understand how football has affected them. Only then can we fully

^d The players’ share of NFL revenues is referred to as the Player Cost Amount. 2011 CBA, Art. 12, § 6(c)(i). The Football Players Health Study is funded from a pool of money known as the Joint Contribution Amount. *See* 2011 CBA, Art. 12, § 5. If the NFL generates new revenue streams, the players are entitled to 50% of the net revenues from those new ventures less 47.5% of the Joint Contribution Amount. 2011 CBA, Art. 12, § 6(c)(ii). Thus, if the NFL generates new revenue streams, the amount that is passed on to the players is reduced by 47.5% of the Joint Contribution Amount, which includes The Football Players Health Study.

address any health problems they may have. We come to this work with no pre-existing agenda—we have neither any interest in ending professional football nor any interest in looking the other way if confronted with compelling data of its downsides. Again, we are interested only in helping players lead the healthiest and most productive lives they possibly can. We are committed to going where the science takes us.

Finally, we are forward-looking. Our role is not to evaluate fault or assign blame for player health problems, and The Football Players Health Study is uninvolved in any litigation (current or past) related to these issues. Instead, we are working with a single-minded focus to develop a clear path for addressing and remediating existing player health problems, and for preventing such problems from continuing or occurring in the future, from both clinical and organizational perspectives. Although this process does include assigning shared responsibility for protecting and promoting players’ health to a wide variety of parties, the past is relevant only to the extent it demonstrates ways to successfully improve going forward. We elaborate on our view of the past in the Introduction.

These are the guiding principles motivating every aspect of The Football Players Health Study at Harvard University.

