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THE SPORTS INDUSTRY'S NEW POWER PLAY: ATHLETE BIOMETRIC DATA DOMINATION. WHO OWNS IT AND WHAT MAY BE DONE WITH IT?

KRISTY GALE*

ABSTRACT

Professional sports leagues and teams utilize wearable technology to collect player tracking data, including athlete biometric data (ABD). This information is used to improve athlete performance, reduce injury and improve game play. Already player tracking data and ABD is making its way into peripheral offerings, such as enhanced fan content. In the future, ABD is set to be a critical component of content used for virtual and augmented reality, fantasy sports, sports wagering, and genetic predetermination of athleticism.

ABD is comprised of inherent characteristics that may make ABD protectable in the form of publicity rights, intellectual property, and Health Information. Because of this unique characterization and the sensitive nature of biometric information, ABD should be considered distinct from other categories of sports information, statistics, or sports data, and be afforded greater protection under privacy and property laws. This is particularly relevant as ABD is increasingly commodified, monetized, and exploited using new technologies.

Part I in this series surveyed the collection, use, and dissemination of ABD in light of emerging technology.[1] *It*

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[1] *See* Kristy Gale, *Evolving Sports Technology Makes its Mark on the Internet of Things: Legal Implications and Solutions for Collecting, Utilizing, and Disseminating Athlete Biometric Data Collected Via Wearable Technology*, 5 ARIZ. ST. SPORTS & ENT. L.J. 337 (2016).

identified potential uses for ABD, and then discussed tensions between property rights and privacy rights and the tensions between the sports industry players who contribute and distribute ABD. It further examined and discussed various definitions of ABD. These definitions lay a foundation for analyzing ABD in relation to the sports industry and under applicable statutory and common law. Finally, Part I presented recommendations for taking a strategic approach when contemplating and thoughtfully defining ABD licensing rights.

Part II in this series contemplates and analyzes the legal treatment of ABD. Specifically, Part II analyzes policymaking, the existing regulatory framework, and relevant publicity, intellectual property, and privacy rights. It identifies factors for courts to consider when hearing infringement and privacy claims. It recommends adoption of reasonable, forward-looking social policy and laws as technology evolves. It asserts that athletes own their ABD as a property right and may control its use as a personal privacy right. Finally, Part II suggests proactive ways parties who use ABD may optimize revenue-generation while mitigating their risks when handling ABD, and proposes practical interim solutions for athletes and other parties who collect, utilize, and disseminate ABD.

INTRODUCTION

Wearable technology used in the sports industry is being widely adopted to improve athlete performance, reduce injury, and improve team gameplay.[2] Significant amounts of data are being generated by wearable technology.[3] This data is incorporated into next generation statistics provided during sporting event broadcasts, mobile applications, and other fan engagement content.[4] Professional leagues and their partners who collect, analyze, and disseminate the data, are exploring

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[2] *See* Nicola K. Smith, *The Wearable Tech Giving Sports Teams Winning Ways*, BBC (Apr. 15, 2016), http://www.bbc.com/news/business-36036742.

[3] *Id.*

[4] Kieran Loftus, *Wearing to Win: Wearing Technology in Sport*, THE HUFFINGTON POST (Oct. 12, 2016, 1:11 PM), http://www.huffingtonpost.com/advertising-week/wearing-to-win-wearable-t_b_12455882.html.

new uses for athlete biometric data ("ABD").[5] It is foreseeable that player tracking data, particularly the sub-category of ABD, will make its way into fantasy sports subscriptions, sports betting information, virtual reality and augmented reality products, 3D-printed merchandise, and more as technology evolves.

Establishing ABD as intangible property accompanied by corresponding rights serves a number of purposes. By characterizing ABD as intangible property instead of mere facts, statistics, or personal information, the ownership of ABD and its attendant legal rights to control and be compensated for ABD is rightfully assigned to those to whom the data inherently belongs and those who contribute ABD. Doing so also benefits the individuals to whom it belongs who invest their own efforts and resources to enhance their ABD and increase its value. Characterizing ABD as intangible property also provides guidance to those who incorporate ABD in their products and services. It serves to inform content creators and those who use ABD for commercial and other purposes of how to protect against misappropriation, infringement and their attendant costs. This exercise also benefits courts and legislators who may encounter ABD and the challenges presented by new technologies. Society, ethics, law, and policy will all undergo change as a result of the commodification of data. Clarifying what ABD is and what it is not can aid those who examine policy, law, and ethics to find socially acceptable solutions.

The discussion in the article *Evolving Sports Technology Makes its Mark on the Internet of Things: Legal Implications and Solutions for Collecting, Utilizing, and Disseminating Athlete Biometric Data Collected Via Wearable Technology*[6] raises and analyzes some legal and ethical issues created by the adoption of wearable technology, proposes definitions that accurately identify what ABD is based upon the purpose of its collection and use, and suggests strategies for defining ABD in licensing, corresponding, publicity, and intellectual property rights. This article continues the discussion by (1) taking a deeper look into the property and privacy rights that correspond

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[5] *Id.*

[6] Kristy Gale, *Evolving Sports Technology Makes its Mark on the Internet of Things: Legal Implications and Solutions for Collecting, Utilizing, and Disseminating Athlete Biometric Data Collected Via Wearable Technology*, 5 ARIZ. ST. SPORTS & ENT. L.J. 337 (2016).

to ABD, (2) asserting that athletes own their ABD as a property right and control its use as a personal privacy right, (3) identifying factors for courts to consider when hearing infringement and privacy claims, (4) suggesting ways that parties who use ABD may optimize revenue-generation while mitigating their risk when handling ABD, (5) supporting rapid innovation by recommending the adoption of reasonable, forward-looking social policy and laws as technology evolves, and (6) proposing practical interim solutions for athletes and other parties that collect, utilize, and disseminate ABD.

First, it is important to reiterate those parties in the sports industry who have a stake in the ABD discussion. These include:

- Athletes (Primary Beneficiary);
- Data controllers including leagues, teams, players associations, and others who collect and control proprietary ABD (First-Generation Beneficiaries);
- Data processors including (i) strategic or investment partners who provide services and capabilities to maximize the utility of ABD, and (ii) vendors who process ABD on behalf of data controllers by obtaining, holding, retrieving, analyzing, utilizing, or disclosing ABD to other third-parties (collectively Second-Generation Beneficiaries); and
- Data users such as the media, sponsors, endorsers, other licensed content creators, users who are in some way contractually affiliated with athletes, data controllers, or data processors that generate revenue from the utilization of ABD (Third-Generation Beneficiaries).[7]

Some parties may fall into different categories at different times depending on the role they play in relation to the collection, use, and dissemination of ABD. Sports fans and others who participate in the sports ecosystem may be considered Fourth-Generation Beneficiaries as they increasingly create content and consume sports entertainment, both of which impact the legal rights of interested parties and impact revenue-generation in the sports industry. Collectively these parties are ABD Beneficiaries.

Second, a working definition of ABD must be understood in order to differentiate among the different

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[7] *Id.* at 341.

definitions used in the sports industry and under statutory and common law. ABD is comprised of unique biological and behavioral characteristics that identify a specific individual.[8] ABD also reflects qualities, activities, playing information, and statistics that fall within the scope of publicity rights.[9] For these reasons ABD is considered a right of publicity owned by an athlete. In some cases, ABD may be used as statistics and sports data. However, traditional definitions of sports statistics and even common law definitions of sports data are insufficient to accurately define ABD. Since ABD may be used as a statistic, content for entertainment, an employment record, and health information used for medical records and other purposes, a proposed definition of ABD must be comprised of elements that are used in practice and in legal application. This definition must also consider the different purposes for which ABD may be used. Therefore, the following definition is proposed for the purposes of this article, for the purposes of examining ABD within the sports industry, and for courts as they address ABD issues:

> ABD is "[a] measurable and distinguishable physical characteristic or personal behavioral trait used to recognize one's identity, including but not limited to name, nicknames, likeness, signatures, pictures, activities, voice, statistics, playing and performance records, achievements, indicia, data, and other information identifying a particular athlete."[10]

The purposes for which ABD may be collected and used will differ; they will correspondingly alter the definition of ABD to include the following additions to the definition:[11]

- ABD that is in the public domain;
- ABD that is collected, used and disseminated in any form and relating to past, present or future physical or mental health conditions such as to provide health care;
- ABD that is collected and/or used in real time, near-real time, and not in real time;

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[8] *Id.* at 363.
[9] *Id.* at 364–65.
[10] *Id.* at 376.
[11] *Id.* at 376–77.

- ABD that is transmitted electronically, digitally, or through another manner of transmission in any and all platforms, mediums, or technologies now existing or hereinafter developed;
- ABD used in a manner for any purpose other than to promote athlete health and safety, enhance performance, prevent injury, and/or improve gameplay;
- ABD used as a commodity or for any purpose of monetization.

In some cases, these definitions incorporate language or terms of art related to publicity rights, intellectual property, health information, personal health information (PHI), and individually identifiable health information (IIHI).

Utilizing a definition that incorporates the primary definition above and relevant distinctions will simplify the categorization of ABD in practice and for legal analysis. Possible distinctions that may be added to one of the definitions include live broadcasts of games; rebroadcasts and other programming that utilizes ABD; sports reporting, statistics, and media uses; fan engagement mediums such as in-stadium technology, mobile applications, and virtual reality and augmented reality experiences; fantasy sports; sports wagering; content creation by Beneficiaries; health, safety and injury-prevention purposes; personnel records; league, team and individual use of ABD to improve gameplay and performance; and, genetic predetermination of athletic ability. [12] Of course these categorizations will evolve and may be simplified over time. This will correspondingly simplify how ABD is classified not only in professional sports, but also in collegiate and amateur sports, as well as high school and youth sports.

Considering the lifecycle of ABD throughout an athlete's career is instructive. For example, if a high school basketball star contributes ABD to be analyzed for improved physical performance during games and for college recruiters to consider in the hopes he will be recruited, he will own the ABD as it is used for both purposes and has the right to control the privacy and property rights in the ABD. If the athlete is recruited by and plays for a university and then, subsequently, a video game maker wants to use the athlete's ABD in a video game, the video game maker must license the athlete's ABD from the

[12] *See id.* at 377–79.

owner-athlete or his authorized licensor. Additionally, if the basketball player subsequently plays in a professional league, his ABD may be used by the league to license augmented reality products, or the athlete can promote his own brand in his own social media platform. This scenario demonstrates the practicality of vesting ABD and its corresponding rights in the athlete who contributes it. Further adopting this philosophy about ABD simplifies ownership, use and rights of the athlete and third parties. This pattern of thinking rightfully allows athletes to protect and preserve their privacy and property rights from the time they contribute ABD. It also allows them opportunities to capitalize on future uses of their ABD according to the success of their career and the value of their personal brand. This is especially practical since (1) more athletes are beginning to contribute ABD at younger ages,[13] (2) ABD may be collected and used by a number of third parties,[14] (3) athletes generally play for a number of organizations throughout their amateur and professional careers, and (4) ABD may be contributed for health and safety purposes as well as for the purposes of generating revenue for themselves and others, all of which can complicate ABD ownership and its permitted uses. Utilizing definitions and approaches now that contemplate the realities of how sports and technology intersect will benefit all Beneficiaries.

Finally, the uses of ABD described above occurs as a result of the connectivity of devices and humans (where computers observe, identify, and understand the world without the limitations of human-entered data) or the Internet of Things (IoT).[15] This connectivity and communicating among devices and people, the data derived from the computing devices, and big data capabilities fuel the next generation of the Internet: the Internet of Everything (IoE).[16] The sports industry's use of cutting-edge technology prompts ethical and legal questions about the collection, use, and dissemination of ABD as part of

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[13] Ben Berkon, *Biomechanics and the Youth Pitching Injury Epidemic*, VICE SPORTS (Apr. 7, 2016), https://sports.vice.com/en_us/article/biomechanics-and-the-youth-pitching-injury-epidemic.

[14] Gale, *supra* note 5, at 341–42.

[15] *Id.* at 349.

[16] *Id.* at 350.

the IoT.[17] Further, as technology and the IoT evolve, innovation will occur more rapidly and raise additional questions. Attorneys and scholars agree that the use and commodification of real-time sports data, with or without ABD, is one of the most important business issues confronting the sports industry.[18] Therefore, it is imperative to analyze the property and privacy rights inherent in ABD and discuss ethical and legal considerations impacting the Beneficiaries.

II. POLICYMAKING AND THE LEGAL LANDSCAPE

Steven Kotler, a writer and the Director of Research for the Flow Genome Project, observed in his recent Forbes column, "the accelerating change we're seeing in the world is itself accelerating . . . for the first time in history, the world's leading experts on accelerating technology are consistently finding themselves too conservative in their predictions about the future of technology."[19] In contrast, the law takes time to advance and "usually lags behind technological developments."[20] Traditional privacy and intellectual property regulatory models and policies may be ill-fitted to emerging concerns.[21]

A. INNOVATION'S IMPACT ON POLICYMAKING AND TAKING AN "INNOVATION-ALLOWED" APPROACH

Wearable technology raises a wide variety of concerns and the shift towards utilizing implantable and ingestible innovations will raise "thorny ethical and legal issues."[22] The data privacy, security, and ownership issues inherent in the use of big data present a formidable landscape to navigate. Adam Thierer, a senior research fellow at the Technology Policy

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[17] *Id.* at 351–52.

[18] *Id.* at 361.

[19] Steven Kotler, *The Acceleration of Acceleration: How the Future is Arriving Far Faster than Expected*, FORBES (Feb. 6, 2015, 9:30 AM), http://www.forbes.com/sites/stevenkotler/2015/02/06/the-acceleration-of-acceleration-how-the-future-is-arriving-far-faster-than-expected.

[20] Ryan Rodenberg, *Who Owns Real-Time Sports Data?*, PANDO (Feb. 6, 2014), https://pando.com/2014/02/06/who-owns-real-time-sports-data.

[21] Adam D. Thierer, *The Internet of Things and Wearable Technology: Addressing Privacy and Security Concerns Without Derailing Innovation*, 21 RICH. J.L. & TECH. 6, 53 (2015).

[22] *Id.* at 35.

Program at the Mercatus Center at George Mason University, observes that new biometric technologies will "force a conversation about how much control people have over their bodies or at least about information regarding their bodies."[23] Should the creators of new technologies seek the blessing of public officials before they develop and deploy their innovations, or innovate and then later address problems as they arise? Two perspectives for approaching this question exist: the Precautionary Principle and Permissionless Innovation.

From the Precautionary Principle view, new innovations should be curtailed or disallowed until their developers can prove they will not harm "individuals, groups, specific entities, cultural norms, or various existing laws, norms, or traditions."[24] Advocates want policymakers to regulate new technology "'early and often' to 'get ahead of it' and address social and economic concerns preemptively."[25] Conversely, Permissionless Innovation is an "innovation allowed" stance that supports experimentation with new technologies until true problems arise or a compelling case can be made that the new technology will substantially harm individuals.[26] A continuum between the two approaches is desirable to promote innovation while protecting the legal rights of affected parties.

Thierer proposes a balanced approach to policy making for wearable technology. He suggests that to the extent public policy is needed to guide technological developments, "simple legal principles are greatly preferable to technology-specific, micromanaged regulatory regimes."[27] Thierer promotes a policy of forbearance – where policymakers exercise restraint and resist the urge to foresee the future and all the various scenarios that may arise. He argues against preemptive and precautionary regulation that could thwart innovation through resolving harms that may never even materialize.[28] Instead, he proposes an approach favoring development of policy after innovation advances and the issues surface. Then, ex-post measures such as common-law actions and administrative enforcement actions to

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[23] *Id.* at 36.
[24] *Id.* at 39.
[25] *Id.*
[26] *Id.* at 40.
[27] *Id.* at 118.
[28] *Id.*

address serious harms could be implemented.[29] This proposal is inspired by the success of the Internet which, as FTC Commissioner Maureen K. Ohlhausen said in her 2013 speech, was driven in large part by the "freedom to experiment with different business models . . . ."[30] Consistent with Thierer's proposal, preemptive and precautionary constraints should generally be reserved for circumstances where immediate and extreme threats to safety, security, privacy, and property exist.[31] Such an approach will likely correspond with social acceptance and norms.

Thierer notes that it is important to consider the role that social and individual adaption plays with regard to new inventions.[32] Generally peoples' attitudes transition from resistance to resilience when confronted with new technologies.[33] Based on Millennials' and post-Millenials' inclinations to readily adopt innovations and desire to drive it forward, time will tell whether this tendency will continue. However, by encouraging adaptation to technology, people will more readily adopt new technologies into their lives.[34] Policymakers can prepare for this change by educating those who are impacted most and by maintaining a long-term perspective of how technology will evolve over time. By adopting a balanced and layered approach to privacy and security concerns to wearable technology and IoT, Thierer believes economic and social innovations will be fostered and privacy and security will be adequately protected.[35]

Where the use of ABD derived from wearable and future technologies raises the greatest threats to property, privacy and security, the Beneficiaries who adopt Thierer's balanced approach will be in a better position to promote innovation,

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[29] *See id.* at 118.

[30] *Id.* at 50 (quoting Maureen K. Ohlhausen, *The Internet of Things and The FTC: Does Innovation Require Intervention?*, FED. TRADE COMMISSION (Oct. 18, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/internet-things-ftc-does-innovation-require-intervention/131008internetthingsremarks.pdf).

[31] *Id.* at 48.

[32] *Id.* at 79 (noting that people's attitudes towards new technology follow a cycle of "initial resistance, gradual adaptation, and then eventual assimilation") (emphasis omitted).

[33] *Id.* at 79–81.

[34] *See id.* at 79.

[35] *Id.* at 84–88.

adopt practices that conform to societal norms, and address ethical and legal risks based on real consequences. This approach should be considered by policymakers as they consider emerging technologies and its accompanying legal issues.

B. THE EXISTING REGULATORY MODEL: AN INTERPLAY AMONG THE RIGHT OF PUBLICITY, FIRST AMENDMENT SPEECH, INTELLECTUAL PROPERTY RIGHTS AND PRIVACY

As the proposed definition of ABD indicates, elements of intellectual property and private information are included in ABD. The legal theories that ABD owners, licensees, and assignees are most likely to raise are: (1) the right of publicity and intellectual property rights; and, (2) the right of privacy. In responding to these claims, defendants will likely raise First Amendment speech and consent defenses. They may also seek to enforce contractual obligations by arguing that ABD is included or omitted in the licensed or assigned rights.

To briefly summarize, the right of publicity refers to personal rights where the damage occurs to human dignity and the injury is the mental distress caused to the plaintiff.[36] The right of publicity is a property right where the damage is commercial injury to the business value of personal identity.[37] One commentator observed, the "[c]ourts do not always find this distinction as straightforward as [the leading scholar in this practice area] Professor [J. Thomas] McCarthy does."[38]

The rights of privacy under the Restatement (Second) of Torts recognize four types of privacy invasions: (1) intrusion; (2) appropriation of name or likeness; (3) unreasonable publicity; and, (4) false light.[39] Misappropriation of one's name or likeness under privacy law is most similar to the infringement of the right of publicity under the Restatement.[40] The claim of misappropriation is one that ABD owners are most likely to raise

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[36] Laura Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 MARQ. SPORTS L.J. 23, 26–27 (1999).

[37] *Id.* at 25.

[38] *Id.* at 31.

[39] *See generally* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960); *Publicity*, CORNELL U. L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/Publicity (last visited Oct. 27, 2016) [hereinafter *Publicity*].

[40] *Id.*

in litigation since third parties will likely use an athlete's name or likeness as defined under common law in an unauthorized manner, that is, in a manner that appears to exceed the scope of authorized use. Unreasonable publicity, or public disclosure of embarrassing private facts as scholar William Prosser's defining treatise puts it, is another likely claim to be made since ABD by its nature is comprised of characteristics that may be considered private details which the owner of ABD does not want to disclose.

The right of publicity, according to J. Thomas McCarthy is the "inherent right of every human being to control the commercial use of his or her identity."[41] This right is commonly raised in conjunction with other intellectual property rights. McCarthy observes that "[t]he right of publicity is a unique creature of state intellectual property law, with a 'family resemblance' to the right of privacy, trademark, copyright, false advertising, and unfair competition."[42]

Under the Lanham Act (the federal statutory law that governs trademarks) and corresponding state law, a person who can establish an aspect of his or her identity as a trademark is afforded protection and granted the ability to raise claims of infringement, false advertising, false designation of origin and unfair competition.[43] In some instances, third parties may incorporate an individual's identity or components thereof into original works of authorship that may be afforded protection under the Copyright Act.[44] Finally, in some cases the use of one's personal data may constitute a trade secret protected under state statute and the recently-enacted Defend Trade Secrets Act – a federal statute that supplements existing state laws.[45] In these instances, owners of ABD may raise claims where their property

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[41] Zachary C. Bolitho, *When Fantasy Meets the Courtroom: An Examination of the Intellectual Property Issues Surrounding the Burgeoning Fantasy Sports Industry*, 67 OHIO ST. L.J. 911, 935 (2006) (citing J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3, at 3 (2d ed. 2004)). The McCarthy treatise is "the most authoritative treatise in the area." *Id.*

[42] *Id.* at 935–36.

[43] *See Publicity, supra* note 38.

[44] Copyright Act of 1976, 17 U.S.C.A. § 102 (West 2012).

[45] Katherine Cheung et al., *Obama Signs Federal Trade Secret Bill into Law: Key Points for IP*, DLA PIPER (May 11, 2016), https://www.dlapiper.com/en/us/insights/publications/2016/05/obama-signs-federal-trade-secret-bill-into-law.

is misappropriated. Since property rights in ABD currently correspond most directly to publicity and trademark rights, these areas are the focus of this discussion.

Defenses commonly used in response to right of publicity claims include First Amendment speech and consent.[46] Under the First Amendment to the U.S. Constitution and its supporting common law, the right of a citizen to protect his right of publicity is balanced against the right to free speech; that is, the right to disclose and disseminate information that is a matter of public concern.[47] For example, in the context of ABD's collection, use and dissemination, third parties with an interest in disseminating ABD would raise a First Amendment speech defense alleging that ABD is protected speech in order to override the ABD owner's right of publicity claim and compel disclosure.

The defense of consent can be used to combat a plaintiff's claims of infringement on his right of publicity.[48] The defendant in an action may raise the defense that the plaintiff consented to the defendant's use of an element of identity.

In the event parties enter into contracts with one another related to the collection, use and dissemination of ABD, courts utilize state laws governing contracts to determine each party's rights and obligations with respect to ABD.

This existing legal framework provides markers on the road to solutions for sports industry players who provide, collect, utilize and disseminate ABD. Additional factors for court consideration are outlined here based upon the unique character of ABD.

1. Athlete Biometric Data as a Right of Publicity

Laura Lee Stapleton and Matt McMurphy wrote about the importance of a professional athlete's identity in their law journal article, *The Professional Athlete's Right of Publicity*:

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[46] *See* Bolitho, *supra* note 40, at 943 n.203.

[47] *See* Ryan M. Rodenberg et al., *Real-Time Sports Data and the First Amendment*, 11 WASH. J.L. TECH & ARTS 63, 95–96 (2015) (discussing the right of a fantasy sports company to use the names of and information regarding professional baseball players under the First Amendment).

[48] *See* Stapelton & McMurphy, *supra* note 35, at 42.

> The celebrity in the public eye has two concerns that go beyond his or her creative efforts. First, is to guard against intrusions to what exists of a private life. Second, is to protect the value of the celebrity's name, image and other attributes surrounding the person. A celebrity's name and image in our star-conscious society are valuable commodities. They can be commercially marketed and reap substantial rewards if done with expertise and intelligence. The celebrity's concern is that others, without authorization, will attempt to exploit their name or image.[49]

a. The Right of Publicity

These two concerns identify two inherent rights professional athletes have: privacy and the right of publicity. Publicity rights are personal rights protecting against *damage to human dignity* due to injury caused by an invasion of privacy; damages are measured by the mental distress suffered by the plaintiff.[50] The right of publicity is a property right,[51] and is "inherent to every human being to control the commercial use of his or her identity."[52] Damages for this claim are measured by the commercial injury to the business value of personal identity.[53] Damages for infringement of the right of publicity can include the "fair market value of the plaintiff's identity; unjust enrichment and the infringer's profits; and damage to the business of licensing plaintiff's identity."[54]

Professional athletes utilize the right of publicity in this era of ever-expanding commercialism to "hold onto the hottest property they know: themselves."[55] Over the years as the right of publicity developed, the concepts of privacy and property have been intertwined and at times proved confusing and difficult to

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[49] *Id.* at 23.
[50] *Id.* at 31.
[51] *Id.*
[52] *Id.* at 24 (citing J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 28:1, at 28–30 (4th ed. 1996)).
[53] *Id.* at 31.
[54] *Id.*
[55] *Id.* at 24 (citing Marcia Chambers, *Lawsuit Pits Artists' Rights vs. Athletes*, N.Y. TIMES (Feb. 16, 1999), http://www.nytimes.com/1999/02/16/sports/golf-lawsuit-pits-artists-rights-vs-athletes.html.

apply in practice. An authority on the right of publicity, Thomas McCarthy, noted that "privacy law seemed unable to accommodate that view that human identity constituted an intellectual property right with commercial value measured by supply and demand in the marketplace of advertising. The situation was ripe for a break in traditional thinking."[56]

This break in thinking evolved into the right of publicity which McCarthy defines as the "inherent right of every human being to control the commercial use of his or her identity."[57] "The right of publicity is basically the right to own, protect, and profit from the commercial value of one's name, likeness, activities, or identity, and to prevent the unauthorized exploitation of these traits by others."[58] As a separate legal doctrine, it filled gaps left by other legal theories: privacy, unfair competition, contracts and defamation.[59]

The right of publicity is created by state law. Generally, the elements required for a violation of publicity rights include: (1) plaintiff owns an enforceable right in the identity of a human being; (2) defendant uses some aspect of identity or persona in a way that plaintiff is identifiable from defendant's use; (3) defendant's use is without permission or exceeds the scope of permission granted such that the defendant misappropriates plaintiff's identity; and, (4) defendant's use causes damage to the commercial value of the plaintiff's persona.[60] Some states require a plaintiff to show a connection between the defendant's use and the commercial purpose, for advertising purposes or for the purpose of trade.[61]

The term "commercial purpose" under common law refers to the advertising of a product or the sale of goods or services.[62] Under statute, such as California's civil code, commercial purposes include the use of a person's name, voice, signature or likeness "for the purposes of advertising or selling,

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[56] *Id.* at 28 (citing MCCARTHY, *supra* note 51, at 423).

[57] *See* Bolitho, *supra* note 40, at 935 & n.149.

[58] *Id.*

[59] *Id.* at 939.

[60] Stapleton & McMurphy, *supra* note 35, at 25, 43.

[61] *See, e.g.*, Dryer v. NFL, 55 F. Supp. 3d 1181, 1196–97 (D. Minn. 2014) (illustrating the recent analysis of right of publicity claims in the United States District Court for the District of Minnesota).

[62] Stapleton & McMurphy, *supra* note 35, at 43.

or soliciting purchases of, products, merchandise goods or services" or "on or in products, merchandise, or goods."[63] The term "for purpose of trade" under Restatement (Third) of Unfair Competition pertains to the use of another person's "name, likeness and other indicia of a person's identity" in advertising for the user's goods or services, placed on merchandise marketed by the user, or use in connection with services rendered by the user.[64] This term does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to these uses.[65]

b. Defenses to Claims of Infringement of the Right of Publicity: First Amendment Speech and Consent

Most states recognize exceptions or defenses to right of publicity claims including, (1) newsworthiness, and (2) consent.[66]

i. First Amendment Speech: Newsworthiness as a Defense

Thomas McCarthy observed, "the rules governing the application of the First Amendment are often maddeningly vague and unpredictable. Even constitutional scholars admit this to be the case."[67] Additionally, "there is no judicial consensus on how to resolve conflicts between intellectual-property rights and free-speech rights."[68] Thus, applying a First Amendment speech analysis is challenging on its own, but applying it to an undeveloped area of law (i.e., the unauthorized use and dissemination of ABD as a right of publicity) requires some mind malleability.

The freedom of speech on public issues "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection," the Supreme Court held in *Snyder v. Phelps*.[69] The Supreme Court's opinion stated:

> Speech deals with a matter of public concern when it can be fairly considered as relating to any matter of political, social, or other concern

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[63] CAL. CIV. CODE § 3344(a).

[64] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (AM LAW INST. 1995).

[65] *Id.*

[66] *See, e.g.*, *Dryer*, 55 F. Supp. 3d at 1197.

[67] Bolitho*, supra* note 40, at 944.

[68] *Dryer*, 55 F. Supp. 3d at 1188.

[69] Snyder v. Phelps, 562 U.S. 443, 452 (2011); *see also* Rodenberg et al., *supra* note 46, at 69.

> to the community or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.[70]

Regarding speech pertaining to sporting events, athletes, statistics and other sports information, Fox Broadcasting and the Big Ten Network as amici in *In Re NCAA Student-Athlete Name & Likeness Licensing Litigation* cited three cases to support the proposition that news about sports and entertainment is a matter of public concern.[71] A two-prong test in *Snyder v. Phelps* was established to determine when speech is a matter of public concern: (1) "when it can be fairly considered as relating to any matter of political, social, or other concern to the community," or (2) "when the speech is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[72] This test did not define "legitimate news interest" so ambiguity remains as to whether the Court is describing a "reasonable" news interest or a news interest that abides by professional journalistic standards.[73] Subsequent cases have not explored what a "legitimate news interest" is or whether the reporting of real-time sports scores is considered to be protected speech,[74] nor have they considered whether ABD is included in the definition of "real-time sports scores." Courts will need to consider whether ABD is a matter of public concern and balance the rights of the athlete with (1) the benefits to society in having access to that information and (2) third-party use and dissemination of ABD as a way to exercise their right to freedom of expression, although use and dissemination may still constitute misappropriation.

Based upon the significant dollars generated by private individuals participating in fantasy sports and sports wagering (which may soon be legalized in the United States), this analysis

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[70] *Snyder*, 562 U.S. at 453 (internal quotes and citations omitted).

[71] Rodenberg et al., supra note 46, at 69 (citing Hilton v. Hallmark Cards, 599 F.3d 894, 908 (9th Cir. 2010); Cardtoons, L.C. v. MLB Players Ass'n, 95 F.3d 959, 969 (10th Cir. 1996); Shulman v. Group W Prod., Inc., 18 Cal. 4th 200, 220 (1998)).

[72] *Id.*

[73] *Id.*

[74] *Id.*

must consider whether the public's interest falls within the above stated tests, or under a new category whereby sports information may or may not be a matter of public concern in light of the pecuniary interest that private citizens retain in the information. Additional uses for ABD should also be examined to determine whether (1) they may be considered protected speech under common law, (2) if they either straddle or fall outside the scope of the "public concern" and "legitimate news interest" categories, or (3) require a new category of "speech" pertaining to the property of others used as a commodity, whether monetized or not.

If an athlete claims that his right of publicity has been infringed, or if a professional sports league claims that ABD provided as a component of sports information is intellectual property infringed by unauthorized use, the first step in balancing these rights requires determining the classification of the speech. Generally, "unprotected speech" includes (1) "speech such as obscenity, defamation, fighting words, or of the type likely to incite lawlessness;"[75] (2) "commercial speech" that is "speech of any form that advertises a product or service for profit or for business purpose;" [76] and (3) "communicative speech" that is considered to be "the expression of ideas and the reporting of information in the public interest for the purposes of enlightenment, education, and entertainment," although the term is not "readily definable."[77]

It should be noted that when a publicity right claim challenges the expressive, non-commercial use of a copyrighted work, the claimant may seek to subordinate the copyright holder's right to exploit the value of the work to the claimant's interest in controlling the work's dissemination.[78] This could occur if an athlete asserts publicity rights in copyrighted works produced by the league.[79] If a claimant seeks to limit the way material can be used in expressive works, then the claims extend into copyright law and exceed state publicity right laws.[80] The court will then undertake an analysis to determine whether the

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[75] *Id.*

[76] *See* Bolitho, *supra* note 40, at n.211 (explaining how this rule is a generalization rather than black letter law due to the imprecise nature of First Amendment law).

[77] *Id.*

[78] Dryer v. NFL, 814 F.3d 938, 943 (8th Cir. 2016).

[79] *E.g.*, *id.* at 942–44.

[80] *Id.* at 943.

publicity right used as speech is considered either commercial speech, which the claimant may protect, or expressive speech, which is more likely to favor the copyright holder.[81]

When the defense of newsworthiness is raised, the defendant argues that newsworthy events or matters of public interest are exempted from the publicity right rule and an athlete's identity or likeness may be used in connection with reporting of newsworthy events.[82] Statutory and common law

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[81] *See id.* at 943–44 (quoting Porous Media Corp. v. Pall Corp., 173 F.3d 1109, 1120 (8th Cir. 1999)). Under the factors in *Porous Media Corp. v. Pall Corp.*, commercial speech is not expressive speech. *See id.* at 943. Expressive speech includes artistic works that may be protected under the Copyright Act, depending on whether: (i) the speech is an advertisement, (ii) the speech refers to a specific product or service, and (iii) the speaker has an economic motivation for the speech. *See id.* In relation to ABD, if an athlete's ABD is collected and utilized in expressive works that require a modicum of originality to create and that serve to publicize and promote a league, team or sport within the scope of the elements of the *Porous* test, such as mobile applications, sports entertainment offerings, and enhanced statistics and features during gameplay, an athlete may be able to assert a copyright infringement claim. *See id.* at 942–44. This could also occur where ABD is utilized during broadcasts of games and in other programming intended to publicize and promote the sport, league, and team. *See id.* at 943–44 Additionally, copyright claims may be asserted if ABD is utilized in protectable works to indirectly publicize and promote a league, team or sport by offering products for fantasy sports participants and other endeavors to generate revenue and increase fan engagement. *See id.* In fact, an athlete can utilize his own ABD in copyrighted works produced under license by players associations and their partners or utilizing platforms such as Facebook Live and other social media where content is created. *See id.* In each situation, specific facts determining the creativity of the work and its use for expressive purposes or for purposes of trade must be examined by courts to determine an athlete's copyright claims. *See id.* at 942–44. When deciding which claims to pursue, athletes should weigh the odds of successfully establishing misappropriation and infringement claims based on laws pertaining to publicity rights and trademarks, respectively, where these claims are based upon the premise that a right exists within an aspect of identity where copyright protection generally requires creation through intellectual labor. *Id.*

[82] Dryer v. NFL, 55 F. Supp. 3d 1181, 1197–99 (D. Minn. 2014).

newsworthiness defenses protect the act of publishing or reporting.[83] California law demonstrates the majority rule that liability will not lie for a defendant utilizing certain publicity rights when reporting any "news, public affairs, or sports broadcast or account."[84] Further, the majority rule extends to reported information that is "factual data" and "true information about 'real-world football games.'"[85] Generally, information that is available in the public domain is considered protected speech.[86]

Under seminal cases regarding athlete rights of publicity, courts have held that speech is protected if "the subject matter of the communication is of 'public interest' or related to 'news' or 'public affairs.'"[87] Under *Gionfriddo v. Major League Baseball*, the court held that "[t]he recitation and discussion of factual data concerning the athletic performance of these plaintiffs commands a substantial public interest."[88] In *CBS v. NFL Players Association*, the court observed that "there is no dispute that both professional baseball and professional football . . . are closely followed by a large segment of the public."[89] In *Dryer v. NFL*, the court held that under California's newsworthiness exception, television programming showing historical video footage of athletes playing football constitutes reporting on a matter of substantial public interest and bars right of publicity claims.[90] In that case, the court considered the nature of the sports information that was used and the public value of that information finding that speech that entertains is protected by the First Amendment. Specifically, the court cited precedent from

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[83] *Id.*

[84] *Id.* at 1197–98 (quoting CAL. CIV. CODE § 3344(d) (Deering 2010)); *see* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. a (AM. LAW INST. 1995).

[85] *Dryer*, 55 F. Supp. 3d at 1198 (quoting *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1283 (9th Cir. 2013)).

[86] *Id.* at 1199 (citing C.B.C. Distrib. & Mktg. v. MLB Advanced, L.P., 505 F.3d 818, 823 (8th Cir. 2007)).

[87] *Id.* at 1198 (quoting *In re* NCAA Student-Athlete Litig., 724 F.3d at 1282).

[88] *Id.* (quoting Gionfriddo v. MLB, 114 Cal. Rptr. 2d 307, 315 (Cal. Ct. App. 2001)).

[89] *Id.* (quoting CBS Interactive, Inc. v. NFL Players Ass'n, 259 F.R.D. 398, 419 (D. Minn. 2009)).

[90] *Id.* at 1186–87, 1198.

C.B.C. v. MLBAM where professional athletes' names, images, likeness, statistics and biographical information were used for online fantasy sports games and where such information was already in the public domain and commanded substantial public interest.[91] The Court held that First Amendment speech would not be superseded by right of publicity claims.[92]

Another nuance in the newsworthiness exception was addressed in the *Dryer* case: news reporting of matters for entertainment. The newsworthy exception applies to "all matters of the kind customarily regarded as 'news' and all matters giving information to the public for purposes of education, amusement or enlightenment, where the public may reasonably be expected to have a legitimate interest in what is published."[93] Under Texas law applicable in this case, what may be reported under the newsworthiness exception may be limited to only "legitimately necessary and proper for public information"[94] In *Kimbrough v. Coca-Cola*, the court found that a public character relinquishes

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[91] *Dryer*, 55 F. Supp. 3d at 1193 (citing C.B.C. Distrib. & Mktg. v. MLB Advanced, L.P., 505 F.3d 818, 821, 823 (8th Cir. 2007)).

[92] C.B.C. Distrib. & Mktg., 505 F.3d at 824. Both C.B.C. and CBS involved the use of current professional athletes' names, images, and statistics for the purposes of online fantasy games. In *C.B.C.*, MLB and its players union challenged another entity's use of baseball players' names and playing information such as statistics and biographical information in an online fantasy baseball website. *C.B.C.*, 505 F.3d at 822. The court focused on the nature of the information used and the public value of that information, finding that even though the speech involved was entertainment, "[s]peech that entertains, like speech that informs, is protected by the First Amendment." *Id.* at 823 (quoting *Cardtoons, L.C. v. MLB Players Ass'n*, 95 F.3d 959, 969 (10th Cir. 1996)). The court noted that the information on C.B.C.'s website was not only already in the public domain, but that the information also commanded substantial public interest. *Id.* at 823–24. Although the C.B.C. court found that the players had succeeded in making out a claim for a violation of their publicity rights under Missouri law, the court determined that C.B.C.'s "first amendment rights in offering its fantasy baseball products supersede the players' rights of publicity." *Id.* at 823–24; *Dryer*, 55 F. Supp. 3d at 1193–94.

[93] *Dryer*, 55 F. Supp. 3d at 1198 (quoting Anonsen v. Donahue, 857 S.W.2d 700, 703 (Tex. App. 1993)).

[94] *Id.* (quoting Kimbrough v. Coca-Cola, 521 S.W.2d 719, 721 (Tex. Civ. App. 1975)).

part of his right of privacy, however, this waiver is limited only to that which may be legitimately necessary and proper for public information.[95] The public character's privacy may not be invaded by the use of his name or picture for commercial purposes without his consent, unless it is incidental to an occurrence of legitimate news value.[96] In jurisdictions where this limitation is not recognized, reporting of newsworthy matters may not be restricted to what is "necessary and proper" for public information.

A rule of law pertaining to whether the unique characteristics of ABD are sufficient to establish publicity rights in this data is yet to be developed. Likewise, under common law there is no rule describing factors for court consideration when analyzing publicity right infringement claims pertaining to ABD and the unique situations giving rise to infringement. Traditional tests are ill-fitted to (1) balance the rights of athletes to those of society where ABD may be newsworthy, (2) determine whether infringement of publicity rights in ABD occurred, (3) fairly define "commercial purposes" to reflect what that means in the context of ABD use and exploitation in society today, and (4) accurately assess and award sufficient damages to claimants. There are several factors specific to ABD that courts addressing these issues in the future will want to consider.

First, courts should consider the nature of ABD that may be newsworthy and reported as entertainment news – i.e. for the purposes of education, amusement or enlightenment – and whether the public may reasonably expect to have a legitimate interest in what is published. Some ABD may enter the public domain through news reports authorized by athletes. In some situations, athletes may authorize the sharing of and license rights to ABD as part of fantasy sports or sports betting information subscriptions, but which are not expected to be published in news articles. In other situations, ABD may be disclosed in forms of entertainment such as virtual reality or augmented reality experiences where the athlete authorized and licensed the use of ABD to virtual reality product creators and distributors. Each situation raises different factors for consideration. The outcome in each situation will likewise be different: either ABD is considered newsworthy information that is protected speech or it is not. Society's expectation of what

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[95] *See Kimbrough*, 521 S.W.2d at 721.
[96] *Id.*

should be protected speech, especially in relation to private information about a person's health, may evolve over time, so crafting a stringent set of factors will add another layer of challenge in creating an appropriate test.

Another consideration is how to treat ABD that is used for monetary endeavors by leagues, teams, their partners, and private individuals. Perhaps courts should consider whether a new category of "speech" is warranted for information that is not newsworthy solely because the public has a legitimate interest in the information as entertainment, but rather because the public can use ABD to generate personal income from fantasy sports or sports wagering winnings. Or perhaps the standard would remain the same, but the court could revise a definition of "commercial purposes" or "purpose of trade." This would include an analysis of what constitutes "commercial purposes" with respect to a private citizen's use of ABD to win fantasy sports prizes, for example, and other monetized uses of ABD by various parties. The analysis should also contemplate what constitutes an athlete's consent to use his or her ABD and potentially include additional factors for determining whether consent is not incidental to an occurrence of legitimate news value.

Additional factors set ABD apart from the names and player information used in fantasy sports over the past decade. ABD is personal Health Information or PHI that is subject to stricter privacy laws.[97] Additional forms of ABD and uses for ABD made available by new technology are likely to emerge. Some data included in ABD will be made available through new technology that collects PHI that only athletes and sports organizations had access to previously. New technology will also generate increasingly granular data collected by multiple parties, thereby increasing the amount of highly personal and confidential information as well as the likelihood of it being disclosed to others. Historically, PHI has not been available to

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[97] *Compare* 45 C.F.R. § 164.502 (2016), *and* 45 C.F.R. § 164.512, *with* Dryer v. NFL, 55 F. Supp. 3d 1181, 1195–99 (D. Minn. 2014). Section 164.502 protects against disclosure of Health Information with section 164.512 only allowing disclosures as required by law, whereas the publicity rights protect personal information but allow for disclosure by private groups based on newsworthiness. *Compare* 45 C.F.R. § 164.502 (2016), *and* 45 C.F.R. § 164.512, *with Dryer*, 55 F. Supp. 3d at 1195–99.

the public in order to protect the privacy of athletes.[98] And, of course, who owns ABD will be a factor.

Further, as the IoT and IoE evolve, athletes and their licensees will have many more opportunities to exploit these rights independent of leagues for the purpose of promoting the sport, league, and team. Today's athletes are much more sophisticated in their approach to building a personal brand compared to the sports stars of the past.[99] Today's technology and audience simultaneously create and demand the athlete as a brand. As a result, athletes have many more revenue streams available to them and the number of streams will increase with technological advances.[100] For example, several professional athletes engage in the sports technology startup market including LeBron James, Carmelo Anthony, and Andre Iguodala.[101] Should their ability to exploit their personal brand in non-athletic endeavors be limited? Under U.S. law and public policy, individuals have the right to protect the fruit of their labors, in all market segments that they engage in.[102] This likewise pertains to athletes and those they select as licensees.

Courts must also examine how fantasy sports products have changed over time and how they are currently transforming as a result of regulation. The factors courts considered previously will certainly be impacted by the monetized use of ABD by fantasy

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[98] *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg 82,462, 82,464 (Dec. 28, 2000).

[99] *See* Mark Fidelman, *8 Lessons from Sports Marketing Experts for Brands and Athletes Resisting Move to Digital*, FORBES (July 28, 2014, 12:06 AM), http://www.forbes.com/sites/markfidelman/2014/07/28/8-lessons-from-sports-marketing-experts-for-brands-and-athletes-resisting-move-to-digital/#5475ba2b6409.

[100] *See Infographic: Ryan Lochte, Lebron James, and Hope Solo Demonstrates Importance of Athletic Endorsements to Modern Athletes*, SPORTS TECHIE (Sept. 9, 2016), http://sportstechie.net/infographic-ryan-lochte-lebron-james-and-hope-solo-demonstrates-importance-of-athletic-endorsements-to-modern-athletes.

[101] *See* Tam Pham, *NBA Stars Who Became Successful Entrepreneurs and Investors*, THE HUSTLE (Mar. 2, 2016), http://thehustle.co/nba-stars-that-became-successful-entrepreneurs-and-investors.

[102] *See* Jay Dratler, Jr. & Stephen M. McJohn, INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE, & INDUSTRIAL PROPERTY § 1.01 (Law Journal Press ed. 2016); POWELL ON REAL PROPERTY § 2.05 (Michael Allan Wolf ed., LexisNexis Matthew Bender Sep. 2016).

sports behemoths FanDuel and DraftKings[103] who offer contests valued at millions of dollars.[104] This is much different from the office pool of the past where participation and awards occurred on a much smaller scale.

Another difference from considerations of the past is how fantasy sports and daily fantasy sports (DFS) has impacted another industry that stands to gain from using ABD: sports betting. Legislation concerning fantasy sports contests has "forced action on behalf of both the leagues and the legislators," according to Will Green, a writer for *Legal Sports Report*.[105] This action could lead to modifications to or repeal of the Professional Amateur Sports Protection Act that prevents all but four states from offering some form of sports wagering.[106] Green correctly observes that "recent signs have hinted at a broadening acceptance by some of the professional sports leagues toward

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[103] Note that the fantasy sports landscape is in flux. Following a year of federal and state regulatory hearings, investigations by state attorneys general, civil litigation and new legislation, embattled fantasy sports contest operators, FanDuel and DraftKings, recently agreed to merge. Joe Drape, *DraftKings and FanDuel Agree to Merge Daily Fantasy Sports Operations*, N.Y. TIMES (Nov. 18, 2016, 10:44 AM), http://www.nytimes.com/2016/11/19/sports/draftkings-fanduel-merger-fantasy-sports.html.

[104] *See* Thomas H. Davenport, ANALYTICS IN SPORTS: THE NEW SCIENCE OF WINNING 2, 8 (International Institute for Analytics 2014); Peter Hammon, *Analyzing FanDuel's Statistical Arguments on Skill vs. Chance at the New York Hearing*, LEGAL SPORTS REP. (Dec. 1 2015, 2:13PM), http://www.legalsportsreport.com/6605/fanduels-skill-vs-chance-arguments/; Jake Pearson, *Judge Hears Arguments Over Gambling in New York Attorney General's Daily Fantasy Sports Case*, U.S. NEWS & WORLD REP. (Nov. 25, 2015, 4:39 PM), http://www.usnews.com/news/business/articles/2015/11/25/gambling-to-feature-at-new-york-daily-fantasy-sports-hearing (explaining the importance of whether the daily fantasy sports are skilled based or luck based in deciding if the game is gambling or not); Daniel Wallach, *Everything you Need to Know About the Illinois Daily Fantasy Sports Legal Battle*, LEGAL SPORTS REP. (Jan. 4, 2016, 5:00 AM), http://www.legalsportsreport.com/7106/illinois-dfs-primer.

[105] Will Green, *Lobbying Push for Legal US Sports Betting Could Start Next Year,* LEGAL SPORTS REP. (July 1, 2016), http://www.legalsportsreport.com/10638/lobbying-congress-sports-betting.

[106] *See id.*

betting."[107] American Gaming Association Vice President of Public Affairs, Sara Rayme, estimates that the organization can build on this momentum to expand legal sports wagering in the next three to five years.[108] "DFS is the gift that keeps on giving," Rayme says, "It's mainstreamed our business."[109] According to Green, DFS has also forced the hands of professional leagues into taking a stand on gaming.[110] Certainly any commodified and monetized ABD that makes its way into fantasy sports and DFS products will also fuel sports wagering.

This new dynamic – where fantasy sports and wagering operations generate revenue from delivering ABD to participants who then use ABD to make decisions for the purpose of generating winnings – warrants the consideration of additional factors for courts to consider when assessing whether ABD has been used for commercial purposes or for the purpose of trade through either advertising or in connection with the sale of goods and services. This dynamic also prompts considering traditional factors when determining damage awards for violations of privacy, and other factors including revenue generated by companies and individuals as a result of using ABD. Intellectual property expert Kevin Goering suggests that, "if a court were to find a right of publicity violation in these circumstances, the court might consider, among other things, in awarding damages the reasonable royalty that a player or group of players would obtain from licensing those rights."[111]

These factors differentiate ABD from other information made available to the public for money-making endeavors such as investing in stocks. Courts should use the above considerations during their analysis when a newsworthiness defense is raised. In appropriate instances, courts may want to consider what type of disclosure is necessary and proper, then limit it pursuant to facts relevant to each case.

ii. Consent as Defense

The other defense that is frequently used in right of publicity claims is that of consent. No infringement occurs if the

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[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] Personal interview with Kevin Goering, Partner, Norwick, Schad & Goering (Aug. 23, 2016).

plaintiff consents to the defendant's use of the plaintiff's identity or persona.[112] Generally, discussions concerning consent center on "whether the defendant had consent to take the particular actions in question."[113] Under common law, a sports figure can recover damages only if he has not consented to the defendant's use of the athlete's name or likeness in advertising or if such use or advertising exceeds the consent granted.[114] Under Restatement (Second) of Torts § 892 & cmt. c, "words or acts or silence or inaction" may constitute consent in right of publicity claims.[115] State laws may vary in defining consent.

For example, in *Dryer v. NFL*, NFL Films created television productions showing historic game footage and depicted retired NFL players engaged in football games. In the lawsuit, the players alleged that their publicity rights were infringed as a result.[116] The NFL contended that the players consented, explicitly or impliedly, to the NFL's use of game footage.[117] The court held that where the evidence presented indicated that the retired players knew of and did not object to the use of their image in the new NFL Films productions, the players consented to the use of their likeness and image.[118]

c. Right of Publicity Analysis: How Athletes Can Protect This Right in ABD

The use of ABD as a publicity right is untested in courts. Because ABD is increasingly being used for health, safety, and commercial purposes, and rapidly-evolving technology increases access to it, the conditions are ripe for a break in traditional thinking. By being proactive now, athletes and their licensees can strengthen their rights in ABD as a right of publicity. If they take specific actions before potential claims arise, athletes may overcome the defenses of First Amendment speech and owner consent. It is imperative for athletes to be aware of how and when they consent to specific uses of ABD in order to preserve

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[112] Stapleton & McMurphy, *supra* note 35, at 41–42.

[113] *Id.* at 42.

[114] *Id.* (citing Sharman v. C. Schmidt & Sons, Inc., 216 F. Supp. 401 (E.D. Pa. 1963)).

[115] Dryer v. NFL, 55 F. Supp. 3d 1181, 1200 (D. Minn. 2014).

[116] *Id.* at 1186.

[117] *Id.* at 1199–1200.

[118] *See id*. at 1200.

their rights to damages for infringement. Athletes who are proactive in protecting their ABD as a publicity right have a greater chance of success in infringement claims.

The focus here will be on scenarios where ABD from wearable technology is used for commercial purposes including: (1) using ABD to publicize and promote a league, team or sport either ***directly*** by (a) improving athlete performance and gameplay through improved safety and performance, and (b) playing in games and appearing in broadcasts or other programming to promote and publicize the league, team or sport; versus (2) using ABD to publicize and promote ***indirectly*** by commodifying and monetizing ABD to be distributed to and by Second-, Third- and Fourth-Generation Beneficiaries for enhanced statistics and other content and product offerings designed to generate revenue and increase fan engagement (e.g., fantasy sports, sports wagering, virtual and augmented reality products, mobile applications, and sponsor promotions and activation). Finally, in an age that is hyper-aware of individual brand creation and enhancement and in an environment that provides access to easy-to-use technological tools which make brand creation relatively simple and inexpensive, an athlete's right to exploit his own publicity and intellectual property rights in revenue streams must be considered.

To address the collection, use, and dissemination of ABD in these scenarios, a court must recognize that the purposes for which the ABD is collected, used, and disseminated will determine which definition and corresponding analysis applies. Generally, a plaintiff will be an athlete, the Primary Beneficiary, who has standing to assert the right of publicity in relation to his ABD. A Primary Beneficiary's assignees and licensees, or the First-Generation Beneficiaries, may have standing to assert infringement of a Primary Beneficiary's right of publicity depending on the circumstances. Further, an athlete will likely have standing to assert trademark and other intellectual property rights inherent in his identity and the commercial purposes it serves such as the promotion and provision of products and services. In some circumstances, the Primary Beneficiary's assignees and licensees, again First-Party Beneficiaries, may also have standing to assert intellectual property claims. Since ABD consists of Health Information, an athlete will likely be the sole party who can establish standing to challenge the use of his Health Information. The situation in which ABD is collected, used, and disseminated also determines whether a court analyzes ABD as part of an employment record, a form of protected

speech, or unprotected due to the athlete's consent to use the ABD and other relevant factors.

Therefore, it is from this understanding that an analysis of the legal implications of collecting, using, and disseminating ABD must be analyzed. Based upon the basic tenets of publicity right law, which may differ in subtle ways from state to state, an athlete must demonstrate that he has a valid and enforceable right in his identity or persona.[119] ABD, by nature and as defined previously, is a characteristic or trait that is used to recognize one's identity.[120] ABD may be in the form of a statistic, a playing or performance record, achievement or other characteristics or data recognized as publicity rights under common law.[121] By common law definitions, ABD should be considered a characteristic identifying an individual, thereby granting its owner an enforceable right to publicity in the athlete's ABD.[122] An athlete may assign or license this right to third parties.[123] As a result, licensees such as professional sports leagues have attempted to assert rights of publicity on behalf of assignors and licensors with mixed success.[124] Thus, an athlete, or Primary

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[119] Bolitho, *supra* note 40, at 942.

[120] Gale, *supra* note 5.

[121] *See generally Dryer*, 814 F.3d at 941; Bolitho, *supra* note 40; CHAMPION ET AL., INTELL. PROP. LAW IN THE SPORTS & ENT. INDUSTRIES 132 (2014); Rodenberg et al., *supra* note 46; Stapleton & McMurphy, *supra* note 35.

[122] *See id.*

[123] Many claims have been raised by professional sports leagues and players associations asserting rights of publicity, privacy, and intellectual property. *See generally* Rodenberg et al., *supra* note 46; Bolitho, *supra* note 40 (discussing athletes' rights of publicity); Stapleton & McMurphy, *supra* note 35 (discussing a court's reluctance to apply right of privacy protections to professional athletes).

[124] *See* C.B.C. Distrib. & Mktg. v. MLB Advanced, L.P., 505 F.3d 818 (8th Cir. 2007). *See also* Rodenberg et al., *supra* note 46, at 82 n.73 (noting that "[s]ports leagues have routinely attempted to claim some ownership over real-time sports data connected to live sporting events."). Professional sports leagues do so to protect proprietary interests in statistics that they collect and disseminate. *See* NBA v. Motorola, Inc., 105 F.3d 841, 853–54 (2d Cir. 1997). Sports information cases have led to the development of the sports industry's information amalgamation and dissemination paradigm as it exists today. As a result, leagues have adopted strategies allowing them to successfully assert claims of misappropriation, and survive claims that

Beneficiary as owner of his ABD (which is an element of his identity), has a valid and enforceable right in his identity and is in the strongest position to assert a right of publicity.

The second element in a right of publicity claim addresses whether an athlete may be identified from the defendant's use of a publicity right, or ABD in this case.[125] Due to its identifying qualities, ABD inherently identifies the athlete who contributed it. For example, in the sports industry, ABD is used to (1) describe characteristics of an athlete's in-game performance, (2) evaluate and influence an athlete's health and training regimen in preparation for game day which may also appear in programming and in other social media formats, (3) add dimension to enhanced statistics that are used to describe an athlete's propensity for performance on a given day, such as in live game programming, and (4) promote a product by incorporating ABD in marketing messages, advertisements, promotions, and content that corresponds to that product.[126]

Player tracking data, including ABD, is already being used to provide enhanced statistics for live game broadcasts, mobile applications, second-screen platforms, and in in-game entertainment for fan engagement.[127] It is also foreseeable that ABD will make its way into fantasy sports and sports wagering information, virtual and augmented reality, and other content created by and for the benefit of the Beneficiaries as the sports

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sports information distributed by third parties is protected as First Amendment speech and that sports information is comprised of facts existing in the public domain which do not belong exclusively to the leagues. "Sports organizations have alternatively deemed the dissemination of real-time data by unapproved third parties as impermissible, illegal, or a threat to sports' integrity." Rodenberg et al., *supra* note 46, at 67 . "Disputes over proprietary data and game-related rights have been litigated for decades, resulting in sometimes conflicting decisions." *Id.* In order to prevent the transmission of real-time data by others, "sports leagues have attempted to incorporate (quasi-)contractual terms in their ticket purchase agreements, spectator notices, and media credentials." *Id.* at 68. The NFL has acquired a stake in sports data business Sportradar in a move that may "buttress future legal arguments that the league has a proprietary interest in certain elements of real-time data." *Id.* at 99 n.147.

[125] Stapleton & McMurphy, *supra* note 35, at 35–36.

[126] Smith, *supra* note 1; Loftus, *supra* note 3; Gale, *supra* note 5.

[127] Gale, *supra* note 5.

ecosystem evolves. Athletes may use their ABD in their own product offerings and on social media platforms such as Facebook Live or Uninterrupted. As eSports grows, ABD will likely be included in on-screen statistics – providing eSports teams and fans information about opponents that are otherwise unavailable when watching competitors play. It is important to understand that the value of ABD comes from its use in identifying a particular athlete.[128] It is therefore likely that any and all uses of ABD in the manners described above will be for the purpose of identifying the athlete who supplied it. As a result, a defendant's use of an athlete's ABD would most certainly satisfy this element.

Note that under common law, the test for "identifiability" refers to the unaided identification of the plaintiff by the audience based on the use of "any indicia by which the plaintiff is identifiable,"[129] such that the audience understands to whom the identity pertains.[130] The test for infringement here is "identifiability."[131] The right of publicity may be infringed without any endorsement being attached.[132] Thus, so long as the audience recognizes an athlete's identity from the use of his ABD, this "identifiability" standard is met, whether or not the audience believes the athlete is endorsing a product that his ABD is being used in conjunction with. This rule of law bolsters a plaintiff's position that he is identifiable from the use of his identity (specifically his ABD), particularly to an audience of sports fans and consumers.

The third element of a right of publicity claim is satisfied if the defendant's use of the plaintiff's identity occurs without the plaintiff's permission resulting in the misappropriation of the plaintiff's identity "in a way that is likely to cause damage to the commercial value of that identity or persona."[133] Consent concerns whether the defendant had the plaintiff's permission to take the particular action in question and whether such consent occurred expressly through words or actions, or implicitly

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[128] *See generally* Stapleton & McMurphy, *supra* note 35, at 36.

[129] Stapleton & McMurphy, *supra* note 35, at 39.

[130] *See id.* at 38.

[131] *Id.* at 35–36.

[132] *Id*. at 36.

[133] *Id*. at 41.

through silence or inaction.[134] In *Dryer*, the court determined that the plaintiffs, former professional athletes whose game footage was used by NFL Films, consented to such use.[135] In that case, the plaintiff's knew that the defendant regularly captured game footage and used it in subsequent productions, and the plaintiffs voluntarily and willingly appeared in the subsequent productions by giving interviews in those productions.[136] When raising their claims, the plaintiffs did not challenge the use of their name and likeness for the interviews, but challenged such use in the footage of the historic games.[137] However, the court found that the plaintiffs' consent to use of their interviews was in conjunction with the game footage because they knew that the defendant, NFL Films, would use both in its productions.[138] Further, the plaintiffs did not challenge the defendant's use of the game footage or interviews over the years between the athletes' retirement and the time the claims were brought.[139] Supporting the court's finding was evidence of one plaintiff expressing that he was "just glad to be interviewed."[140] The court held that the plaintiffs, through their words and actions, consented to and encouraged the defendant's use of game footage which barred recovery of damages.[141]

Even when a plaintiff (1) remains silent as to a defendant's use of some aspect of the plaintiff's identity or (2) does not act to prevent such use, such may be considered consent that bars a plaintiff's recovery of damages awards.[142] Consenting by silence or inaction is something athletes may be especially susceptible to given that the choice generally lies between either consenting to ABD collection or foregoing play.[143] However, to preserve rights and recover damage awards, athletes must retain

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[134] *Dryer*, 55 F. Supp. 3d at 1200 (holding that through their own actions and words, Plaintiffs consented, and even encouraged, NFL films' use of game footage in which they appeared).

[135] *Id*.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *See id.* (stating that the "NFL recognizes, consent does not bar Plaintiffs' publicity-rights claims, but rather prevents them from recovering damages for any pre-suit act").

[143] *See id.*

control of how publicity right material is used. This means they will want to thoughtfully consider what they consent to – whether expressly or impliedly.

State laws vary in the statutory requirements of consent. Some state laws require a plaintiff to show a connection between the defendant's use and the commercial purpose, whether for advertising purposes or for the purpose of trade as mentioned previously.[144] Courts will consider the facts in each case to determine whether a plaintiff consented to a defendant's use of a publicity right for a commercial, advertising or trade purpose occurring in connection with the use.[145]

An athlete's consent to the collection, use, and dissemination of ABD is a thorny issue. Under the scenarios described previously, ABD may be used (1) by a league or team to publicize and promote a league, team or sport *directly* by improving athlete performance and gameplay or by utilizing it during broadcast games in the form of statistics and sports information and in later broadcasts and programming, (2) by a league or team to *indirectly* publicize and promote a league, team or sport by commodifying and monetizing ABD to be distributed to Second-, Third- and Fourth-Generation Beneficiaries such as in mobile applications and fantasy sports offerings, and (3) by an athlete and the players association that represents him for an *athlete's self-promotion*, exploitation of his publicity and other intellectual property rights, even during contract negotiations.[146]

In the first scenario presented above, ABD is used to publicize or promote a league, team or sport by improving

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[144] Cohen v. Facebook, Inc., 798 F. Supp. 2d 1090, 1093 (N.D. Cal. 2011); *See also* Valentine v. C.B.S., Inc.*,* 698 F.2d 430, 433 (11th Cir. 1983) (recognizing that the proper interpretation of Fla. Stat. § 540.08 requires the plaintiff to prove that the defendants used a name or likeness to directly promote a product or service); *see also Dryer*, 55 F. Supp. at 1196–97.

[145] *See Dryer,* 55 F. Supp. at 1200.

[146] *See generally Dryer*, 55 F. Supp. at 1200; Liz Mullen, *Sensor Tech Has Attention of Leagues, Unions*, SPORTS BUS. J. (Nov. 2, 2015), http://www.sportsbusinessdaily.com/Journal/Issues/2015/11/02/Labor-and-Agents/Sensors.aspx; *Collective Bargaining Agreement*, NFL PLAYERS ASS'N at 258 (Aug. 4, 2011), https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf.

athlete performance and gameplay. ABD may also be used during broadcast games in the form of statistics and sports information, and in later broadcasts and programming. Using the NFL as an example, the collective bargaining agreement (CBA) requires that an athlete explicitly consent to the collection and use of ABD via sensors used at practices and in games which collect information regarding the player's performance and movement, and medical and other player safety-related data.[147] The NFL may only collect data relating to medical or other safety-related data after it obtains the NFLPA's consent.[148] The athlete's consent given directly to the NFL and given indirectly through the NFLPA to the NFL is adequate to meet this element of a right of publicity claim.[149]

Where ABD is collected to *directly* publicize and promote a league, team, or sport during broadcast games and programming, the matter of consent is not as straight forward. For example, under the NFL's CBA described above, one could argue that the "characteristics" included in the Publicity Rights licensed to the NFL include ABD. If ABD is a Publicity Right, the athlete will likely be deemed to have consented to the NFL's collection, use, and dissemination of his ABD to publicize and promote the league, teams, and the sport of football. The language of the NFL Player Contracts and CBA may be interpreted to include many more ways in which the NFL may utilize ABD, thus procuring an athlete's consent either directly or through the NFLPA.

Conversely, if ABD is not considered a "characteristic" licensed to the NFL, it could be argued that an athlete did not explicitly consent to the NFL's collection, use, and dissemination of his ABD by words or actions. However, an athlete's silence and inaction against the NFL's collection, use, and dissemination of ABD may be construed as consent. This is precisely why athlete consent to the manner in which his ABD is used is imperative.

Under the second scenario, a league or team uses ABD to *indirectly* publicize and promote a league, team or sport by commodifying and monetizing ABD to be distributed to Second-, Third-, and Fourth-Generation Beneficiaries for uses such as in mobile applications, virtual reality sports entertainment, and

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[147] Mullen, *supra* note 145.
[148] *Id.*
[149] *See generally Dryer*, 55 F. Supp. at 1200.

fantasy sports and sports wagering information offerings. Such use of ABD may or may not be included in "characteristics" licensed to the NFL as an element of Publicity Rights. The same analysis applies as for ABD used for broadcasts and programming, leaving ambiguity around whether or not an athlete implicitly consents to this use of his ABD by his words. Again, if ABD is collected, used, and disseminated by a league and the athlete does not act to prevent the same or remains silent, his actions will be deemed to be consent.

In the third scenario where an *athlete desires to exploit his right of publicity*, either directly or through an assignee such as the players association, determining whether or not consent is given can be difficult. For example, under the NFL Player's Contract, an athlete assigns "rights" including "indicia" to the players association.[150] This may not be analogous to the "characteristics" licensed to the NFL as part of the athlete's Publicity Rights.[151] Further, the Rights assigned to the NFLPA designate the use of those rights for use in connection with any product, brand, service, appearance, product line or other commercial use.[152] This type of use is outside the scope of rights granted to the NFL.[153] Yet there is some overlap when ABD is used by an athlete under contract to promote or endorse a fantasy sports service provider, but the same ABD is included in the providers' subscription package for determining fantasy player picks. Does the athlete's consent to use in this way constitute consent to the NFL's grant of ABD to a fantasy sports service provider as part of its product offerings?

Consent of an athlete to one party's collection, use, and dissemination of his ABD for a narrowly defined purpose is already unclear and can expand quickly and unintentionally. Athletes will naturally be opposed to this since it has the potential to erode their rights and diminish licensing fees. These negative consequences are more likely to result if consent may be inferred from inaction and silence. This is concerning because the athlete's recovery for damages may be severely limited or prohibited. Not only is this an inequitable result, but it may also result in misappropriation by, and unjust enrichment of

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[150] *Collective Bargaining Agreement*, *supra* note 145.
[151] *See id.* at 256–57.
[152] *Id.* at 258.
[153] *Id.*

defendants who expand their use of ABD without making good faith efforts to respect the publicity rights of thousands of athletes.

The final element of a right of publicity claim requires a plaintiff to prove that the defendant used plaintiff's identity or persona in a way that is likely to cause damage to its commercial value.[154] To recover, the plaintiff must demonstrate some amount of actual commercial damage,[155] backed by evidence of the fair market value of the plaintiff's identity, unjust enrichment in the infringer's profits, or damage to the business of licensing the plaintiff's identity. One way to measure damage awards is to calculate the royalties a plaintiff would have received for the defendant's use of the misappropriated rights.[156] For injunctive relief, the plaintiff need not prove a quantifiable amount of damages.[157] If a plaintiff cannot establish damages, he may succeed in his claim for infringement, but will be barred from recovery.[158] As far as ABD is concerned, this could be highly prejudicial to athletes since their ABD has the potential to generate billions of dollars without compensating them adequately for its use.

Although athletes co-promote themselves, their teams, the league, sponsors, and endorsers, the use of such an inherently personal characteristic or trait such as ABD has far-reaching implications and risks that merit fair compensation to athletes for the use of their ABD. Situations may arise where an athlete's commercial value is damaged due to impaired contract negotiation leverage, lower compensation, or a shortened career span. Or, third parties would be unjustly enriched from using ABD in an unauthorized manner. For example, a team may decide not to sign a player due to information derived from ABD that supersedes the athlete's on-field performance or may use ABD for other dystopian purposes.

Under the common law, the amount of damage awarded for the infringing use of ABD has not been determined. Courts will consider the situations where ABD was used and affix a dollar amount to the harm. The matter of consent is crucial in

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[154] Stapleton & McMurphy, *supra* note 35, at 41.

[155] Bolitho, *supra* note 40, at 942.

[156] Personal interview with Kevin Goering, Partner, Norwick, Schad & Goering, *supra* note 110.

[157] *Id.*

[158] *Id.*

determining the value of harm suffered by a plaintiff and his ability to recover damages. Calculating the value of billions of bytes of ABD collected, used, and disseminated by First-, Second-, Third- and Fourth-Generation Beneficiaries will be a challenge. Clearly, this data is of great worth to the owner, the athlete and Primary Beneficiary. Where ABD is commodified and monetized, perhaps a method of looking to the amount leagues charge to Second-, Third- and Fourth-Generation Beneficiaries for the use of ABD and then working back to the value of the raw data can be a starting point in determining the value to an athlete and third parties. This calculation must also take into account the value of the individual athletes as well as the market value of ABD belonging to a team's star as opposed to a bench player whose performance may be less impactful on a team's success. Injunctive relief may be an adequate remedy pending a determination of a reasonable damage award amount.

i. First Amendment Speech Defense

In the event a defendant raises the defense of First Amendment speech under any of these scenarios, courts will take a traditional approach and look to whether reporting of ABD is newsworthy, of concern to the community, or a subject of general interest of value and concern to the public.[159] Avid sports fans want as much information as possible about their favorite athletes and teams. The sports industry and courts both recognize sports information as being of concern and value to the public.[160] Sports fans want to know the inside scoop and feel involved in the action. Utilizing ABD to increase fan engagement makes sense to provide this sports entertainment experience. Also, factual data and true information is generally protected speech under common law.[161] ABD qualifies as factual data and true information in addition to being a proprietary right. However, there are factors that may mitigate application of the "protected speech" designation to ABD provided to the public. One distinguishing factor in the newsworthiness of ABD is the heighted confidentiality of Health Information due to privacy laws. Another distinguishing factor is that, historically, individual biometric data has not been included in sports

[159] Rodenberg et al., *supra* note 46, at 69–70.
[160] *Id.* at 70.
[161] *See id.* at 96.

information or statistics which have been the subject of First Amendment protection. Nor has ABD been available in the public domain, especially to the extent available under new technologies. ABD cannot be collected through one's senses like traditional sports information can.

With ABD a spectator can watch a game to see the Golden State Warriors' player Steph Curry's athletic ability when shooting and see how he utilizes his body mechanics, controls his energy, hydrates, and stretches to enhance his performance. Conversely, spectators can see when the New England Patriots' wide receiver Julian Edelman suffers a knee injury during game play. ABD cannot be ascertained by a third party's senses. For this reason, ABD is typically not in the public domain and will only be in the public domain if it is placed there by the athletes themselves or data collectors.

Another distinguishing feature is that ABD can be a matter of public concern because it generates value from fantasy sports and sports wagering participants. Courts may adopt additional factors to determine whether ABD used by private citizens as a means of generating personal income falls into the newsworthiness exception, or if a class of quasi-protected speech is warranted as personal data is increasingly used as a commodity. A balance may be struck between the rights of the public to access information for pecuniary interests and the rights of athletes to protect their ABD. For example, courts may determine to what extent disclosure of ABD is acceptable for the purpose of generating income from fantasy sports or sports betting. They may also revise the definition of "commercial speech" to include new forms of information derived from personal data. If courts recognize that some ABD is not protected speech this will carve out additional protection of athletes' publicity rights or contemplate ways in which athletes may be compensated for these types of confidential, but financially valuable, property rights. To balance the potential risk to athletes, perhaps more compensation should be provided to them either before disclosure or in the form of damages after disclosure. Conversely, in the event ABD is determined to be protected speech, restricting disclosure of ABD to that which is "legitimately necessary and proper for public information" under *Kimbrough* is a fair limitation on disclosure. This supports public policy to protect individual privacy and property. If an athlete's property and privacy are honored by law, it is less likely he or she will be commercially disadvantaged or that his or her

reputation will be impaired by the disclosure of Health Information that would otherwise be confidential and private.

ii. Consent Defense

The other defense a defendant may raise is that of consent. In any scenario involving ABD, courts must consider whether consent was given by an athlete or his assignees or licensees for a particular use and/or whether that use extended beyond the scope of consent granted.[162] If an athlete consents to the use of his ABD by words, acts, silence, or inaction then his ability to assert an infringement claim could be limited. However, the IoT and IoE will present more scenarios where ABD may be increasingly collected and disseminated. If ABD is collected for one purpose and then used or disclosed for another without the athlete's knowledge, he could demonstrate that the use of his ABD extended beyond the scope of permission granted and will be able to recover damages for infringement. Courts should understand that uses for ABD will develop faster than the courts can address them. Courts should also compare the bargaining power and position of data collectors and their ability to capitalize on ABD to that of athletes who may feel pressured to consent to an ABD use in order to enjoy the benefits of employment as a professional athlete. Particularly in cases involving highly confidential data such as PHI, courts should determine whether athletes knowingly consented to the use of their ABD in ways that disadvantage them.

d. Practical Solutions For Athletes and Licensees Who Want to Use ABD

Consent to a particular use of ABD can be easily construed from the owner's action, inaction, words, or silence. For these reasons, athletes will want to be proactive in determining how their ABD is used and ensure they clearly convey or withhold their consent to use ABD for a particular purpose and when consent is withheld to avoid inadvertent and unintended and consent. Conversely, Beneficiaries who use ABD should know and understand the consent requirements in each state and take measures to obtain it. In so doing, confusion

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[162] State laws will vary as to what constitutes consent. *See, e.g.*, *Dryer*, 55 F. Supp. 3d at 1202, n.7 (noting that under the New York state publicity-rights statute, any consent must be in writing).

regarding an athlete's consent will be avoided. However, these Beneficiaries must be motivated to do so. The current legal framework seems to incentivize defendants to take no pre-emptive actions because it allows Beneficiaries to utilize ABD without the explicit consent of athletes, thus resulting in violation, erosion, or infringement of athlete rights of publicity and privacy. To limit liability and risk and to ensure they can use ABD, Second- and Third-Generation Beneficiaries should require the First-Generation Beneficiaries collecting and providing data to represent and warrant that they have consent from the ABD owners to use it in a specified manner.

To summarize, each ABD Beneficiary must consider the factors of misappropriation of a right of publicity and take steps to prevent it. Athletes whose ABD has been used without consent can prevail so long as the athlete can prove that a First-, Second- or Third-Generation Beneficiary caused damage to the athlete's commercial value, was unjustly enriched, profited from, or otherwise injured the athlete's personal identity. If a league, team, or sponsor does not compensate the athlete for licensing fees associated with ABD use, then these damages become apparent. ABD collected via wearable technology that is used and disseminated to promote the athlete's health and safety and improve individual and team performance in gameplay is likely consented to through the contracts the athlete has with leagues, teams, and/or players associations provided that ABD is collected pursuant to contract terms (e.g., during authorized practice and game times). However, athletes should consider, and inquire if necessary, whether or not ABD is explicitly included in the publicity rights that he or she assigns or licenses and define when, how, and to what extent it can be disclosed in order to minimize the risk of missing out on licensing fees. Further, athletes, being the Primary Beneficiaries, must consider whether their actions, words, or silence constitute consent to use their ABD. Athletes would be wise to strategize the manner in which they authorize use of ABD, define the scope of that use, and specify what ABD is being licensed in order to maintain control of and exploit their ABD as part of their business.

Likewise, First-Generation Beneficiaries will want to ensure that ABD is included in their licenses from athletes so ABD can be used to publicize and promote the league, its teams, and the sport. While ambiguity in contracts may help leagues develop products designed to increase fan engagement, a proactive approach will reduce the risk of future litigation and promote fair practices in data collection, use, and security, for

both the sports industry and other IoT developers. For leagues, understanding athlete rights and appropriately obtaining consent and licenses can significantly reduce damage payouts for the unauthorized or unlicensed use of ABD. It will also decrease the potential payments owed to a league's or team's third-party data collector, sponsor, and other content creators under contract indemnification provisions.

Another benefit is that First-Generation Beneficiaries and their partners can adopt strategies to characterize ABD as a publicity right and track its use as such. This will allow content developers to understand what elements of identity are being included in content and programming so rights may be properly allocated and athletes can be properly compensated. First-Generation Beneficiaries, particularly leagues and players associations, should educate athletes about ABD collection, use, dissemination, and security practices to satisfy notification and consent requirements. Finally, First-Generation Beneficiaries will want to coordinate efforts with Second-Generation Beneficiaries who handle, analyze, distribute, store and transmit data, and create contractual obligations with Second- and Third-Generation Beneficiaries to control the use of ABD as required by law and the contractual obligations First-Generation Beneficiaries owe to the athletes. Likewise, Second- and Third-Generation Beneficiaries will want to protect their interests in and rights to use ABD under contract and perhaps protect their rights by incorporating ABD in proprietary products.

e. Contractual Considerations

Before leaving the topic of the right of publicity, an athlete's contractual rights and obligations with respect to ABD must be mentioned. A party's publicity rights and the use of elements of one's identity are generally described within contracts that assign or license specific rights of publicity to third parties. Such is the case with NFL players. When a contract governs, courts will generally consider the arrangement entered into by the parties. Until ABD is specifically defined and its use clearly articulated in contracts, ambiguity regarding ownership, usage rights, scope of consent, and other issues typically addressed under licenses will continue to exist. In the meantime, the issue of whether ABD is included in publicity rights granted under a contract will be a challenge to address. In the event parties enter into contracts with one another for the collection,

use, and dissemination of ABD, it would be wise for each party to memorialize their rights and obligations concerning ABD.

2. Athlete Biometric Data As Other Types of Intellectual Property

Intellectual property rights protect a variety of valuable innovations and intangibles including patents, trademarks, copyrighted works, and trade secrets. In this age of great technological advancement, social media, and shared data, nearly anyone who has access to Twitter, Facebook, Instagram, Snapchat, or other *app du jour* can create intangibles for which intellectual property rights may be claimed. These technologies raise a myriad of complex legal issues needing to be addressed and resolved.

The primary intellectual property claims that are likely to arise with ABD include trademark claims under the Lanham Act and state trademark laws, and copyright infringement under the Copyright Act. In some cases, athletes may even raise trade secret claims under state and federal statutes.[163] This section will summarize fundamental laws, the issues most likely to arise under them, considerations for analyzing infringement claims, and how courts address these claims. A comprehensive analysis of how ABD is likely to be treated in these circumstances is reserved for a different discussion focused on the application of all potential intellectual property claims that may be brought in relation to the use of ABD.

a. Trademark Claims Under the Lanham Act

Under the Lanham Act and its corresponding common law, a person who can establish an aspect of his or her identity as a trademark is afforded certain protections and may raise claims of infringement, unfair competition, and false designation of origin.[164] At their core, these claims assert that a defendant used a word, term, name, symbol, device, or any combination of these elements and made a false or misleading representation of fact that is likely to cause confusion or mistake, or deceive consumers about the affiliation, connection, or association of a plaintiff with the defendant.[165] Plaintiffs also have a claim if a defendant's activities confuse consumers so that they are

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[163] *See* Cheung et al., *supra* note 44.
[164] 17 U.S.C. § 102.
[165] 15 U.S.C. § 1125(a)(1)(A).

uncertain whether the defendant's products or services originated from a plaintiff or if a plaintiff sponsored or approved of a defendant's use of plaintiff's trademark.[166] Courts will analyze Lanham Act claims only if a defendant's use of a plaintiff's identifier constitutes commercial speech under the Supreme Court's First Amendment jurisprudence.[167] Therefore, if a court undertakes this analysis, it is because it has found that the use of an athlete's ABD is protected speech rather than a publicity right.

In these circumstances, a plaintiff must demonstrate that false advertising and similar claims occur from the collection, use, and dissemination of his ABD by First-, Second-, and Third-Generation Beneficiaries for the purpose of publicizing and promoting a sport and the league and team for which an athlete plays. The viability of an athlete's successful claim weakens if a substantial amount of time lapses between the initial offending use of ABD and the time the claim is raised (due to the defenses of laches, estoppel and acquiescence that a defendant may raise against plaintiffs).[168] The legal treatment of this topic serves as a warning to athletes to control the use of their ABD as soon as collection of ABD begins in order to hedge such defenses. Further, in *Dryer v. NFL*, the court held that professional athletes' trademark-related claims failed because the retired athletes did not timely object to the league's use of intellectual property.[169]

Where ABD is "indicia" of an athlete's identity, the athlete must treat their ABD like a trademark to the extent reasonably possible and enforce corresponding rights to the same. Likewise, assignees and licensees can raise these claims to protect their interests and those of the athletes. Athletes should raise claims of false advertising and unfair competition early to ensure ownership rights are not eroded. Adequately defining ABD as a trademark right and describing the scope of its use in written contracts is important to protect rights. As with other intellectual property rights, the use of ABD may be licensed. Primary Beneficiaries or their assignees and licensees can be compensated accordingly. Utilizing these measures allows

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[166] *Id.*
[167] *Dryer*, 55 F. Supp. 3d at 1202.
[168] *Id.*
[169] *Id.* at 1200.

licensors and licensees to control the use of ABD via trademark law to reduce the number of infringement claims in the courts.

b. Copyright Infringement Claims Under the Copyright Act and Common Law

There is much under statutory and common law to draw on for a comprehensive analysis of whether ABD may be entitled to copyright protection. A complete analysis of each scenario exceeds the scope of this discussion. The issues and rules of law discussed here serve as a survey only of basic concepts impacting ABD, the parties who are most likely to raise copyright-related claims, and potential considerations applicable to the emergence of ABD as a commodity.

The types of claims most likely to arise under copyright law when ABD is characterized as intangible property include: (1) an athlete's claim of copyright protection of his ABD and (2) a league or other third party's claim of copyright protection in the expressive works it creates by incorporating ABD. This may occur, for example, where leagues and other Beneficiaries utilize ABD in broadcasts and programming, mobile applications and second-screen offerings, advertising, virtual and augmented reality products, sponsor products, and fantasy sports and sports wagering products and services.

Under the Copyright Act, "original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated" qualify for copyright protection.[170] The Copyright Act seeks to protect original works "founded in the creative powers of the mind," or the "fruits of intellectual labor."[171]

i. Athlete Claims of Copyright Protection in Their ABD

Observing how courts have handled the incorporation of athlete property into another work provides a useful comparison for the treatment of ABD as a property right. Professional athletes have claimed that copyright law protects their image, likeness and other personal features.[172] For example, in *Dryer v. NFL* the court recognized that the plaintiffs had plausibly alleged

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[170] 17 U.S.C. § 102.

[171] Feist Publ'ns Inc. v. Rural Tel. Serv. Co. Inc., 499 U.S. 340, 346 (1991).

[172] *See Dryer*, 55 F. Supp. 3d at 1186–87.

that the players' identities were the copyrighted work at issue,[173] thus providing a potential copyright claim for athletes. Upon further development of the case, however, it became clear that the copyrighted works that the athletes claimed were infringed were, in fact, NFL Films' productions containing game footage of the athletes playing football.[174] The Court reasoned that the athletes could not succeed in their claims of copyright infringement because broadcast games are copyrighted works owned by the NFL.[175] Later reproductions of these games for NFL Films' expressive, non-advertising, programs were not used "for the purposes of trade."[176] As a result, the NFL used this footage in accordance with its rights.[177] Essentially, the court held that when an athlete's performance on the football field is part of the copyrighted material, their likenesses cannot be detached from the copyrighted performances.[178] This position allows the NFL to exploit its copyrighted game footage in later expressive works and the NFL's valid copyright in game footage forecloses the athletes' publicity claims.[179]

If an athlete claims his ABD is protected under copyright law, a court may consider whether ABD is included in another's creative expression or copyrighted work. Likewise, the court may consider whether the copyrighted work that incorporates ABD is used for the purpose of trade. An additional analysis of what constitutes the purpose of trade as the IoT develops is likely to emerge. Whether claims will receive the same treatment with respect to ABD remains to be seen. Case-specific factors will certainly impact the court's analysis.

ii. Athlete Claims of the Right of Publicity in Their ABD

An athlete may also bring claims of misappropriation of a right of publicity under state law to limit how publicity right material can be used in expressive works. However, these claims will be preempted by the Copyright Act unless they are wholly based upon the assertion that the publicity rights are incorporated

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[173] *Id.* at 1202.
[174] *Id.*
[175] *Id.* at 1203.
[176] *Id.* at 1202.
[177] *Id.*
[178] *Id.*
[179] *Id.*

in a copyrighted work that constitutes advertising used by the defendant for the purposes of trade.[180] Again, the *Dryer* case is demonstrative. Former NFL players sued the NFL under claims of misappropriation of publicity rights, among other things, based upon the NFL's use of game footage in later-developed television programming.[181] The court first chose to analyze the plaintiff's right of publicity claims noting that the claims raised under the statutes of four different states set forth different requirements, then found that the claims failed under each state's newsworthiness defense.[182] Ultimately the court found that the state claims failed since the athletes' play in the NFL was the subject of public interest (i.e., it was newsworthy) and that the athletes consented to the use of their likenesses in gameplay footage and subsequent interviews.[183] The court noted that if the publicity-right claims had not been barred by the First Amendment or the defenses of newsworthiness and consent, they would have been preempted by the Copyright Act if: (1) the disputed work is within the subject matter of copyright; and (2) the state-law-created right is equivalent to any of the exclusive rights within the general scope of the Act.[184] In *Dryer*, the court found that the Copyright Act preempted statutory publicity-rights claims since (1) the disputed works (the NFL Films productions) were expressive works protected by valid copyright not used for the purpose of trade or advertising, and (2) the plaintiffs' claims of publicity-right misappropriation alleged that NFL Films included clips of the plaintiffs that were reproduced, used to create derivative works, copied, and distributed as video

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[180] *Id.* at 1201–2; *see also* Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426, 428 (8th Cir. 1993) (quoting 17 U.S.C. § 301(a)) (stating that federal copyright law preempts "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright." The test for determining when federal copyright law will preempt a state law claim is whether (1) the disputed work is within the subject matter of copyright; and (2) the state-law-created right is equivalent to any of the exclusive rights within the general scope of the act.).

[181] *Dryer*, 55 F. Supp. 3d. at 1186.

[182] *Id.* at 1196–97.

[183] *Id.* at 1198–200.

[184] *Id.* at 1200–01 (quoting 17 U.S.C.A. § 301(a) (West 1998)).

recordings to the public, all of which are "encompassed by copyright law."[185]

In the event publicity rights in ABD are established and athletes seek to limit the use of publicity right material in copyrighted works under the *Dryer* standard, courts will consider whether the publicity right material is included in an expressive work, which is protected by copyright law, and whether that work is used for the purpose of trade or advertising. As this pertains to ABD, copyrighted works may include broadcast games, rebroadcasts, video games, mobile applications, virtual and augmented reality products, and fantasy sports and sports wagering services. Many of these formats will incorporate the name, likeness, or identity of an athlete through the use of his ABD. The manner in which these elements are utilized may be similar or significantly different from how video of athletes playing football was used in television productions.

For example, the use of ABD in games, rebroadcasts and viewer programming may include a player's name, likeness and biometric data as well as data incorporated into statistics, analytics, computer-generated images of the player, and other visual aids that demonstrate how each player's ABD will impact individual and team performance. In this scenario there seems to be some correlation in how ABD may be used as compared to the manner in which video of an athlete has been used. Perhaps ABD utilized for virtual and augmented reality performances will be incorporated in a similar way. Alternatively, in scenarios where ABD is incorporated into fantasy sports or sports betting products, courts will likely apply fairly subjective tests to determine whether the works incorporating ABD warrant copyright protection and to what extent under the Copyright Act. This will be particularly relevant as courts consider whether ABD constitutes "facts" in compilations to determine whether the originality test is met. These determinations will impact whether the resultant works are considered to be "the subject matter of copyright" which fall within the first requirement for a publicity-right claim to be preempted by the Copyright Act.[186]

Additionally, courts will consider whether ABD is used for the purposes of trade or as an advertisement when offered to

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[185] *Id.* at 1202.

[186] *See* Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426, 428 (8th Cir. 1993) (quoting 17 U.S.C.A. § 301(a)).

the public in the scenarios described. New factors and tests for determining what is considered the "subject matter of copyright" and what constitutes "for the purpose of trade" in these new product offerings are likely to emerge.

If the first prong of the test is satisfied, courts will also consider whether the state-law-right is equivalent to any of the exclusive rights within the general scope of the Copyright Act. This assessment will correspond with exclusive rights enumerated in § 106 of the Copyright Act.[187] These rights may evolve as well. For example, the manner in which copyrighted works may be duplicated or distributed may change. In light of the many technological advancements and its impact on the use and dissemination of copyrighted works, the U.S. Copyright Office recently undertook a public study to evaluate the effectiveness of safe harbor provisions contained in § 512 of title 17 of the United States Code governing copyrights.[188] This section also specifically addresses copyright infringement under the Digital Millennium Copyright Act (DCMA).[189] Perhaps the U.S. Copyright Office will undertake studies to determine the impact that new technologies have on exclusive rights under the Copyright Act and take legislative action to modify these rights. In any event, as the IoT develops and ABD is incorporated into copyrighted works, additional factors will come into play impacting the rights of athletes claiming ABD as a right of publicity and the rights of those creating copyrighted works.

iii. League or Third Party Claims of Copyright Protection in Expressive Works That It Creates Which Incorporate ABD

Leagues and other content creators may use ABD in their own copyrighted works. These works may be subject to copyright protection based upon a number of factors as previously set forth. The ability of a content creator to incorporate ABD within each work and to claim copyright protection of an entire work will vary with the various intellectual property and privacy laws affecting ABD and the requirements for obtaining copyright protection.

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[187] 17 U.S.C.A. § 106 (West 2002).

[188] U.S. COPYRIGHT OFFICE, *Section 512 Study* (Dec. 31, 2015), http://www.copyright.gov/policy/section512/; *see also* 17 U.S.C.A. § 512 (West 2010).

[189] 17 U.S.C.A. § 512.

In many instances, professional sports leagues have taken steps to protect their game broadcasts, statistics, and other features of the game.[190] Sports information, real-time data, and the works they are incorporated into are protected under law and recognized by courts under common law.[191] The question is whether ABD constitutes facts or property subject to certain rights, like privacy rights. As ABD is incorporated into more products and services – for commercial purposes or otherwise – Beneficiaries and courts will be challenged by laws that foster inconsistent results.

For example, the NFL already uses player-tracking data that includes, in part, athlete acceleration rate for its Next Gen Stats.[192] These Next Gen Stats are reported on-screen during football game broadcasts, incorporated into the 2015 NFL application for Xbox One and Windows 10 within the "Next Gen Replay" feature, and is integrated with the NFL's fantasy football offerings.[193] In the future, paid subscriptions for this data will be available to fans.[194] In each of these scenarios the final work that may claim copyright protection may receive different levels of protection.

In the first scenario explained above, the final product is the football game broadcast which is subject to copyright protection. In the second scenario, the final product is a software program, which is also entitled to copyright protection. The third scenario involving fantasy football offerings may or may not be entitled to copyright protection, depending on the originality of the work and other factors. In each scenario, ABD may be categorized as: (1) facts or statistics in the public domain not subject to intellectual property or privacy protection; (2) names, likenesses, and athlete information subject to protection as a publicity right; (3) indicia or characteristics protectable as a trademark; or, (4) original works of authorship subject to copyright protection. The extent of copyright protection afforded to the league or content creator in each of these scenarios will

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[190] *See generally* Ryan M. Rodenberg et al., *Real-Time Sports Data and the First Amendment,* 11 WASH J. L. TECH. & ARTS 63, 65 (2015).

[191] *Id.*

[192] Gale, *supra* note 5, at 342.

[193] *Id.* at 343.

[194] *Id.*

depend on which category or categories the ABD is deemed to belong to by courts.

Courts will also consider whether the final work is distributed for commercial purposes, whether athletes consented to the use of their ABD in that manner, and whether the newsworthiness defense limits use and disclosure of ABD. For these reasons, the resultant copyright protection in each medium will vary as will the right-holder's ability to enforce these rights.

One of the primary factors that must be addressed when leagues and others claim copyright protection of works that incorporate ABD is whether ABD is merely a fact, or property subject to corresponding rights. Under *Feist Publications*, the seminal case concerning the extent to which facts may be entitled to copyright protection, the Court held that facts utilized in copyrighted works lack the requisite originality if they are merely copied and compiled.[195] The *Feist* court also found that if data is not considered to be "original" then it "may not be copyrighted and [is] part of the public domain available to every person."[196] Factual compilations may possess the originality required for copyright protection if the selection and arrangement of facts warrants it, though protection is limited.[197]

This is true even if the compiler expends substantial time and resources in compiling a fact-based work. Under the "sweat of the brow" doctrine, copyright protection was extended to factual information within the compilation in order to reward the compiler for "industrious collection" of facts.[198] However, this doctrine contradicts the premise that "copyright rewards originality, not effort"[199] and the "sweat of the brow" doctrine was invalidated by the Copyright Act of 1976.[200]

In the event that leagues and other content creators claim ABD is merely facts while simultaneously claiming their works are entitled to copyright protection (and the U.S. Copyright Office and the courts agree with them) these parties must construct the works in a manner that is original under the statute and common law

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[195] *Feist Publ'ns*, 499 U.S. at 347.

[196] *Id.* at 347–48 (quoting Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1369 (5th Cir. 1981)).

[197] *See id.* at 348.

[198] *Id.* at 360.

[199] *Id.* at 364.

[200] *See id.* at 354–56.

because it is unlikely that they will obtain copyrights based upon their "industrious collection" of facts.

It remains to be seen whether ABD will be treated as (1) facts that are not protected by copyright, (2) creative expressions entitled to copyright protection, or (3) rights of publicity or trademarks that are subject to their own protections. To be sure, arguments in favor of each of these positions will be made.

For example, it will be advantageous, albeit challenging given the current regulatory and legal framework, for athletes to assert viable claims to protect ABD as a copyrighted work or publicity right, thereby allowing them to control and be compensated for the use of their ABD. For content creators such as leagues or their data collectors, it could be beneficial to take the position that ABD is merely facts in the public domain that are not entitled to copyright protection. This would allow these Beneficiaries to utilize ABD at will without compensating athletes.

Alternatively, leagues, sponsors, and others who create content incorporating ABD may claim their works are protected under copyright in order to prevent infringement by others. This may be a challenging argument to make if a work is comprised of "facts." One option for leagues and other content creators is to ensure these works meet the three-prong test to qualify compilations for copyright protection.[201]

Certainly the categorization of ABD is an important issue needing to be resolved as law and policy develops. Determining whether ABD is considered to be facts, property, or both will promote equitable division of rights. The U.S. Copyright Office, the legal community, and the sports industry must consider when facts are not merely facts. As far as ABD is concerned, such data is not merely facts, but rather a form of intangible property that contains extremely private information not in the public domain. Data that is not only property with corresponding rights, but also data that is subject to greater

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[201] *See id.* at 357 (holding that "the statute identifies three distinct elements and requires each to be met for a work to qualify as a copyrightable compilation: (1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and, (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an 'original' work of authorship.").

privacy protection should be treated differently from "facts" that are not comprised of these elements. As courts sift through the issues presented by ABD as property, Beneficiaries should take a proactive approach to ensure that ABD is properly licensed for use in creative works and determine when doing so is necessary.

3. Trade Secret Misappropriation Claims

During the summer of 2015, news broke of an alleged computer network hack of Major League Baseball's Houston Astros.[202] The FBI and U.S. Justice Department investigated the St. Louis Cardinals in what was believed to be the first time that a professional sports team had hacked the network of another team.[203] The hack was purported to have been carried out by vengeful front-office employees of the Cardinals.[204] By July 2016, Christopher Correa, a former Cardinals executive, was sentenced by a federal judge to nearly four years in prison after pleading guilty to five counts of unauthorized access to a protected computer.[205] Correa used a computer password belonging to a former Cardinals employee to hack into the Astros' player personnel database and email system.[206] The proprietary information that Correa accessed included scouting reports, trade discussions, player statistics, and notes on recent performances and injuries of team prospects.[207] Federal prosecutors estimated the Astros' cost of the data hack to be $1.7 million, which included the value of the information Correa used to draft players for the Cardinals.[208]

This situation emphasizes the value of trade secrets in sports, particularly proprietary information developed by sports organizations to track athlete health and performance. ABD falls

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[202] Michael S. Schmidt, *Cardinals Investigated for Hacking into Astros' Database*, N. Y. TIMES (June 16, 2015), http://www.nytimes.com/2015/06/17/sports/baseball/st-louis-cardinals-hack-astros-fbi.html?_r=0.

[203] *Id.*

[204] *Id.*

[205] Bob Levey, *Christopher Correa, Former Cardinals Executive, Sentenced to Four Years for Hacking Astros' Database,* N.Y. TIMES (July 18, 2016), http://www.nytimes.com/2016/07/19/sports/baseball/christopher-correa-a-former-cardinals-executive-sentenced-to-four-years-for-hacking-astros-database.html?_r=0.

[206] *Id.*

[207] *Id.*

[208] *Id.*

into this category. This proprietary information is a critical asset – "competitively valuable information" developed by a company over time – and may be considered a trade secret.[209] Trade secrets have been protected under U.S. Code Title 18 § 1030, the Computer Fraud and Abuse Act (CFAA),[210] and by statutes in 47 states modeled after the Uniform Trade Secrets Act (UTSA).[211] In the Cardinals hacking case, Correa was charged under the CFAA with Unauthorized Access to a Protected Computer.[212] On May 11, 2016, the Defend Trade Secrets Act of 2016 (DTSA) was adopted.[213] This federal statute supplements existing state laws and provides a federal civil claim for misappropriation of trade secrets.[214] With the enactment of the DTSA, companies and individuals can file "private lawsuits to remedy a wrongful taking of their trade secret information."[215] According to John Carson and Cameron Cushman, intellectual property attorneys with Lewis Roca Rothgerber Christie LLP, the DTSA is modeled after the UTSA, but also allows for ex parte seizure orders, creates immunity from trade secret misappropriation actions for whistleblowers, imposes requirements on employers, and provides additional protections to those who own trade secrets.[216]

Trade secrets under the DTSA and the UTSA generally include those that derive independent economic value from *not* being generally known to . . . another person (under the DTSA) or other persons (under the UTSA) who can obtain economic value from its disclosure or use.[217] Trade secret misappropriation

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[209] Dean Pelletier, *Stealing Signs, Bases and, Now, Secrets,* PELLETIER L. (Mar. 8, 2015), http://www.pelletier-ip.com/?p=219.

[210] Lee et al., *supra* note 44.

[211] John Carson & Cameron Cushman, *DTSA Versus UTSA: A Comparison of Major Provisions,* LAW360 (June 8, 2016, 11:08 AM), http://www.law360.com/articles/803049/dtsa-versus-utsa-a-comparison-of-major-provisions.

[212] Plea Agreement of Christopher Correa, United States v. Correa, No. H-15-679 (S.D. Tex. Jan. 8, 2016).

[213] Carson & Cushman, *supra* note 210.

[214] Lee et al., *supra* note 44.

[215] Nineveh Alkhas et al., *The Notice Provision of the Defend Trade Secrets Act (DTSA): What Employers Must Do Now,* NAT'L L. REV. (May 20, 2016), http://www.natlawreview.com/article/notice-provision-defend-trade-secrets-act-dtsa-what-employers-must-do-now.

[216] Carson & Cushman, *supra* note 210.

[217] *Id.*

claims may be brought by employees or non-employees for wrongful access to information. Further, the statutory definitions of what constitutes "access," "unauthorized access," and the scope of authorized access are ambiguous[218] and will likely receive additional interpretation by the courts.

In a recent Ninth Circuit case concerning trade secret misappropriation, *United States v. Nosal*, the court held that misappropriation occurred when an organization's former employee accessed a protected computer without authorization by utilizing passwords and other security credentials provided to him by the organization's current employees.[219] This is different from the situation involving the St. Louis Cardinals where a current employee used a former employee's password to access a computer and trade secrets. One note from the case that is of concern is the ambiguity surrounding who is authorized to provide access to a protected computer or system. Judge Reinhardt who wrote the dissenting opinion in this case notes that the majority opinion would appear to "punish innocent cases of password-sharing."[220]

The potential for increased exposure to liability under trade secret law is real. *Nosal* demonstrates that there are various means of misappropriating trade secrets, that this area of law is unsettled, and that there are new statutory requirements for organizations to comply with to prevent trade secret misappropriation.[221] As the situation with the St. Louis Cardinals illustrates, an employee or other person who intentionally accesses information from a protected computer without authorization can incur liability on behalf of the entire organization. Data breach and hacking incidents continue to occur and will likely increase. The area of trade secret misappropriation through the unauthorized access to a protected computer will continue to develop.

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[218] *See* United States v. Nosal, 828 F.3d 865, 888–898 (9th Cir. 2016) (Reinhardt, J., dissenting).

[219] *Id.* at 878.

[220] Orin Kerr, *Password-Sharing Case Divides Ninth Circuit in Nosal II,* WASH. POST: VOLOKH CONSPIRACY (July 6, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/06/password-sharing-case-divides-ninth-circuit-in-nosal-ii/?utm_term=.b1d21f1f4277; *see also Nosal*, 828 F.3d at 889.

[221] *See Nosal*, 828 F.3d.

As a result, athletes, leagues and other ABD Beneficiaries should monitor developments in trade secret law and adopt strategies to protect ABD as a trade secret. Sports organizations and other Beneficiaries must be mindful of the liability that they may be subject to when collecting and using ABD that could qualify as a trade secret.

4. Privacy Rights and Athlete Biometric Data as Protected Information

Perhaps the legal issues that are most significant for sports technology players to understand pertain to privacy and the impact privacy laws have on not only the collection, use and dissemination of ABD, but also the transmission, storage, and protection of ABD. The IoT and IoE will evolve rapidly, fueled by technological advances and big data. As this occurs, there will be a degree of uncertainty involved in the application of law to sports technology issues. As Johnny Madill, an attorney who advises clients on technology and regulatory matters notes:

> The challenge, therefore, for everyone from athletes, clubs, governing bodies and federations, to developers, manufacturers, sports data analytics professionals, sponsors, agents and lawyers, is to fully understand the data privacy and legal challenges brought about by the sport's continuing digital revolution.[222]

Madill observes that the initial disputes related to sports technology that have surfaced represent only a fraction of those that will arise due to technology's impact on sports.[223] Again, due to the complexity of the issues and analysis, only a superficial treatment of the issues will be presented here. This will identify potential issues ABD Beneficiaries may encounter in the collection, use and dissemination of personally identifiable information (PII), present situations that are somewhat analogous to the manner in which the sports industry will utilize ABD, and analyze the impact on ABD Beneficiaries including the

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[222] Jonny Madill, *Wearable Tech in Sport: The Legal Implications of Data Collection,* LAWINSPORT (Apr. 9, 2015), http://www.lawinsport.com/articles/item/wearable-tech-in-sport-the-legal-implications-of-data-collection.

[223] *Id.*

implication of First Amendment speech on ABD from a privacy standpoint.

The term "privacy" is defined by leading scholar, Daniel J. Solove, as "a set of protections against a related cluster of problems."[224] In the U.S., the legal landscape consists of a "patchwork of privacy protections."[225] Which laws govern depend on the type of data that is used and how it is used.[226] Laws create responsibilities for parties who own, collect, manage, disclose and maintain personally identifiable information. The collection, use, and dissemination of ABD presents distinct legal issues because, on one hand, ABD is private information protected by law and, on the other hand, ABD may also be newsworthy information and a commodity subject to public disclosure. Further, leagues and teams that collect ABD are in a unique position to collect Health Information from employees which has commercial value. Are there any other employers in the possession of IIHI who have such a large market and business opportunity for that information?

Remember that Health Information, IIHI and PHI are subsets of PII. To identify the most relevant privacy laws and practices pertaining to ABD, we can look to the application of laws in the use of wearable technology at large and to the use of mobile health apps since both deal with the collection, use and dissemination of Health Information. In both instances, additional considerations specific to privacy are also identified, including requirements for the transmission, handling, and security of Health Information. Since ABD will be used in a variety of circumstances, identifying relevant standards that affect PII is also important. The focus of this discussion will be on the privacy standards most relevant to the sports industry's collection, use, and dissemination of ABD via wearable technology with an eye to the future that contemplates implantables, injectables, and the IoE.

Like mobile phone and mobile health app providers, the sports industry legally contends with health-specific laws and

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[224] Anne Marie Helm & Daniel Georgatos, *Privacy and Mhealth: How Mobile Health "Apps" Fit into a Privacy Framework Not Limited to HIPAA,* 64 SYRACUSE L. REV. 131, 134 (2014) (quoting DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 40 (2008)).

[225] *Id.* at 133.

[226] *See id.* at 147.

regulations on top of all of the other legalities confronting the sports industry. Leagues and teams already collect and share data for health-related purposes and for commercial purposes. Which privacy laws and standards apply can be confusing.

The most logical place to start an examination of applicable privacy standards is with HIPAA since ABD is collected by professional leagues and teams as Health Information collectors and transmitters as well as employers of athletes. ABD is Health Information, IIHI and PHI under HIPAA requiring HIPAA compliance.[227] Under the "employment record exception" to the Rule promulgated by HIPAA enforcer, the HHS, health information that relates to an employee's job performance is part of an employee's employment record which is outside the scope of HIPAA.[228] However, ABD collected for the purpose of employee performance and included in an employment record is afforded other protections of confidentiality by law.

In 2002, the HHS considered a comment regarding the status of a professional sports team as a "covered entity" under HIPAA.[229] It reasoned that professional sports teams are unlikely to be covered entities that owe a duty of confidentiality to athletes.[230] Review of this matter by the HHS was limited in scope and certainly did not contemplate commodified and monetized PHI. While there may be a very limited exception to the treatment of athlete PHI under the HIPPA Rule, the use of athlete PHI remains limited by professional sports leagues' CBA and uniform player contracts which contain provisions authorizing leagues and teams to use some of an athlete's Health Information[231] unless the information is especially sensitive, such as when an athlete has a sexually transmitted disease.[232]

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[227] *See* Health Insurance Portability and Accountability Act, 45 C.F.R. §§ 160.103, 164.514 (2014).

[228] *Id.* at §§ 160.103, 164.512.

[229] Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 52,841, 53,193 (Aug. 14, 2002) (to be codified at 45 C.F.R. pt. 160 & 164).

[230] Michael K. McChrystal, *No Hiding the Ball: Medical Privacy and Pro Sports*, 25 MARQ. SPORTS L. REV. 163, 165 (2014).

[231] *Id.* at 166.

[232] *Id.* at 169.

Privacy rights related to athlete PHI are underscored by professional leagues and teams acting as "covered entities" under HIPAA. Covered entities have special obligations to protect PHI. In his article, *The Price of Health Privacy in Sports,* Travis Walker, Regulatory Affairs Specialist for Regence BlueCross BlueShield of Utah, notes that under HIPAA's Privacy Rule sports teams that submit a bill charge for a service or transmit PHI to an insurance plan in an electronic format is considered a covered entity.[233] Some organizations may have divisions that are considered covered entities and some that are not so the manner in which information is shared and with whom it is shared determines whether HIPAA attaches.[234]

How and when HIPAA applies to ABD that is collected, used and disseminated for other purposes is unclear. Looking to privacy considerations pertaining to wearable technology is useful. For example, scholars observe that privacy concerns arise with wearable technology in relation to wearers, users, and those in surrounding environments. [235] Wearables allow massive amounts of data to be gathered, observed, and shared, potentially without the knowledge of the person to which the ABD corresponds and belongs to.[236] The data that is collected can be very sensitive information about health or specific medical conditions. New datasets may be used by third parties for a variety of purposes including for marketing and discriminatory practices in addition to job-related purposes.[237]

Additionally, data may be shared among multiple parties and devices and transmitted to the cloud or any remote storage system creating additional risk.[238] Big data capabilities, together with sensors, pierce many spaces that were previously private. Further, "always-on wearable technologies . . . [and] whole classes of networked devices will only expand information collection still further [making] the notion of limiting information collection challenging, if not impossible." [239] In

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[233] Travis Walker, *The Price of Health Privacy in Sports*, S.J. QUINNEY C. L. (Nov. 12, 2015), http://www.law.utah.edu/the-price-of-health-privacy-in-sports.

[234] *Id.*

[235] Thierer, *supra* note 20, at 54.

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Id.* at 63 (citing a recent White House Big Data Report).

addition to health information privacy, other areas related to privacy may come into play as ABD is utilized in a variety of ways, including communications, location, storage, mobile, and consumer privacy.[240] Further, as mobile devices are utilized to collect Health Information they are subject to laws regarding qualification as a medical device and will be subject to relevant privacy protections.[241]

The types of data collected and the manner in which they are used will continue to expand while those collecting and handling data attempt to comply with many laws, standards, and protocols concerning this data. As this happens, different privacy laws and fair information practices (FIPS) will come into play to provide guidance for those who use ABD.

A number of FIPs models have been created and adopted by countries, regions and industries since the 1970s.[242] Robert Gellman, a privacy and information policy consultant and former Chief Counsel and Staff Director, Subcommittee on Government Information, Committee on Government Operations, U.S. House of Representatives, compiled a list of federal privacy statutes and FIPs that govern and shape information privacy practices.[243] These apply to some extent to the collection, use and dissemination of ABD. They include:

- The Privacy Act of 1974;[244]
- A 2012 White House report on consumer privacy entitled *A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy* which includes a Consumer Bill of Rights that pertains to companies that collect personal data directly from consumers;[245]
- A 2012 Federal Trade Commission report setting forth the Commission's privacy framework;[246]
- A 2012 Department of Health and Human Services Policy containing "key privacy principles and a toolkit to guide

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[240] Helm & Georgatos, *supra* note 223, at 148.

[241] *Id.*

[242] Robert Gellman, *Fair Information Practices: A Basic History* (Feb. 11, 2015), http://bobgellman.com/rg-docs/rg-FIPShistory.pdf.

[243] *Id.*

[244] *Id.* at 5.

[245] *Id.* at 33.

[246] *Id.* at 21.

efforts to harness the potential of new technology and more effective data analysis, while protecting privacy;"[247] and

- A 2014 report from the Executive Office of the President entitled *Big Data: Seizing Opportunities, Preserving Values*.[248]

The Privacy Act of 1974 [249] promulgates the law governing privacy protection in the U.S. The reports and policies protect consumer information and PII collected by companies in the private sector and by the government, and provide FIPs pertaining to the collection of Health Information. Leagues, teams, professional associations, athletes, third party data processors, sports fans, and others who participate in the collection, use, and dissemination of ABD will be impacted by these regulations and policies as technology and data collection practices evolve.

The primary privacy concern for ABD is the protection and proper use of Health Information. Health Information has long been recognized as deserving of special privacy protections.[250] Special treatment of health information was first required under the 1966 Freedom of Information Act, which prohibits disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[251] In 1996, statutory privacy protections specific to Health Information were established under HIPAA. [252] The Health Information Technology for Economic and Clinical Health Act (HITECH) was passed in 2009 as part of the ARRA to promote the adoption and utilization of a nationwide Health Information technology infrastructure.[253] This legislation gave rise to the new Breach Notification Rule and resulted in the "expansion of the HIPAA Privacy, Security, and Enforcement Rules."[254]

The 2012 Department of Health and Human Services report referenced previously includes FIPs intended to protect

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[247] *Id.* at 23–24.
[248] *Id.* at 28.
[249] *Id.* at 10.
[250] Helm & Georgatos, *supra* note 223, at 147.
[251] *Id.*
[252] *Id.*
[253] *Id.* at 152–54.
[254] *Id.* at 154.

privacy by allowing those whose Health Information is collected to control and limit access, collection, use, and disclosure of information and to ensure the accuracy of their IIHI.[255] The report also proposes that record holders take steps to ensure data integrity for Health Information and types of information not included under the HIPAA Privacy Rule.[256] Finally, parties who collect, store and otherwise handle Health Information are strongly encouraged to employ reasonable security safeguards to protect data and to comply with FIPs intended to protect privacy.[257]

In legislation and the established standards for information privacy, FIPs are most concerned with an individual's ability to make informed decisions about the collection, use, and disclosure of their IIHI, to prevent the occurrence of erroneous information, to prevent discrimination based upon IIHI and to prevent unauthorized or inappropriate access, use or disclosure.[258] FIPs also stress the importance of accountability by data collectors and handlers since they collect and control sensitive data.[259] Leagues, teams, and other Beneficiaries who collect and handle ABD will be impacted by information privacy FIPs.

According to Adam Greene, former employee of HIPAA enforcer Department of Health and Human Services and current partner in the HealthIT/HIPAA practice of the Washington D.C. law firm Davis Wright Tremaine, "whether or not [HIPPA] applies is more about who is handling the data than about the content of the data itself."[260] Although referring to mobile apps that collect Health Information from consumers, the comments are relevant to professional sport collection of ABD as electronic PHI from athletes which may be used to provide healthcare and to monetize data for revenue. This data collection may have additional implications under individual state statutes dealing

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[255] Gellman, *supra* note 241, at 23–24.

[256] *Id.* at 24.

[257] *Id.* at 25.

[258] *See id.* at 23–27.

[259] *See id.* at 24–27.

[260] Mark Sullivan, *Health Apps Could be Heading into a HIPAA Showdown*, VENTUREBEAT (June 13, 2014, 9:56 AM), http://venturebeat.com/2014/06/13/health-apps-could-be-heading-into-a-hipaa-showdown.

with biometric data privacy, even for entertainment purposes.[261] Each Beneficiary must consider his actions in relation to ABD that contains Health Information to ensure compliance with relevant privacy laws and regulations.

"[N]o silver-bullet solution to these complex privacy issues exists. As [attorneys] with Morrison Foerster have asserted, 'threats to security and privacy vary considerably and the breadth of challenges presented means that a one-size-fits-all approach to policy and/or regulation is unlikely to work.'"[262] A generally-accepted practice for data collectors has been notifying individuals that their private information is being collected and stating generally how that information may be used and obtaining consent. Due to the sophistication of wearable technology and the sheer amount of data wearables can collect, finding a notice and consent solution that can foresee every possible use and misuse of ABD is challenging.[263] For this reason, academics, government officials and private companies suggest using a model focused on the context of data use and one that promotes data control and accountability by data collectors.[264]

To illustrate how to apply existing privacy principles in a new IoT environment, many IoT players including Intel, Oracle, AT&T, and General Electric believe that a good model for managing notice and choice is based upon what happens to collected data – how it is used, real world harms, benefits and consequences – then considering what controls are needed to protect privacy within the circumscribed use.[265] Data collectors will control the collection, use and dissemination of data and be held accountable for how they manage data based upon data contributor choice and public policy.[266] Likewise, under this model, leagues, teams, and Second-Generation Beneficiaries

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[261] Eriq Gardner, *Why Hollywood Should Pay Attention to Biometric Privacy*, THE HOLLYWOOD REPORTER (May 19, 2016, 9:38 AM), http://www.hollywoodreporter.com/thr-esq/why-hollywood-should-pay-attention-895713.

[262] Thierer, *supra* note 20, at 74.

[263] *Id.* at 61.

[264] *Id.* at 65.

[265] *Id.* at 66–67 (citing Letter from Daniel W. Caprio, Jr., Senior Strategic Advisor, Transatlantic Computing Continuum Policy Alliance, to Donald S. Clark, Sec'y, U.S. Fed. Trade Comm'n 3 (Jan. 10, 2014), *available at* http://perma.cc/5JL6-23K3.

[266] *Id.* at 64–65.

who handle ABD can define fluid, logical restrictions on ABD based on the purposes for which it is collected, how it will be used, and to whom and for what purposes it will be disseminated. This set of standards guiding the collection, use and dissemination of ABD can anticipate technological advances and their impact on the use of ABD, plus promote realistic, futuristic problem-solving before legal risk escalates. This approach is desirable considering the potential data collection and use that wearable technologies could provide. Traditional FIPs certainly influence data collection, use, dissemination, and protection practices; however, serendipitous discoveries and data-driven innovation requires organically-created, flexible, and evolving privacy and security practices, some of which may occur outside the realm of public policy.[267] As they develop, new privacy and security standards will promote high transparency about data collection and use, make smart and efficient use of data, limit sharing of information with too many third-parties, and safeguard data against unauthorized interception or data breaches.[268]

Already, professional leagues and teams utilize tools to maintain the security of electronic medical records (EMRs) that may transfer from team to team as players are traded.[269] The notion of data sharing and protection of sensitive Health Information is an issue that the NFL has already addressed.[270] The NFL coordinates with medical providers and EMR integration companies to collect and maintain players' personal medical information in an employment record.[271] The result is an integrated system that shares player Health Information including images, information, video, and injury data with teams, hospitals, and other care providers beginning at the Combine through a players' career.[272] The NFL could be poised to securely collect, use, and disseminate ABD not only for the

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[267] *Id.* at 73.

[268] *See id.*

[269] *E.g.*, Lucas Mearian, *NFL CIO: Tech Isn't the Problem with Health Info Sharing,* COMPUTERWORLD (Apr. 17, 2015, 2:59 AM), http://www.computerworld.com/article/2911097/nfl-cio-tech-isnt-the-problem-with-health-info-sharing.html.

[270] *Id.*

[271] *See Id.*

[272] *Id.*

purpose of healthcare, but also for commercial purposes including commodification and monetization.

With respect to the collection, use, and dissemination of ABD for the purpose of health, safety and performance as well as for commodification and monetization, security measures for the protection of ABD will be more sophisticated. The IoT will require companies to rethink how they handle security and implement layers of security measures that contemplate how data is collected, the devices used to collect and transmit that data and the non-standard protocols on which they operate, real-time data collection and use, and big data capabilities.[273] For leagues and teams, this means that adaptive strategies must be implemented to maintain the security of ABD.

Finally, in relation to highly-sensitive Health Information, First Amendment speech protections do allow for some reporting of athlete health and injuries as matters of public concern. The protections around the use and dissemination of Health Information and ABD are somewhat diminished due to the newsworthiness of athletes' sports endeavors and because athletes authorize limited use of this Health Information through terms of their contracts with the leagues and teams. However, contractual obligations, public policy, and in some cases an athlete's actions to prevent disclosure can limit third-party disclosure and use of Health Information (consider Seattle Seahawks running back Marshawn Lynch, well-known for his limited comments to the media). Where ABD falls on the scale of private information – whether as PHI, an employment record, or a commodity – is difficult to say.

Privacy torts by nature involve a careful weighing of competing values, and courts are tasked with striking a balance among them. "The values on both sides of the scale are inordinately difficult to measure" and "[t]he need for flexibility and adaptability will be paramount if innovation is to continue in this space."[274] This will occur in light of the "high value Americans place on privacy in balancing it with other values,

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[273] Jaikumar Vijayan, *The Internet of Things Likely to Drive an Upheaval for Security,* COMPUTERWORLD (May 2, 2014, 7:07 AM), http://www.computerworld.com/article/2488878/security0/the-internet-of-things-likely-to-drive-an-upheaval-for-security.html.

[274] Thierer, *supra* note 20, at 70–71 (quoting Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205, 261 (2012)).

such as freedom of speech and journalistic freedoms," and "economic innovation and consumer choice."[275]

To summarize, U.S. privacy laws protect personal information. Health Information, including ABD, enjoys a higher level of protection due to its sensitive and highly confidential nature. ABD that is collected, used, and disseminated for the purpose of publicizing and promoting a league, team, or sport *directly* – such as to improve individual and team gameplay – justifies the use of ABD, but still requires leagues and teams to comply with employment law, HIPAA, and other privacy laws. This is due to the reality that leagues and teams may be considered "covered entities" under HIPAA, requiring them to maintain confidentiality and security protections of athlete PHI, which encompasses ABD. Further, athlete PHI and, therefore, ABD is part of an employment record, which also must be maintained as confidential.

Alternatively, if the collection, use and dissemination of ABD is undertaken for the purpose of *indirectly* publicizing or promoting a league, team, or sport by commercialization – that is, commodifying and selling ABD or using it to enhance or create content, these practices are governed by privacy laws and related security practices that will surely evolve as wearable technology and the IoT become more pervasive.

ABD may be collected for reporting athlete health status for the purposes presented previously, and in other ways that will continue to develop as technology evolves. As the market morphs to include products designed to increase fan engagement, these methods of indirectly publicizing and promoting leagues, teams, and individual athletes must be contemplated under existing contracts and privacy law. As wearable technology and data use evolves, all Beneficiaries in the sports ecosystem must contemplate the impact on the collection, use, dissemination and protection of ABD and alter their practices accordingly.

III. REAL WORLD SOLUTIONS FOR THE ATHLETES AS PRIMARY BENEFICIARIES, AND FOR LEAGUES, TEAMS, PLAYERS ASSOCIATIONS AND THEIR PARTNERS AS ADDITIONAL BENEFICIARIES OF ABD

[275] *Id.* at 70.

The issue of how ABD, collected via wearable technology, should be treated under the law is complex and several practical problems have been presented pertaining to its ownership and use. Sound business practices, combined with legal solutions that promote innovation while protecting ABD, will allow athletes and other ABD Beneficiaries to fully realize the potential of using ABD in sports and serve as a model of well-reasoned methods for moving into the age of the IoE. Where such complexity exists, a layered approach to providing solutions is required.

First, private actors who are "in the trenches" so to speak – the athletes, leagues, teams and players associations most closely involved with the collection, use and dissemination of ABD – can tackle ABD ownership, privacy and use issues in a strategic manner and address them in contracts. These parties should take the lead in resolving issues by taking a proactive, collaborative approach to address privacy and property right concerns before they arise in order to avoid high transactional costs that are associated with having issues decided by the courts. Solutions may be captured in collective bargaining agreements and individual player contracts.

Next, ABD should be distinct from other categories of sports information, whether or not collected, used, and disseminated in real time. This is due to the unique characteristics that make it simultaneously a right of publicity, an intellectual property right, Health Information, newsworthy information and a stand-alone commodity that commands substantial revenue available through multiple revenue streams for all ABD Beneficiaries. Once categorized, ABD should be organized, tracked and protected to comply with corresponding data privacy laws and to simplify administrative business practices when utilizing and disseminating ABD.

And last, as the issues related to ABD unfold, policymakers, legislators and courts should adopt a balanced approach that will allow all Beneficiaries in the sports industry to promote innovation, adopt practices that conform to societal norms, and address ethical and legal risks based on real consequences as technology evolves. Employing existing legal principles and allowing them to develop with technological advancements will encourage innovation.

Specifically regarding publicity rights, Brittany Lee-Richardson, a New York sports and entertainment law attorney, suggests enacting a federal statute to create uniformity in the treatment of publicity rights to accommodate this era of publicity

and promotion.[276] Her proposition is valid and may be one way to simplify resolution of legal issues made more complex by technological advances. However, such legislation may be premature because the parties who are most directly involved and affected should first be allowed to create appropriate solutions in the open market. This is particularly true where the sports industry encounters nuances that the entertainment industry may not so that a "one size fits all approach" may not be most beneficial to affected parties.

Generally, solutions to be examined and discussed include:

1. Developing a position and strategy for athletes, players associations, leagues and their partners/subsidiaries;
2. Ensuring rights with respect to ABD are properly defined and flow appropriately through all assignments, licenses and other relevant contracts, current and future;
3. Drafting and adopting policies, procedures and best practices to ensure protection of athlete property and privacy rights and reserving additional rights for athlete/player association exploitation as technology and the definition of "publicity rights" evolves;
4. Requiring by contract and under law that leagues, teams and their partners who handle ABD respect athlete rights in ABD and comply with generally accepted cyber-security practices for ABD depending on its designation as Health Information, Personally Identifiable Information, etc.; and,
5. Strategically identifying and preserving revenue streams for athletes, players associations, their representatives and media companies who may utilize ABD and other athlete characteristics as technology and mediums for ABD use evolve.

By taking a proactive approach that contemplates growth of the business and corresponding compliance factors from the start, leagues, teams, and their partners will be in a better position to optimize revenue generation opportunities as

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[276] Brittany Lee-Richardson, *Multiple Identities: Why the Right of Publicity Should be a Federal Law,* 20 UCLA ENT. L. REV. 189, 219–29, 232 (2013), *available at* http://escholarship.org/uc/item/7z58n0x8.

technology and data use evolve while minimizing the cost of related infringement, breach, and other legal claims.

A. THE MOST PROACTIVE APPROACH IS FOR ATHLETES, PLAYERS ASSOCIATIONS AND LEAGUES TO UTILIZE CONTRACTS TO BRING CLARITY AND SOLUTIONS TO THE COLLECTION, USE AND DISSEMINATION OF ABD

The athletes to whom ABD belongs have the sole ability to assign rights to ABD and control its collection, use, and disclosure. As the use of ABD expands in programming, statistics, video games, virtual reality experiences, mobile apps, fantasy sports, sports betting, and other platforms, Primary Beneficiaries must take steps to ensure control over their ABD.

1. Primary Beneficiary Athletes: Leverage Individual Contracts and Collective Bargaining Agreements

Through their contracts with leagues, teams and players associations, athletes must protect their right of privacy and their publicity and intellectual property rights in ABD. This may be accomplished by defining what constitutes ABD as clearly as possible. Next, the scope and method of its collection should be adequately identified with an eye looking forward to new technologies, capabilities and uses that will continue to shape practices in this area. Athletes should consider how, when and why ABD should be collected to determine a licensing strategy. Doing this in concert with other athletes and players associations will more effectively protect rights. Athletes and players associations can benefit as they proactively participate in discussions about ABD and act to utilize and protect it. Contracts should address the purposes for which ABD will be used and provide for its protection. Further, it is beneficial to address ABD challenges and determine solutions using a committee comprised of stakeholders as was recently agreed to by the NBA and NBPA.[277]

Terms governing athlete consent should be included as well. These terms should specify what does and does not constitute consent. Where ABD is highly sensitive information

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[277] Diamond Leung, *NBA's New Labor Deal to Address Wearables, Data, How David Stern's Vision Could Come True,* SPORTTECHIE. (Dec. 15, 2016), http://www.sporttechie.com/2016/12/15/sports/nba/nbas-new-labor-deal-address-wearables-data-david-sterns-vision-come-true.

and because state statutes governing individual privacy rights may require it, express, written consent is recommended. In order to protect player rights, requests for athlete consent to use ABD for specified purposes, and the consents that are received or withheld, should be tracked and recorded. Contracts should include provisions that require methods such as these to assure athlete rights are not eroded or waived as a result of consent by silence or acquiescence.

In any event, athletes should carefully consider what constitutes consent and thoughtfully determine what types of collection, use and dissemination of ABD will be consented to. Though it is impossible to imagine every possible scenario, athletes and their agents should determine the many ways in which ABD may be used now and in the future in order to reserve the athlete's right to protect and, if desired, use ABD in his or her own ventures where ABD may be monetized. They should consider the particular purposes for which ABD may be used currently as well as those not contemplated under the contract or that fall outside the scope of the contract. Athletes and agents may coordinate with leagues and teams to discuss how ABD that is collected will be categorized and valued. Contracts should include corresponding compensation terms for ABD since it is highly sensitive information that is also a property owned by the athlete. In the future, athletes will likely have more opportunities to utilize their publicity rights, including their ABD, in new ways. Athletes and their agents will reap greater rewards if they pre-determine how they will utilize ABD in other ventures then craft contract carve outs that retain athlete rights for these ventures or partner with media companies to capitalize on these rights by licensing them to third parties.

Finally, stringent security requirements should be set forth in contracts to protect ABD from unwanted disclosure by parties other than the athlete. In relation to this, athletes and their agents should be aware of the impact athlete disclosure of ABD may have on his ability to prevent disclosure by third parties and implement a strategy to limit or prevent disclosures that may adversely affect privacy and property rights.

Incorporating contract provisions that clarify what ABD is, how it may be collected and used, and how it will be protected are the initial, primary goals for athletes as the Primary Beneficiaries. Maintaining control of their privacy and publicity rights coupled with receiving commensurate compensation for

their ABD via contracts will reduce transactional costs of pursuing claims in court and prevent erosion or these rights.

2. First- and Second-Generation Beneficiaries: Add Relevant Provisions to Collective Bargaining Agreements, League-Professional Association Licenses and Vendor Agreements

First-Generation Beneficiaries including leagues, teams and players associations have some interests that are complimentary and others that compete with one another. Leagues and teams want to utilize ABD for altruistic reasons and for revenue generation. Players associations seek to protect player rights while capitalizing on these rights as well. All of these organizations rely upon athletes to assign, license or otherwise grant these rights. For these reasons it is in the best interest of these parties to develop a strategy that protects athlete rights and compensates them for the use of their property.

Utilizing the provisions that are recommended above for use in athlete contracts, professional associations should promote and negotiate for inclusion of appropriate provisions in collective bargaining agreements, league-players association licenses, and individual player contracts. Players associations should review the property rights assigned to them by athletes and compare them to property rights that players associations have licensed to leagues and teams via collective bargaining agreements and individual player contracts. Ambiguous definitions that may or may not include ABD should be clarified so that athletes, leagues, teams and players associations have the same understanding of what rights are being licensed and confirm that those rights match the rights assigned or licensed by athletes. The rights and obligations that are assigned from athletes to players associations and licensed from athletes and players associations to leagues and teams must consistently flow through each agreement. Definitions of assigned and licensed property must include ABD and clarify what it is, what it is not, and how it may be collected and used. This approach will reduce claims, disputes and related costs while identifying revenue streams from ABD utilization and establishing profits for each party involved.

The rights and responsibilities connected to the collection, use and dissemination of ABD conveyed within these agreements, assignments and licenses must trickle down to Second-Generation Beneficiaries who partner with First-Generation Beneficiaries to collect, analyze, process, disseminate and protect ABD. For example, in a scenario where

a league partners with or otherwise engages a vendor to collect, analyze, report on, house, and create content from ABD, the league should ensure it has procured consent from athletes to collect and use their ABD from a privacy law perspective and procured a license to utilize the ABD from a property law perspective, if the situation warrants it. If the league has taken these steps, it will then sublicense these rights to Second-Generation Beneficiaries. This approach will reduce infringement claims and related costs to First- and Second-Generation Beneficiaries. Optimally, it will also create a method for tracking parties who collect, create content, and use that may serve as the basis for compensating athletes and players associations for property rights. Additionally, security obligations described in collective bargaining agreements and other governing documents can be included in agreements between leagues and their ABD vendors to ensure league compliance and offset risk, passing some liability to those parties handling ABD. As a result, leagues may seek warranties and indemnification from Second-Generation Beneficiaries who may create infringing content or breach security obligations. Second-Generation Beneficiaries may likewise seek warranties and indemnification from leagues who may provide infringing or unauthorized property to Second-Generation Beneficiaries.

Players associations, leagues and vendors should utilize contracts to properly license rights, govern ABD collection, outline use and security practices, clearly state obligations, and precisely allocate risk. Taking this approach is a cost-effective way to procure and sublicense rights, reduce infringement claims and transaction costs, and increase profit margins.

3. Third- and Fourth-Generation Beneficiary Sponsors and Content Creators: Protect Interests by Incorporating Appropriate Contract Provisions

Leagues and players associations also have obligations to sponsors, endorsers, data disseminators and content creators. These Third-Generation Beneficiaries must also be legally obligated to observe relevant rights and responsibilities in their use of ABD as sponsors, endorsers, content creators and disseminators. They will also want to be protected from potential infringement claims from players and professional associations as well as security breach claims from Primary and First-Generation Beneficiaries.

The contracts that leagues and players associations enter into with Third-Generation Beneficiaries should clearly articulate rights and obligations with respect to ABD. Parties to these agreements must undertake practices to prevent infringement of publicity and intellectual property rights and to comply with security-related obligations in the handling of ABD. Contract provisions should state these obligations and grant appropriate rights to Third-Party Beneficiaries who utilize ABD to create content. This approach will reduce liability for Third-Party Beneficiaries and costs related to defending potential infringement and security breach claims.

B. PROPERTY CATEGORIZING AND MANAGING ABD SIMPLIFIES COMPLIANCE ACTIVITIES AND BUSINESS PRACTICES

Clear guidelines must be developed by leagues, teams, and their technology services providers regarding the collection, use, and dissemination of ABD. These must then be conveyed to Fourth-Generation Beneficiaries, sports fans and society, who may create content and incorporate elements of ABD as they engage in the sports ecosystem.

Proactively addressing the issues that are inherent in ABD collection, use and dissemination are important because this may curtail transaction costs that arise as a result of having courts or regulatory bodies determine the roles, responsibilities and rights of affected parties. Further, a "wait and see" approach, rather than strategic planning, is likely to result in a loss of the rights of Primary Beneficiaries and revenue that all Beneficiaries stand to gain. To protect ownership and privacy rights of Primary Beneficiaries, First-Generation Beneficiaries must adopt policies and procedures to govern the collection, use, protection and dissemination of ABD, anticipating to some extent how biometric data and big data practices will evolve in the coming years. Departments within leagues, teams and players associations and their affiliated entities (e.g., Digital Content Creation, Business Development, R&D, Product Development, Marketing, Legal, and Compliance) can coordinate efforts to ensure product offerings are built in a manner to respect and protect the rights of Primary Beneficiaries.

Articulating reasonable and clear practices for utilizing only that ABD which is necessary and proper in news reporting and revenue-generating endeavors such as utilizing ABD in mobile applications and fantasy sports information will allow for greater protection of athlete privacy. This may also diminish discriminatory practices due to disclosure of unfavorable Health

Information and the availability of genetic predisposition information. Categorizing ABD when it is collected based upon how it will be used will promote compliance with applicable publicity rights, intellectual property and privacy laws.

ABD collected, used and disseminated for the purpose of health, safety, performance and injury prevention should be categorized distinctly from ABD used as a commodity, which is licensed or sold to other parties to generate revenue. Such would be the case for ABD used by Third-Generation Beneficiaries such as fantasy sports providers who provide ABD to fantasy sports participants to be used in their contests. Third-Generation Beneficiaries such as sponsors and endorsers who use ABD in their own product offerings to create and must also adopt best practices to protect ABD and utilize it only within the authorizations granted by licensors. Due to the potential uses of ABD by First-Generation Beneficiaries in programming and even in broadcasts containing ABD as a component of enhanced statistics, these uses should be examined and best practices should be adopted to ensure protection of the rights of Primary Beneficiaries and compliance with law and assigned or licensed rights and other contractual obligations. Further, First-, Second- and Third-Generation Beneficiaries must employ frameworks providing for athlete notice and consent regarding collection, use, dissemination and protection practices involving ABD.

The athletes as Primary Beneficiaries and their agents must be educated regarding the collection, use, dissemination and protection of their ABD and their own rights in relation to ABD. Players associations are in a position of protecting athlete rights; however, they have their own interests at stake where ABD is concerned. Players associations are incentivized to license ABD to leagues, teams, and other Beneficiaries as well as utilize ABD in their own product offerings and through those developed by their own sports and entertainment subsidiaries, who create content and programming around professional athletes. Each Beneficiary must contemplate the risks and rewards associated with its interaction with ABD.

Specific solutions for all ABD Beneficiaries include the following:

- Primary Beneficiaries and First-Generation Beneficiaries can begin now to adopt policies, procedures and best practices that anticipate greater regulation pertaining to

their data collection, use, dissemination and protection in an attempt to reduce risk by proper handling of ABD.

- First-Generation Beneficiaries should undertake self-regulation and adopt a privacy by design model when collecting, using, and protecting ABD to create a flexible and responsive business model that can evolve based upon changes in technology and the law.
- Beginning when ABD is collected, tracking it as well as related consent and licensing obligations.
- Creating then following models for tracking notice and consent, for tracking data collectors' responsibilities and compliance based upon use-based permissions, and implementing FIPs to govern treatment of ABD promotes regulatory compliance.
- Adopting policies, procedures and best practices concerning ABD collection, use, dissemination and protection by ABD Beneficiaries based upon their role. For example, First-Generation Beneficiaries will define what types of ABD may be collected and by what means. Policies and procedures should include parameters for data tracking, use, retention, and security. Leagues and players associations should agree on what types of ABD will be licensed or disclosed and for what purposes. Second-Generation Beneficiaries should adopt policies and procedures for handling ABD and implementing them to protect against loss, destruction or damage to data, breaches, and to define permissions regarding who can access, alter or delete data. Third-Generation Beneficiaries will want policies and procedures to ensure that their use of ABD complies with the rights licensed and permissions granted to them.
- First-Generation Beneficiaries are in a position to minimize risk at the lowest cost since they and their partners, Second-Generation Beneficiaries, collect ABD and foresee its uses. They are in a position to reduce risk by securing ABD and building product offerings with security and regulatory compliance in mind from the start.
- First- and Second-Generation Beneficiaries must communicate clearly with one another regarding what data is being produced, how it is being used and whether appropriate security measures are being taken to collect data and delete it when it is no longer required.

Regularly scheduled meetings may be a good forum to identify and uniformly address these topics.

- First- and Second-Generation Beneficiaries should implement practices to (1) create databases designed with privacy in mind at every stage of development, (2) simplify the process for athletes to make choices about the use of their ABD within the defined uses agreed upon by leagues and players associations, (3) make information collection and use practices transparent, (4) promote corporate cultures that respect ABD and value its security especially during product development, (5) incorporate substantive privacy protections related to data security, collection limits, retention and disposal, and data accuracy, and (6) promote accountability.
- First- and Second-Generation Beneficiaries and their affiliates should employ content compliance managers to oversee their respective organization's treatment of ABD and other forms of information, characteristics and property that result from the use of technology in sport to ensure compliance with applicable laws and their organization's policies and procedures.
- Athletes and their agents must be educated about athlete rights in relation to ABD and understand who is collecting their ABD, the purposes for ABD collection, its impact on them and how ABD is being controlled, processed and protected.
- Athletes must understand what constitutes consent and its impact on the retention or erosion of certain legal rights.
- Creation of an Athlete Bill of Rights promulgated by players associations with input from athletes outlining principles related to ABD including an athlete's rights to (1) control the ABD collected from him and how it will be used, (2) have access to easily understandable information about privacy and security practices in relation to ABD, (3) expect that ABD will be used only in ways for which it is authorized and in a limited context of the professional sport the athlete plays, (4) rely upon secure and responsible handling of ABD by those collecting, using, disseminating and protecting it, (5) take steps to ensure accuracy of ABD and protect it from the risks of adverse consequences, (6) reasonably

limit ABD collection and retention, and (7) be assured under contract that their ABD is handled by data controllers who comply with generally-accepted information security practices.

- ABD Beneficiaries must be diligent to stay informed, shape the discussion and solutions surrounding ABD, ensure they are preserving rights, and comply with the law as it evolves.

If implemented by ABD beneficiaries, these solutions can mitigate risk while allowing for optimization of revenue. Further, when each ABD Beneficiary proactively participates in the emerging area of wearable technology, they are each in a better position to protect their interests and the corresponding compensation for the value they bring to the sports technology space.

IV. CONCLUSION

The possibilities created by wearable technology and the use of ABD are exciting. The sports industry is a leader in the wearable technology field with the ability to make a significant impact on big data practices and the development of the IoT. By embracing technology and becoming early adopters, professional sports leagues are providing exciting entertainment experiences for sports fans. New sports entertainment products and other enhancements will elevate the level of individual athlete performance and gameplay.

How ABD is collected, used, disseminated and protected will continue to evolve. As it does, sports industry players can take a collaborative approach to mitigate legal risk and optimize opportunities for revenue generation for all parties who are involved in the contribution, collection, use and dissemination of ABD. Property and privacy rights can be balanced when encountered by sports industry players and policymakers. Public policy and regulatory schemes can be pliable so as to adopt a pro-innovation approach that responds to the relevant legal issues facing society today and in the future as the IoE emerges. Additionally, those parties involved with determining the treatment of ABD are encouraged to use their collective efforts to define ABD and its attending rights and responsibilities. Sound policy and law-making will consider foreseeable uses for ABD and seek to address reasonable consequences of collecting, using and disseminating ABD.

To resolve the inherent tensions that exist, leagues, teams and players associations can implement best practices for

the collection, use, dissemination and protection of ABD that respect the rights of athletes who contribute ABD. Athletes and their agents are wise to obtain as much information as possible to understand the implications of contributing ABD, control its use, and protect the athlete's rights. ABD Beneficiaries will be benefitted by utilizing contracts to memorialize rights and obligations with respect to the collection, use, dissemination and protection of ABD. All parties can begin implementing strategies now to promote best practices for the commercialization of ABD.

Challenges are ahead as legal issues are raised by wearable technologies and the biometric information they collect. However, utilizing well-reasoned solutions and a collaborative approach will increase successful adoption of new technologies and maximize the benefits to the sports industry and its fans.

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THE ONCE AND FUTURE NCAA AND COLLEGIATE SPORTS

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INTRODUCTION

Whenever I consider predicting the future, I think of two things. I first think of Casey Stengel, the longtime, garrulous manager of the New York Yankees at a time when "[r]ooting for the Yankees [was] like rooting for U.S. Steel."[1] Casey advised to "never make predictions, especially about the future."[2] Sage advice, that. I also think about the Star Trek TV series, and other Sci-Fi productions, where alternative universes existed at the same time. Unfortunately, Casey was right; predictions about the future are perilous. Equally unfortunate, we live in a world bound by finites, not one where alternative universes co-exist and we get to see how all the paths not chosen would play out.

No doubt, past is prologue. To predict where collegiate sports may be headed, it is helpful to consider where they have been. To discuss the future, therefore, I begin with the past.

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[1] PINSTRIPE QUOTES: THE WIT AND WISDOM OF THE NEW YORK YANKEES (Henry Clougherty ed., Skyhorse Publishing 2013) (ebook) (quoting Joe E. Lewis).

[2] *Casey Stengel Quotes*, BRAINYQUOTE, http://www.brainyquote.com/quotes/authors/c/casey_stengel.html (last visited Nov. 5, 2016).

I. THE NCAA AND MEMBER DIVERSITY

There has always been diversity amongst NCAA colleges and universities. The NCAA is made up of small private colleges, colleges with special missions to serve the disadvantaged, historically black colleges, religious affiliated colleges, and large public land grant universities.[3] From 1906 to 1955, there was one big NCAA – there were no divisions or subdivisions.[4] Amicable co-existence was reasonably possible. Not coincidentally, broadcast TV was not a major player. Also, not coincidentally, there was not much money generated by college athletics.

For the most part, in those first 50 years, athletic departments were not a separate satellite enterprise on campus.[5] Coaches' salaries matched those of faculty and administrators.[6] Scholarships were not awarded by coaches.[7] There were no special academic services for athletes.[8] Even for elite athletes in football and basketball, there was an expectation that they were in college to get a degree and not just to compete.[9]

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[3] *See* Jake New, *No Rooney Rule for Colleges*, INSIDE HIGHER ED (Sep. 22, 2016), https://www.insidehighered.com/news/2016/09/22/ncaa-urges-institutions-sign-diversity-pledge.

[4] For a full description of NCAA divisional history and weighted voting, *see* Josephine (Jo) R. Potuto, Connie Dillon & David Clough, *What's at Our Core? NCAA Division I Voting Patterns vs. Student-Athlete Well-Being, Academic Standards, and the Amateur (Collegiate) Model*, KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, NCAA Divisional History (2012), http://www.knightcommission.org/images/pdfs/2012research/2012_kciareports_potuto_dillon_clough_report.pdf [hereinafter Potuto, *What's at Our Core?*].

[5] *See* Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 989–91 (1987) [hereinafter Smith, *Death Penalty*].

[6] Dr. Carol Barr, *History of Faculty Involvement in Collegiate Athletics*, NCAA 42–44 (1999), http://www.ncaa.org/sites/default/files/History+of+Faculty+Involvement_final.pdf.

[7] *Id.*

[8] Smith, *Death Penalty*, *supra* note 5, at 990.

[9] *See generally* ANDREW S. ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME C. SPORTS 38–40 (Princeton University Press, 1999) [hereinafter Zimbalist].

By 1956, the differences among NCAA institutions led to NCAA divisions – the University and College Divisions.[10] In 1973, they gave way to Divisions I, II, III.[11] Within Division I, votes were by athletic conference – no longer by individual institutions – and the major conferences' votes received more weight.[12]

In 1984 the revenue floodgates burst wide open courtesy of the United States Supreme Court's ruling in *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*.[13] Up until then, the NCAA limited the number of times that a particular football team's games could be televised annually, and also required that schools other than the traditional football powerhouses have the opportunity to televise their games.[14] In *Board of Regents*, the Supreme Court declared the NCAA's limitations on individual schools' TV broadcast appearances a violation of antitrust laws.[15] College sports have never been the same.

As the athletics enterprise began to grow, university presidents asked athletic departments to find ways to fund the bloat on their own – a classic example of "be careful what you ask for." So Nike, Adidas, and later, Under Armour, arrived with full force. Athletic programs began operating their own development departments and maintaining their own donor lists in search of revenue streams. They began charging license fees for name and logo use, and selling photos of iconic plays and videotapes of games.[16] Athletic departments made their own exclusive marketing deals.[17] They outsourced their marketing to International Management Group or other agencies, taking

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[10] *See* Smith, *Death Penalty*, *supra* note 5, at 992–94.

[11] *Id.* at 993.

[12] *See* Potuto, *What's at Our Core?*, *supra* note 4, at 2–3.

[13] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984).

[14] *See id.* at 90.

[15] *See id.* at 120.

[16] *See* Robert Lattinville, *Logo Cops: The Law and Business of Collegiate Licensing*, 5 KAN. J.L. & PUB. POL'Y 81, 81 (1996).

[17] *See id.*

marketing decisions yet another step away from the campus environment and ethos. License fees for stadium seats are now the norm, and many schools now permit beer sales at games.[18]

The result is that athletic departments have become separate entities on campus in ways that a law college or business college are not. They raise their own money, and they spend that money in ways that would not be tolerated on the rest of the campus. Coach and top administrator salaries are only one example. Athletic department building projects are another. On most campuses, athletic department building projects would not make the top 100 campus construction needs.

At the same time, athletic spending – unrestrained by campus protocols, limits, and priorities – far exceeds athletic revenues. Athletic departments at all but seven Division I institutions are subsidized by their universities.[19] The University of Oregon athletic department, which generated more than $196 million in 2014 revenues, still received over $2 million in campus subsidies.[20] Athletic departments have a very cozy favored nation status. They are subsidized by the campus but not subject to campus rules.

Today there are more than 350 schools in Division I, the NCAA division that has all the major, traditional football powers – those schools that reaped the *Board of Regents* windfall.[21] Division I schools include Ohio State, a land-grant, PhD-awarding public university with 52,000 students, and Wofford College which has only 1,400 students.[22] They include Texas,

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[18] *See* Dennis Dodd, *Alcohol: Coming Soon to a College Football Stadium Near You*, CBS SPORTS (June 27, 2016), http://www.cbssports.com/college-football/news/alcohol-coming-soon-to-your-college-football-stadium-if-its-not-there-already.

[19] *See* Erik Brady et al., *College Athletics Finance Report: Non-Power 5 Schools Face Huge Money Pressure*, USA TODAY (May 26, 2015, 7:49 PM), http://www.usatoday.com/story/college/2015/05/26/ncaa-athletic-finances-revenue-expense-division-i/27971457.

[20] *Id.*

[21] *See Division I Members*, NCAA, http://web1.ncaa.org/onlineDir/exec2/divisionListing?sortOrder=0&division=1 (last visited Oct. 5, 2016). The author focuses on Division I because it is what people think of when they think of the NCAA and, more importantly, because it is the focus of the major problems that beset intercollegiate athletics.

[22] *See 2015 Enrollment Report*, THE OHIO STATE UNIVERSITY (2015), https://web.archive.org/web/20160403224315/http://

with an athletics budget somewhere around $175 million and its own TV network; Michigan, with a stadium that seats over 100,000; and Presbyterian College, with no varsity football and an entire campus operating budget of maybe $50 million.

Most of the differences among NCAA institutions relate to revenues produced and spent. We now have big media rights contracts, with the bulk of the money going to the major football powers and their conferences. We have powerful athletic conferences to handle the money. We have conferences (and even a university) with their own broadcast networks.

As the athletics budgets of institutions increased, and the disparity among athletic revenues grew, so too the pressure on the NCAA to continue dividing. Division I now is the locus of NCAA subdividing. In 1978 the NCAA established Division IA, now called the Football Bowl Subdivision (FBS); Division IAA, now called the Football Championship Subdivision (FCS); and all the Division I institutions that do not sponsor football.[23] Two years ago came the Autonomy Sub-division of the FBS (A5).[24] The A5 includes the schools from the ACC, Big Ten, Big 12, SEC, and Pac-12 conferences.[25]

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enrollmentservices.osu.edu/report.pdf; ASS'N OF PUB. AND LAND-GRANT UNIVS., THE LAND-GRANT TRADITION 31 (2012); *About Wofford*, WOFFORD C., http://www.wofford.edu/about/fastfacts/ (last visited Oct. 5, 2016).

[23] *See* Brad R. Humphreys et al., *Financing Intercollegiate Athletics: The Role of Monitoring and Enforcing NCAA Recruiting Regulations*, 1 INT'L J. OF SPORT FIN. 151 (2006) (discussing the structural breakdown of the NCAA); Steve Wieberg, *NCAA to Rename College Football Subdivisions*, USA TODAY (Aug. 3, 2006, 9:59 PM), http://usatoday30.usatoday.com/sports/college/football/2006-08-03-ncaa-subdivisions_x.htm.

[24] Michelle Brutlag Hosick, *Board Adopts New Division I Structure*, NCAA (Aug. 7, 2014, 11:49 AM), http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure; Jake New, *Autonomy Gained*, INSIDE HIGHER ED (Aug. 8, 2014), https://www.insidehighered.com/news/2014/08/08/ncaa-adopts-structure-giving-autonomy-richest-division-i-leagues-votes-college.

[25] New, *supra* note 24.

In one sense, this subdividing is benign, a natural evolution. It is even advisable, as it permits like-situated universities and colleges to decide their own fates. It permits like-resourced universities and colleges to spend their money on student-athletes unrestrained by the resource limits of those less endowed. It permits the colleges and universities facing external threats to the collegiate model of athletics to spend their money to ameliorate concerns and respond to all those threats. Such threats and concerns include athlete unions, pay for play, athlete marketing and endorsements, involvement of agents, high visibility of football and basketball programs and the claims that student-athletes in those sports are not really students and are being exploited, donor intrusion in decision-making, and athlete behavioral issues.

In another sense, however, NCAA subdivisions remove constraints that a broader, more inclusive NCAA voting body was able to maintain. Admittedly, these constraints may have been driven in substantial part by financial concerns, but they also reflected a closer embodiment of collegiate sports as different from professional sports.

Today, we have conferences (and the University of Texas) with their own broadcast networks. Midweek games are common. Games start as late as 9 p.m. Student-athletes then have to travel home, sometimes halfway across the country after playing a 9 p.m. weekday game. We have conference realignment to achieve better TV market shares.[26] The drive to increase revenues to support all the expenses is ever-increasing. Spending is neither constrained by market forces nor common sense, and we also have the external pressures from big donors and a noisy fan base.

Most everyone agrees that collegiate sports, at least in the A5 of the FBS, are out of whack with the values that should underlie athletics on our campuses.[27] Finding a way to re-achieve a balance, particularly in the A5, so far has proved elusive.

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[26] *See* Matt Tait, *TV Sets, as Much Football Programs, Fueling Big 12 Expansion Talk*, KU SPORTS: STAFF BLOG (May 12, 2016, 12:17 PM), http://www2.kusports.com/weblogs/tale-tait/2016/may/12/tv-sets-as-much-football-programs-fuelin/.

[27] *See* Jake New, *Left Behind*, INSIDE HIGHER ED (Aug. 5, 2014), https://www.insidehighered.com/news/2014/08/05/growing-stratification-ncaa-conferences-concerns-less-wealthy-division-i-colleges; Jon Solomon, *Power Five Passes on Tackling Big NCAA*

II. CURRENT STRESSES

The world is changing. A quick glance at Facebook and Twitter underscores that millennials have very different views of what constitutes private information. We have less person-to-person, face-to-face interaction. Even during social interactions, people are on their cellphones, or surreptitiously glancing at them. The changes to media – reporting, entertainment, marketing – are mind boggling. Print journalism is moribund. Now social media and all the alternative ways to "share" information are attacking broadcast. Professional journalists are giving way to bloggers and tweeters. The pressure to compete is leading to a departure from journalism's professional standards.[28] The old two source rule seems to be going the way of the dinosaur.

The traditional media "establishment" are competing with new entries such as Rolling Stone. Consider its coverage of the alleged group rape perpetrated by Duke lacrosse players at a fraternity house at the University of Virginia, and how the stalwart traditional media accepted the prevailing narrative.

It used to be said that broadcast revenues were safe and could be counted on to increase because sports contests are the one thing viewers want to see live, and, therefore, sports will always be attractive to advertisers. But viewers increasingly object to the cost of large cable packages that include content in which they have no interest.[29] Skinny bundles are becoming

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Issues to Help Athletes, CBSSPORTS.COM (Jan. 15, 2016), http://www.cbssports.com/college-football/news/power-five-passes-on-tackling-big-ncaa-issues-to-help-athletes.

[28] Jayeon Lee, *The Double-Edged Sword: The Effects of Journalists' Social Media Activities on Audience Perceptions of Journalists and Their News Products*, 20 J. OF COMPUTER-MEDIATED COMM. 312, 314–16 (2015).

[29] Richard Siklos, *Why Can't I Have Just the Cable Channels I Want?*, N.Y. TIMES (Apr. 16, 2006), http://www.nytimes.com/2006/04/16/business/yourmoney/why-cant-i-have-just-the-cable-channels-i-want.html.

more popular.[30] New technology has made a serious dent on broadcasting margins.[31] Streaming is all the rage. During the 2016-17 season, Twitter began streaming NFL games.[32] ESPN and Fox Sports have downsized.[33] Cable and Direct TV are resisting the fees charged by premium channels for fear that more subscribers will bolt or opt for a skinny bundle.[34] Even the New York Yankees network, YES, faced push back from distributors as it sought increased rights fees.[35]

The game day environment also is changing. Watching at home is so very convenient. It avoids ticket and parking costs, traffic jams, and bathroom lines. Flat screen HD TV gives great sight lines and views of the action. Virtual technology will only accelerate the watch-from-home trend.

The result is lost revenues from game day attendance. Ticket sales are not a huge revenue stream, at least as compared to what media rights deals bring in, but it is a revenue stream

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[30] *See* Meg James, *Consumers Want Fewer TV Channels and Lower Monthly Bills - Will 'Skinny' Packages Work?*, L.A. TIMES (Aug. 14, 2015, 11:35 AM), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-skinny-bundles-verizon-dish-20150816-story.html.

[31] Shannon Bond & Matthew Garrahan, *Broadcasters Fear Falling Revenues as Viewers Switch to On-Demand TV*, FIN. TIMES (Feb. 22, 2015), https://www.ft.com/content/e46dc7a4-b843-11e4-86bb-00144feab7de.

[32] *Nat'l Football League and Twitter Announce Streaming P'ship for Thursday Night Football*, NFL (Apr. 5, 2016), https://nflcommunications.com/Pages/National-Football-League-and-Twitter-Announce-Streaming-Partnership-for-Thursday-Night-Football.aspx.

[33] Michael McCarthy, *Layoffs at Fox Sports; More than 20 Online Writers Let Go*, SPORTING NEWS (Mar. 9, 2016), http://www.sportingnews.com/other-sports/news/fox-sports-fox-digital-layoffs-jimmy-traina-online-media/3uimxyeleamj19joiu836n9eu.

[34] *See* Shalini Ramachandran & Christopher Stewart, *No Sign of Progress in CBS/Time Warner Cable Dispute; Two Sides Can't Even Agree on Whether Talks are Under Way*, WALL ST. J. (Aug. 4, 2013, 5:59 PM), http://www.wsj.com/articles/SB10001424127887324136204578646243072251584.

[35] Meg James, *Yankees Fans Strike Out as YES Network-Comcast Battle Heats up*, L.A. TIMES (Mar. 6, 2016, 4:00AM), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-fox-yankees-network-comcast-battle-sports-costs-20160308-story.html.

schools do not want to lose.[36] Concessions and game day attire sales are a small part of the revenue pie, but still a revenue stream, and one that will decrease as in-stadium audiences do.

There are also collateral revenue consequences. Businesses in cities like Lincoln, Nebraska, whose economy relies heavily on sports tourism,[37] will lose substantial revenues if fans stay home. These include not only hotels and restaurants but also department store sales. Those who come to town on game days do not all have game tickets. Others go shopping (and that includes sports bars). Lost commercial revenues mean lost tax revenues for the city.

To keep fans in the seats, athletic departments have spent money to make the game day experience more comfortable and fun.[38] In particular, they are upgrading stadium internet capability.[39]

An imponderable is the effect that watching from home will have on a fan base in football and men's basketball where, at least for the A5 traditional powers, large crowds have been the norm.[40] Will fans, particularly younger fans, stay at home and, in

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[36] *See* Travis Sawchik, *Is TV Keeping Fans Away?*, THE POST AND COURIER (Dec. 22, 2012), http://www.postandcourier.com/sports/is-tv-keeping-fans-away/article_a312cab5-ae74-56c3-bcef-e304bf721fa1.html.

[37] *See* Eric Thompson & Shannon McClure, *The 2013-2014 Economic Impact of the University of Nebraska Department of Athletics* 2–7, THE UNIV. OF NEB. DEP'T OF ATHLETICS (Nov. 24 2014), http://www.huskers.com/pdf9/3003724.pdf?DB_OEM_ID=100.

[38] Jake New, *Empty Seats Now, Fewer Donors Later?*, INSIDE HIGHER ED (Sept. 11, 2014), https://www.insidehighered.com/news/2014/09/11/colleges-worry-about-future-football-fans-student-attendance-declines.

[39] Jake Trotter, *Schools Aiming to Improve Fan Amenities*, ESPN (June 25, 2014), http://www.espn.com/blog/bigten/post/_/id/102758/schools-aiming-to-improve-fan-amenities.

[40] *Men's Basketball Attendance Tops 32 Million for 10th Straight Year*, NCAA (last updated June 9, 2016, 2:00 PM), http://www.ncaa.com/news/basketball-men/article/2016-06-07/mens-basketball-attendance-tops-32-million-10th-straight-year; *see also 2015*

turn, switch allegiance from local teams to more national teams? And what will game day be like for fans who do attend the games (and for the players who compete) if there are very few there?

How will schools replace revenues if media contracts (the big enchilada), ticket sales, and concessions disappear? Will they break precedent and spend less? Or will they attempt to find more revenues, and, in turn, will this lead to even more commercialism, and even less clarity, in what separates college and professional sports?

Litigation threats loom large in current discussions regarding college athletics. At some point, the spate of litigation will lessen. Either lawyers will be discouraged because the lawsuits are unsuccessful or the lawsuits will be successful and there will be little left to litigate.[41]

Student-athlete empowerment is a mixed bag in terms of what the future holds for college athletics. If we mean unions, and other organized attempts, I am doubtful such efforts will be successful—in part because of the enhanced student-athlete benefits and treatment recently adopted (multiyear scholarships, full cost of attendance), and in part because more will likely be coming.[42] Kain Colter, the Northwestern football player behind the 2014 Northwestern union effort, bemoaned the absence of current student-athletes at a conference on the unionization of athletes. [43] If student-athlete empowerment focuses on the

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National College Football Attendance, NCAA, http://fs.ncaa.org/Docs/stats/football_records/Attendance/2015.pdf (last visited Nov. 5, 2016).

[41] *See* Helen Christophi, *Judge Leans Toward NCAA in Antitrust Case*, COURTHOUSE NEWS SERVICE (Aug. 3, 2016, 6:56 AM), http://www.courthousenews.com/2016/08/03/judge-leans-toward-ncaa-in-antitrust-case.htm (discussing litigation regarding caps to funds provided student-athletes may be coming to an end).

[42] *See* Poseur, *The NLRB Says No to Student-Athlete Unions... For Now*, SBNATION: AND THE VALLEY SHOOK! (Aug. 18, 2015, 10:00 AM), http://www.andthevalleyshook.com/2015/8/18/9172031/the-nlrb-says-no-to-student-athlete-unions-for-now (discussing whether student-athletes ultimately will be seen as employees by the National Labor Relations Board (NLRB) remains to be seen).

[43] Jon Solomon, *College Athletes' Rights Movement has Stalled: How it Can Pick up Again*, CBS SPORTS (Apr. 2, 2016), http://www.cbssports.com/collegefootball/writer/jon-solomon/25539604/JonSolomonCBS (describing one outside possibility to

pressures imposed by millennial students, then yes, I believe millennials will affect more change.[44] Their pressure, and that of changing standards generally, is already influencing coach behaviors.

There will also be integration of athletic operations with external standards imposed on universities – sexual harassment, discrimination, and criminal conduct. Those athletic departments that were on their own little islands in managing these issues no longer will be able to do so. Happily.

The spanner in the works is what the research on concussions will show, as well as research on other head traumas and health issues generally. Right now all the attention is on football. The number of boys playing youth football has decreased annually.[45] But there are more concussions being suffered by players of other sports.[46] Recent research suggests the main source of the problem is the frequency of hits and number of total hits over a career, not the location or even severity of a particular hit.[47]

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energize student-athlete involves current efforts to locate and enlist elite high school students to come to college ready to take on the fight).

[44] Consider the impact wrought by the threatened game boycott by Missouri football players to protest race relations on the Missouri campus. *E.g.*, Rick Maese & Kent Babb, *Missouri Football Players Threaten to Boycott Season Amid Racial Tension*, WASH. POST (Nov. 8, 2015), https://www.washingtonpost.com/sports/missouri-football-players-threaten-to-boycott-season-amid-racial-tension/2015/11/08/5c11c456-8641-11e5-9a07-453018f9a0ec_story.html?utm_term=.8927c926e27c.

[45] Jack Moore, *Youth Football Participation is Plummeting*, VOCATIV (Mar. 16, 2016, 1:17 PM), http://www.vocativ.com/298019/youth-football-participation-is-plummeting.

[46] Marie-France Wilson, *Young Athletes at Risk: Preventing and Managing Consequences of Sports Concussions in Young Athletes and Related Legal Issues*, 21 MARQ. SPORTS L. REV. 241, 246–247 (2010) (discussing how athletes in soccer and hockey are also prone to concussions).

[47] Benedict Carey, *Study Focuses on Repeated Hits, Not Concussions*, N.Y. TIMES (Apr. 1, 2016), http://www.nytimes.com/2016/04/01/health/study-focuses-on-repeated-hits-not-concussions.html

What if a direct causal relation is shown between concussions and chronic traumatic encephalopathy, and there are no adequate ameliorative measures available? If football increasingly becomes a sport played by the economically disadvantaged and minorities, and concern about injuries increases, then football may go the way of the gladiators in the Coliseum. And will other sports suffer the same fate? Here, I assume that the American appetite for competition, American ingenuity, and the money that will be poured in to finding solutions, means that football, and all sports, will continue to hold an important place in American life.

III. WHAT THE FUTURE HOLDS

Some impediments to reform are not unique to college sports. Perfection as a policy objective is fine; perfection as an absolute requirement to policy adoption means no policy can be adopted.

Winston Churchill said that "Democracy is the worst form of government, except for all those other forms that have been tried . . . ."[48] Large entities that move forward with full stakeholder participation and process move at glacier speed. They engage only when crisis is upon them.

Meet the NCAA.

A. AUTONOMY

The A5 has independent authority to adopt bylaws that cover A5 institutions and conferences over several areas.[49] These bylaws pertain to recruiting restrictions, pre-enrollment support, financial aid, awards and benefits, academic support, student-athlete health and wellness, meals and nutrition, time demands, student-athlete career transition, and athletics personnel.[50] There is no necessary rhyme or reason to why some of the items are on the list, and why others are not. Except for two areas purposefully left to the full Division I for determination –

(discussing a Boston University study that suggested that the number of hits a person sustains in football over their lifetime could sustain more long-term injury to players).

[48] JAMES C. HUMES, THE WIT & WISDOM OF WINSTON CHURCHILL 28 (Harper Perennial 1995).

[49] *2015-2016 NCAA Division I Manual* 33, NCAA (July 2015), http://www.ncaapublications.com/productdownloads/D116.pdf.

[50] *Id.* at 33–34.

academic standards and championships – most of the subjects ascribed to the A5 or retained by Division I were the result of compromise.[51] Academic standards are retained by Division I in fear that they might be diluted.[52] Championship determinations are also retained by Division I partly to protect the Men's basketball Championship and partly to assure there were enough teams for A5 teams to compete against.[53]

There was also concern in the Division I Board (made up of presidents and chancellors who represent all Division I institutions) and the NCAA hierarchy that an autonomous structure might lay the framework for A5 schools and conferences to depart from the NCAA and create their own athletic association. As a result, there are certain limits imposed on how the A5 operates:[54]

a. A5 proposals must be approved by an NCAA presidential review group that includes presidents and chancellors from conferences in addition to the A5.
b. The A5 did not decide the voting plurality needed to adopt an A5 proposal. Instead, the full Division I imposed the relevant requirements, including the fact that adoption of A5 proposals requires more than a simple majority.

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[51] *See* Hosick, *supra* note 24.

[52] *Division I Steering Committee on Governance: Recommended Governance Model* 17, NCAA (July 18, 2014), http://www.ncaa.org/sites/default/files/DI%20Steering%20Commitee%20on%20Gov%20Proposed%20Model%2007%2018%2014%204.pdf [hereinafter *Division I Steering Committee on Governance*] (showing the text that constituted the "updated Division I model" that was recently adopted); *see also* Hosick, *supra* note 24.

[53] *Compare Big East Response to NCAA Board of Directors Steering Committee Proposal on Governance Redesign* 3, NCAA (June 27, 2014), http://www.ncaa.org/sites/default/files/NEW%20FEEDBACK%20DOCUMENT.pdf, *with Division I Steering Committee on Governance*, *supra* note 52, at 17.

[54] *2015-2016 NCAA Division I Manual*, *supra* note 49, at 33–35.

c. There is a date after which amendments to A5 proposals may not be made and new proposals may not be introduced. This stems from a similar rule employed by Division I.
d. Interpretations of A5 bylaws and requests for waivers from them go to the full Division I interpretations committee and to the full Division I committee that handles the particular waiver, not to a committee of the A5.[55]
e. Institutions in the rest of the FBS may adopt a proposal adopted by the A5, but these institutions may not adopt a proposal that covers the same subject but differently from how the A5 does it. This limitation offers the NCAA the most protection from A5 independence (or exodus from the NCAA).[56] It assures that the A5 and the rest of Division I do not have a host of different subject-specific Division I bylaws.

B. A5 CONVENTION, 2015 DALLAS ORGANIZATIONAL MEETING, AND THEREAFTER

At its first convention in 2014, the A5 adopted athletic scholarships to fund the full cost of university attendance.[57] Division I had already adopted multiyear scholarships.[58] For many years, the NCAA had another priority – to reduce student-athlete time demands.[59] Both the first convention and the 2015 A5 convention failed to reform time demands. Instead, the A5

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[55] At the full committee, only A5 members vote.

[56] *See 2015-2016 NCAA Division I Manual*, *supra* note 49, at 33–35; Hosick, *supra* note 24.

[57] *See* Steve Berkowitz, *NCAA Increases Value of Scholarships in Historic Vote*, USA TODAY (Jan. 17, 2015, 11:05 PM), http://www.usatoday.com/story/sports/college/2015/01/17/ncaa-convention-cost-of-attendance-student-athletes-scholarships/21921073.

[58] Michelle Brutlag Hosick, *Multiyear Scholarships to be Allowed: Vote to Override Legislation Falls Just Short of Required Mark*, NCAA (Feb. 17, 2012, 11:01 PM), http://www.ncaa.com/news/ncaa/article/2012-02-17/multiyear-scholarships-be-allowed.

[59] *See* Tom Yelich, *Division I SAAC to Take Next Step in Addressing Time Demands: The Committee is Preparing a Survey that Will Be Sent to College Athletes This Fall*, NCAA (Oct. 7, 2015, 8:16 AM), http://www.ncaa.org/about/resources/media-center/news/division-i-saac-take-next-step-addressing-time-demands.

adopted a resolution calling for action regarding time demands by 2016.[60]

A major impediment to time demand reforms is that there is no governing structure for the A5, and thus no structure for even introducing a discussion on the topic.[61] The five commissioners, and now conference staffs, have tried to organize.[62] But process-by-committee is a disaster. The A5 held an organizational meeting in April 2015 for the purpose of adopting an A5 governing structure and to begin tackling time demands.[63] At the meeting, no interest existed for creating a formal structure to handle A5 matters.[64] Instead, conference offices continue to manage the A5 agenda.[65] It appears that an annual A5 meeting will likely occur and operate to set the next year's legislative agenda.

The 2015 meeting recommended only modest modifications of time demands to be adopted at the 2016 A5 legislative session.[66] There was general agreement to employ a

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[60] *See* Michelle Brutlag Hosick, *D1 Continues Talks on Time Demands: Council, Five Autonomy Conferences to Work Together on Proposals*, NCAA (Feb. 18, 2016, 2:08 PM), http://www.ncaa.org/about/resources/media-center/news/di-continues-talks-time-demands.

[61] *See* Jon Solomon, *Power Five Autonomy Has Created a Small Subset of NCAA Dysfunction*, CBS SPORTS (Apr. 24, 2016), http://www.cbssports.com/college-football/news/power-five-autonomy-has-created-a-small-subset-of-ncaa-dysfunction.

[62] *See id.*

[63] *See Report of the NCAA Board of Governors*, NCAA (Apr. 30, 2015), https://www.ncaa.org/sites/default/files/April2015_BOG_report_20151008.pdf.

[64] *See id.*

[65] *See* Dan Wolken, *Small, Positive Steps, But No Fireworks at NCAA Convention*, USA TODAY (Jan. 17, 2016, 12:31 PM), http://www.usatoday.com/story/sports/ncaaf/2016/01/15/ncaa-convention-autonomy-time-demands-athletes/78857778.

[66] *See* Michelle Brutlag Hosick, *D1 Council Starts Discussion About Time Demands: Student-Athletes Expected to Contribute to Conversation next Month*, NCAA (Oct. 1, 2015, 9:48 AM), http://www.ncaa.org/about/resources/media-center/news/di-council-starts-discussion-about-time-demands.

framework for time management that avoids black letter bylaws. Instead, the framework provides the required elements that institutions must meet, but allows institutions to develop their own method for meeting them. Annual institutional monitoring would assure that requirements are met.[67] The other time demand proposals generated by the Dallas 2015 meeting: (1) a team travel day could not count as an off day in NCAA athletic activities, (2) there needs to be a set number of days off during the academic year, and (3) there had to be a mandatory seven days off at the end of a championship season.[68] Arriving at these requirements took a fair amount of negotiation. A reasonable prediction is that consensus will be much harder to achieve with the next round of time management proposals.

IV. ALTERNATIVE FUTURES

So, now, ignoring Casey, a few words about what the future of college athletics, and the NCAA, may bring. These universes concentrate only on the A5.

Universe I. In Universe I, everything remains status quo with the exception of an antitrust exemption for coach salaries and amateurism issues generally. In this universe, the NCAA would continue to administer athletic competition for all the colleges and universities that make up the NCAA, and proceed as usual to administer college athletics. Budget issues prevail over student-athlete well-being initiatives. Current efforts to slow commercialization come to a halt. Minor perceived competitive issues continue to capture undue attention. Change is very slow, and material change awaits the next crisis. The antitrust exemption limits the number of crises and permits

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[67] *See* Tom Yelich, *Nearly 50,000 Weigh in on D1 Time Demands: Council-Sponsored Survey Includes Input from Stakeholders Across Division*, NCAA (May 9, 2016, 3:02 PM), http://www.ncaa.org/about/resources/media-center/news/nearly-50000-weigh-di-time-demands (explaining the general framework is to establish time management plans by sport, with student-athlete participation on the front end and president/FAR annual review on the back end).

[68] *2016-17 NCAA Division I Autonomy Publication of Proposed Legislation*, NCAA, http://www.ncaa.org/governance/2016-17-ncaa-division-i-autonomy-publication-proposed-legislation (last visited Dec. 16, 2016). *See* Kyle Goon, *College sports: Time demand Proposals May Not Add up to Substantial Change*, THE SALT LAKE TRIBUNE (July 20, 2016, 3:41 PM), http://www.sltrib.com/home/4126304-155/college-sports-time-demand-proposals-may.

group action to limit coach salaries; competitive interests make it unclear the extent to which limits will be imposed.

Universe II. Universe II also embodies the status quo. No antitrust exemption is needed because court decisions uphold the status quo (except for movement already achieved through the *O'Bannon* litigation). Escalating coach and administrator salaries is the main difference between this universe and Universe I, because there will be no incentive or regulation to limit them. This universe likely will lead to a reduction in the number of sports sponsored.[69]

Universe III. Universe III is the professional model of sports visited in full force on college sports, at least in the A5. Here we see the future through professional sports: Unions, agents, and pay for play. Maybe strikes. Reduction in the number of sponsored sports is more likely here than in Universe II. We may end with football, men's basketball, and perhaps one other men's sport, and enough women's sports to meet Title IX requirements, and that will be it.

Universe IV. In this universe, A5 universities and conferences depart the NCAA and create their own athletic association for the five conferences and 65 schools. This alternative has been gaining momentum over the years. The main impetus is the opportunity for A5 institutions to be in charge of their own fates and issues. The chief obstacles: The NCAA Men's basketball tournament and the impact a departure by 65 schools would have on it;[70] the need for enough teams

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[69] In 2016 FBS institutions were required to sponsor at least 16 sports. *Frequently Asked Questions*, NCAA (Dec. 8, 2007), http://fs.ncaa.org/Docs/AMA/Division%20I%20Forms/2010-11%20FBS%20Forms/Football%20Bowl%20Subqa%2012%208%2010.pdf . In 2016 Ohio State sponsored 35 sports while Texas sponsors 18 or 20. OHIO STATE BUCKEYES, www.ohiostatebuckeyes.com (last visited Nov. 8, 2016); THE OFFICIAL WEBSITE OF THE UNIVERSITY OF TEXAS ATHLETICS, www.texassports.com (last visited Oct. 30, 2016).

[70] Mark Alesia, *NCAA Approaching $1 Billion Per Year Amid Challenges By Players*, INDYSTAR (Mar. 27, 2014, 11:06 PM), http://www.indystar.com/story/news/2014/03/27/ncaa-approaching-billion-per-year-amid-challenges-players/6973767/ (reporting 2013

against which A5 teams may compete; the optics of departing the NCAA (perceived as revenue-seeking and not to maintain a collegiate model or to uphold academics); reluctance to rebuild a structure the NCAA already has in place; a worry among some institutions that this model will unleash the genie; and, finally, the difficulty of getting all major football institutions and conferences to decide to bolt.[71]

Universe V. In Universe V we return to the collegiate model full throttle, even in the A5. We roll back commercialization; we stop the search for revenues – or at least line up any such search with what the rest of the campus is doing. We find ways to limit the admission of the "one-and-dones."[72] We require that athletic departments follow campus protocols. We limit the number of competitions and limit all sports to one semester of competition. I wish I thought this Universe had a realistic chance. The whole issue of time demands is a good example of the difficulties.[73]

V. THE A5 CZAR

It may be that any change, even incremental, will need an A5 czar. Process related impediments suggest that this is true. Because of the extreme diversity among institutions, there is unlikely to be support for a czar for all of the NCAA or even for

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NCAA revenues as more than $912 billion, with 84 percent of those revenues derived from the men's basketball tournament).

[71] Jason Kersey, *Exploring the History of College Football Media Rights*, NEWSOK (Aug. 25, 2013, 12:00 AM), http://newsok.com/article/3875459 (describing effort of traditional football powers in the College Football Association to break from NCAA, an effort thwarted when Notre Dame signed its own broadcast deal).

[72] Eric Pincus, *NBA AM: Adam Silver on One-And-Done, Labor Relations*, BASKETBALL INSIDERS (Mar. 23, 2016), http://www.basketballinsiders.com/nba-am-adam-silver-on-one-and-done-labor-relations/ (explaining that one and done issue phenomenon is creation of NBA and NBAPA); Jon Solomon, *Fitting NCAA Tournament Final: Team Penalized for Poor Academics vs. Team Built Not to Graduate*, AL.COM (Apr. 7, 2014, 5:00 AM), http://www.al.com/sports/index.ssf/2014/04/fitting_ncaa_tournament_final.html (suggesting that one and done departures contribute to poor APR, and resultant penalties).

[73] *See infra* Section V The A5 Czar.

the full Division I. There might be a czar for the A5 or for A5 institutions in a separate association.

But how do you move the needle when there is so much opposition to any change?

VI. TIME DEMANDS, UP CLOSE AND PERSONAL

In preparation for an A5 meeting to create a governance structure, and also to work on time demands, NCAA staff prepared a survey completed by Division I administrators, faculty athletic representatives (FARs), senior woman administrators (SWAs), student-athletes, and head coaches.[74] The head coaches supported very few changes.[75] Except for FARs, there was no support to reduce midweek games.[76] Except for student-athletes in most sports and FARs, there was no support for providing a midseason multiday athletic break.[77] Except for student-athletes and FARs, there was no support for including travel, compliance meetings, and team promotions in the tally at required athletic activities.[78] Evidence supporting a reduction in overall competitions was difficult to read,[79] and no questions even arose regarding one-semester sports.[80]

Not an auspicious beginning to make real change in time demands.

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[74] *Results of Division I Time Demands Survey* 2, 4, NCAA (Apr. 22, 2016), http://www.ncaa.org/sites/default/files/2016RES_DI-Time-Demands-Full_20160506.PDF [hereinafter *Time Demands Survey*] (resulting in the following responses: 55 percent of ADs – 77 percent in the A5; 63 percent of SWAs – 68 percent in the A5; 52 percent of FARs responded – 66 percent in the A5; 31 percent of Division I student-athletes responded; and 52 percent of Division I head coaches).

[75] *Id.* at 7–13, 29, 53 and 77.

[76] *Id.* at 36–38.

[77] *Id.* at 40–44.

[78] *See id.* at 8 (describing majority of student athletes for these items but opposition by most head coaches and administrators).

[79] *See id.* at 9 (noting what appeared to be little support from student-athletes, administrators, and coaches for reduction of competition opportunities).

[80] *Id.*

A reduction on time demands has been a popular battle cry for years. Medical concerns are part of the reason. So too are claims that student-athletes are not "real" students, an argument which surfaced in litigation and the Northwestern union movement.[81] Certainly, student-athletes have little opportunity to participate in study abroad programs, student teaching, and other opportunities available to non-student-athletes. So why the lack of support in the survey responses? In part, the lack of support may be traced to respondents with different balancing of priorities. There are those, especially faculty members, who believe that class time and the time to fully participate in campus life should prevail over at least some athletic considerations. There are those who believe that universities should offer elite athletes the opportunity to reach their full potential as athletes and as students. Finally, there are those who believe that students who do well academically should not have limits placed on their athletic time. The varied responses may partly relate to lack of clarity in the questions asked. They certainly relate to the 'perfect is enemy to the good' phenomenon.

- **One-Semester Seasons.** Implementing one-semester seasons may strain campus facilities and require more games played at odd times. Some respondents may have voted assuming that the same number of games would be played. This certainly would strain facility access and scheduling. Moreover, under this assumption, there would be more midweek travel. It is also unclear what medical research will say regarding the correlation between rest times and incidence of injuries. In some sports, this will reduce broadcast revenues. That might most clearly be true for men's basketball. In addition, the men's basketball tournament seems to fall into an otherwise reasonably dead period regarding sports broadcasts, and moving it to another time frame might affect the value of the tournament.

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[81] *See* Northwestern Univ., 362 N.L.R.B. No. 167 (Aug. 17, 2015); *see also* Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrb-says-northwestern-football-players-cannot-unionize.html describing effort by Northwestern football players to gain recognition as university employees and form unions).

- **Fewer games.** Most student-athletes, particularly elite athletes, do not want to reduce the number of competitions. A reduction in the number of games may have an impact on the number of Olympic athletes who attend college. It also may persuade more baseball student-athletes to forego college for the minor leagues. Another concern is the potential impact on women's sports if broadcast dictates what games get prime times based on viewer numbers. Most of the potential considerations for one-semester sports also might have impact here.
- **Three-week break from sports.** This proposal was tabled at the 2016 A5 convention. Among the reasons for tabling the proposal was that time demand proposals should be evaluated as an integrated whole.[82] Specific to this proposal were concerns about how it would apply to track and field, whose indoor and outdoor seasons cover both semesters.[83] Stresses on facilities were also raised.
- **More Days Off Between Competitions.** This one gives rise to a host of concerns. It was a modest proposal advanced and tabled by the Big Ten Conference at the 2016 A5 Convention, specifying that a team travel day could not count as a day off.[84] Some of the concerns raised included: what to do if travel delays result in a

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[82] *See* Jake New, *Too Much Time on Sports?*, INSIDE HIGHER ED (Jan. 15, 2016), https://www.insidehighered.com/news/2016/01/15/time-demands-focus-ncaa-convention-policy-changes-may-have-wait (describing calls for research before voting on time demand proposals).

[83] *See* Steve Berkowitz, *Power Conferences Announce Plan to Reduce Time Demands on Athletes*, USA TODAY (July 7, 2016, 10:40 PM), http://www.usatoday.com/story/sports/college/2016/07/07/power-five-autonomy-conferences-time-demands-student-athletes/86803134.

[84] Amy Wimmer Schwarb, *SAAC Reveals Time Demands Survey Results at Division I Issues Forum*, NCAA (Jan. 15, 2016, 11:54 PM), http://www.ncaa.org/about/resources/media-center/news/saac-reveals-time-demands-survey-results-division-i-issues-forum.

team returning home after midnight; what a coach might do to compensate for not being able to use a travel day as a day off; and what constitutes a day off (trainer appointments? Film review? Etc.).[85]

VII. EXTERNAL PRESSURE

No part of a university is as public as athletics. No other part of a university has external constituents (and some with the biggest checkbooks) who have little interest in the overall interests of higher education, who see athletics decisions as independent of general university policy and the university mission, or who see any reason to evaluate policy except as it seems geared to assuring football success.

Media stories typically follow the same line. I am a big fan of journalists and journalism. I majored in journalism. I think it is a noble calling. I say what I say as a fellow traveler.

Sports stories often read as if the only interest a university should have is to make the football team successful. I am not sure sports journalists feel that way. It is more like it never even occurs to them that there is a larger side to the story.

Want to win? Just pay the coach more. Alabama does it.[86] Why wouldn't [here insert the A5 football program]?

The head coach wants something. Why would anyone get in his way?

A school fires a coach for off-the-court behavior. How come?

In the midst of infraction investigations at Ohio State, Gordon Gee, then its president, responded to a question about firing his successful head coach by saying, "it's more likely he

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[85] *See Time Demands Survey*, *supra* note 74, at 11, 85.

[86] *See* Matt Slovin, *How Much Do SEC Coaches Make?* THE TENNESSEAN (Oct. 8, 2015, 3:44 PM), http://www.tennessean.com/story/sports/2015/10/08/how-much-do-sec-coaches-make/73561936/ (listing Alabama's head coach Nick Saban as receiving the highest compensation of all SEC head coaches); *see also* Teddy Mitrosilis, *Alabama Coaches Made a Stupid Amount in Bonuses for Winning the Title*, FOX SPORTS (Jan. 12, 2016, 12:35 PM), http://www.foxsports.com/college-football/story/alabama-crimson-tide-national-title-nick-saban-coach-bonuses-011216 (stating that Alabama coaching staff earned roughly $1.6 million for winning both SEC and national championships).

will fire me."[87] He was rightly castigated for suggesting, even jokingly, that Ohio State football wasn't just the tail that wagged the dog, but it was, in fact, the dog.[88] Sports journalists joined in the ridicule.[89] But then other stories arrived, and they reverted to form.

Sports stories also regularly fail to follow professional journalism rules, even to the extent that news journalists still do. They have a penchant for writing stories when hearing only one side. They don't always look for the right sources. A big name trumps someone who actually can provide information and context. They almost never talk to faculty when doing a sports story, with the possible exception when the story relates directly and exclusively to academic rules on a campus.

I am not sanguine about the future of collegiate sports. I hope I am wrong, and there is a real appetite for change. I hope we are willing and able to be the ants in the fable about the ant and grasshopper and provide for winter long before the snow starts to fall.

I am sure there are many who believe that college sports need to reflect their situs on university campuses and be administered to reflect that it is students who compete.

The media is organized, and it talks. Big donors are heard. Where is the organized group of higher education fans that can help achieve fundamental change?

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[87] George Schroeder, *College Football Proved to Be Gordon Gee's Undoing*, USA TODAY (June 4, 2013, 8:39 PM), http://www.usatoday.com/story/sports/ncaaf/bigten/2013/06/04/college-football-ohio-state-president-gordon-gee-retires/2390019.

[88] *See* Laura Pappano, *How Big-Time Sports Ate College Life*, N.Y. TIMES (Jan. 20, 2012), http://www.nytimes.com/2012/01/22/education/edlife/how-big-time-sports-ate-college-life.html (detailing the importance to universities of college athletics).

[89] *See* Phillip Morris, *Ohio State President E. Gordon Gee's Joke Reveals that Bad Sportsmanship Isn't Confined to the Athletic Department*, CLEVELAND.COM (Mar. 11, 2011, 5:05 AM), http://www.cleveland.com/morris/index.ssf/2011/03/osu_president_gees_joke_reveal.html (analyzing Gordon Gee's comment and The Ohio State University's lack of sportsmanship as a whole).

I said we need a czar. With all the problems, and with all my doubts about success, certainly I volunteer!

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STANDING IN THE OCTAGON: THE ULTIMATE FIGHTING CHAMPIONSHIP'S BATTLE TO LEGALIZE MIXED MARTIAL ARTS IN NEW YORK STATE

MICHAEL ROMEO*

> "If you take four street corners, and on one they are playing baseball, on another they are playing basketball and on the other, street hockey. On the fourth corner, a fight breaks out. Where does the crowd go? They all go to the fight."[1]

INTRODUCTION: THE UFC AND MMA'S FIGHT FOR RECOGNITION AND EQUALITY

As of 2016, The Ultimate Fighting Championship (UFC) is the face of Mixed Martial Arts (MMA) around the world.[2] Starting from a single weight class in a one night tournament, today the UFC has made MMA a globally recognized professional sport.[3] Recently, the UFC set the record for the

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[1] Dana White, *Dana White Quotes*, EVAN CARMICHAEL, http://www.evancarmichael.com/Famous-Entrepreneurs/1166/Dana-White-Quotes.html (last visited Sept. 30, 2016).

[2] *See The UFC*, ULTIMATE FIGHTING CHAMPIONSHIP, http://www.ufc.com/discover/ufc (last visited Sept. 30, 2016) [hereinafter *The UFC*] (tracking growth and evolution of UFC since its inception in 1993 and noting its dominance in martial arts today).

[3] *See* Jonathan Strickland, *How the Ultimate Fighting Championship Works,* HOW STUFF WORKS (May 1, 2007), http://entertainment.howstuffworks.com/ufc4.htm (noting origins of UFC 1 and how they were different compared to modern UFC events). Specifically, the article discusses the implementation of one-night tournaments, no weight classes, and how the original UFC tournament was billed as a chance for martial artists to fight against other fighters from various martial arts disciplines.

largest sale of any professional sports organization.[4] In light of these milestones, the UFC has taken steps to increase the safety of its competitors, to further legitimize itself in the eyes of the professional sports world and garner the respect that mainstream sports demand.[5] For the most part, these efforts have proved successful.[6] However, until early 2016, one of the biggest venues in the world was still off limits: New York State.[7] Before

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[4] Darren Rovell & Brett Okamoto, *Dana White on $4 billion UFC Sale: 'Sport is going to the next level,'* ESPN (July 11, 2016), http://espn.go.com/mma/story/_/id/16970360/ufc-sold-unprecedented-4-billion-dana-white-confirms.

[5] *See* Adam Hill, *A Timeline of UFC Rules: From No-Holds-Barred to Highly Regulated*, BLEACHER REPORT (Apr. 24, 2013), http://bleacherreport.com/articles/1614213-a-timeline-of-ufc-rules-from-no-holds-barred-to-highly-regulated (tracing the evolution of UFC regulations and safety procedures from MMA's inception to present day); *see also Unified Rules and Other Important Regulations of Mixed Martial Arts*, ULTIMATE FIGHTING CHAMPIONSHIP, http://media.ufc.tv//discover-ufc/Unified_Rules_MMA.pdf (last visited Sept. 30, 2016) (listing unified rules of MMA which govern all UFC bouts).

The unified rules of MMA govern all aspects of a UFC bout, including weight classes, ring size, equipment, specifications for hand wrapping, protective equipment, and appearance. *Id.* Further, the UFC has recently named the United States Anti-Doping Agency as the new administrator for drug testing. Jesse Holland, *UFC Names United States Anti-Doping Agency (USADA) as Independent Administrator for New Drug-Testing Policy*, MMA MANIA (June 3, 2015), http://www.mmamania.com/2015/6/3/8724401/ufc-names-usada-independent-administrator-new-drug-testing-policy-july-1-mma.

[6] *See* Michael McCarthy, *As Business, UFC is a Real Knockout*, USA TODAY (June 21, 2011), http://usatoday30.usatoday.com/sports/mma/2011-06-21-mma-business_N.htm (noting explosive popularity gained by UFC after free televised fights were broadcast in 2005). Additionally, the UFC signed a major endorsement deal with Reebok in 2015, further solidifying itself as a main stream sport. Kevin Iole, *UFC's Sponsorship Deal with Reebok About More Than a New Look*, YAHOO! SPORTS (June 30, 2015, 1:59 PM), http://sports.yahoo.com/news/ufc-s-sponsorship-deal-with-reebok-about-more-than-just-a-new-look-205716284.html (noting that UFC's Reebok deal makes MMA more appealing to television networks and fringe fans). For more examples of the UFC's growth and acceptance as a mainstream sport, *see supra* text accompanying notes 1–3.

[7] N.Y. UNCONSOL. LAW § 8905-a (McKinney 2016), repealed by L.2016, c. 32, §1, eff. Sept. 1, 2016 (S.5949A), *but see Governor*

overturning its Combative Sports Ban, New York stood in stark contrast to its sister states and did not allow any professional martial arts competitions within its borders.[8] Numerous attempts were made to convince the New York legislature to overturn the Combative Sports Ban with varying degrees of success.[9] However, in 2012, attempts at diplomacy waned when a group consisting of MMA fighters, trainers, fans, and the UFC's parent company, Zuffa, LLC (Zuffa), brought a lawsuit against New York State in *Jones v. Schneiderman* claiming that the statewide ban on MMA was unconstitutional.[10]

After a long legal battle, a federal court in the Southern District of New York dismissed the claim on grounds that the plaintiffs did not have standing to sue.[11] Although this result angered critics, fans, and the media, the legal ramifications were significant.[12] Primarily, the standing doctrine and the imminence of injury requirement were applied in a way that contradicted other courts' holdings.[13] Further, the court almost backhandedly

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Cuomo Signs Legislation Legalizing Mixed Martial Arts in New York State, NEW YORK STATE (Apr. 14, 2016), https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-legalizing-mixed-martial-arts-new-york-state.

[8] N.Y. UNCONSOL. LAW § 8905-a (McKinney 2016), repealed by L.2016, c. 32, §1, eff. Sept. 1, 2016 (S.5949A). From 2013–2016, New York State was the only governing body in the U.S. which still outlawed MMA. Dave Meltzer, *Major Day for MMA Legislation as Bills Pass in Canada and Connecticut*, MMA FIGHTING (June 5, 2013, 9:20 PM), http://www.mmafighting.com/2013/6/5/4400386/major-day-for-mma-legislation-as-bills-pass-in-canada-and-connecticut (noting that with MMA legal in Connecticut, New York is the only state which still outlaws MMA).

[9] Kenneth Lovett, *UFC Spent $1.6 Million in Lobbying in New York*, NEW YORK DAILY NEWS (Apr. 29, 2013, 12:49 AM), http://www.nydailynews.com/new-york/ufc-spent-1-6-million-new-york-lobbying-article-1.1329863 (noting that New York State Senate has passed legislation which would legalize MMA in New York four separate times only to see said bill fail in New York State Assembly).

[10] 888 F. Supp. 2d 421, 422 (S.D.N.Y. 2012).

[11] Jones v. Schneiderman, 101 F. Supp. 3d 283, 293 (S.D.N.Y. 2015) [hereinafter *Jones III*].

[12] *See infra* notes 154 to 215 and accompanying text.

[13] *See also infra* notes 16, 75, 122, 208, 209, 211, 212 and accompanying text. *Compare* Jones III, 101 F. Supp. 3d at 289, n.4 (analyzing when to apply credible threat of prosecution standard for

agreed with the merits of the plaintiffs' lawsuit, claiming that if they were to sue again, events that took place during the previous litigation could alter the outcome.[14] Thus, the Court rejected some commentators' critiques, which suggest that the standing doctrine is employed to evaluate the merits of a case before that stage of the litigation is reached.[15]

This article starts by discussing the facts surrounding *Jones v. Schneiderman* and the precedent cases which led the court to issue a summary judgment in favor of the defendants.[16] Part II of this article will discuss the standing doctrine as defined by the Supreme Court and later look to its application by the Second Circuit.[17] Part III narrates the holding of the Southern District of New York Court in finding the plaintiffs lack of standing,[18] and Part IV analyzes that decision in light of the

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purposes of standing), *with* Pacific Capital Bank, N.A. v. Connecticut, 542 F.3d 341, 350 (2d. Cir. 2008) (explaining that Pacific has standing if its interpretation of the statute is reasonable and it legitimately fears enforcement of the statute.).

[14] *See Jones III*, 101 F. Supp. 3d at 291, n.6.

[15] *See, e.g.,* Gene Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 650 (1985) (noting the extra considerations courts implicitly take into account when determining standing); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977) (claiming inconsistencies in standing decisions show that courts use standing to rule on merits); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221, 221-23 (1988) (noting scattered standing decisions by courts and proposing a standing analysis that incorporates the merits of plaintiffs' claims); Gene R. Nichol, Jr., *Injury and the Disintegration of Article III*, 74 CAL. L. REV. 1915, 1918-99 (1986) (noting courts' incomplete description of injury analysis and its requirements); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N. C. L. REV. 1741, 1742 (1999) (arguing that judges use standing to further their political ideologies in courts); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 639-40 (1999) (describing injury analysis in standing as incoherent). *But see* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 881 (1983) (classifying standing as essential to separation of powers).

[16] *See infra* notes 22 to 35 and accompanying text.

[17] *See infra* notes 36 to 125 and accompanying text.

[18] *See infra* notes 126 to 159 and accompanying text.

material discussed in Part II.[19] The article concludes with a discussion of Zuffa's subsequent actions since the disposition of *Jones v. Schneiderman*, an analysis of scholarly critiques of the standing doctrine, and a brief discussion of New York's subsequent actions, which have legalized MMA, since the disposition of *Jones v. Schneiderman*.[20]

I. FACTS: TRASH TALKING, UGLY HISTORY, AND THE BEGINNINGS OF A HEAVYWEIGHT BRAWL

In 1993, the UFC promoted its first professional MMA event in a "winner take all" one-night tournament.[21] MMA then continued to grow throughout the 1990s, with various promotions having varying amounts of success in both the USA and abroad.[22] Eventually, the UFC emerged as the leader of professional MMA events[23] which attracted both positive and negative media attention.[24]

Reacting to the growing popularity of MMA, New York enacted a ban on professional combative sports in 1997 (the "Combative Sports Ban") which outlawed all professional martial arts competitions within the state (subject to only a few exceptions).[25] Under the terms of the 2016 iteration of the

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[19] *See infra* notes 160 to 198 and accompanying text.

[20] *See infra* notes 201 to 218 and accompanying text.

[21] *See The UFC*, *supra* note 2; *see* Strickland *supra* note 3.

[22] *See* Tony Loiseleur, *MMA's Cold War: The UFC vs. Pride Fighting Championships*, SHERDOG (Nov. 22, 2013), http://www.sherdog.com/news/articles/MMAS-Cold-War-The-UFC-vs-Pride-Fighting-Championships-59579 (discussing the rivalry between Pride FC and UFC promotions); *The Rise and Fall of Pride FC, Fedor Emelianenko*, BOXING INSIDER, http://www.boxinginsider.com/mma/the-rise-and-fall-of-pride-fc-fedor-emelianenko (noting the success of Pride FC in early 2000's in Japan and Asia) (last visited Sep. 29, 2016).

[23] *Source: UFC buys Pride for less than $70M,* ESPN (Mar. 27, 2007), http://sports.espn.go.com/sports/news/story?id=2814235 (finding that with the purchase of Pride FC the UFC becomes the front runner of professional MMA promotions).

[24] *See* McCarthy, *supra* note 6; N.Y UNCONSOL. LAW § 8905-a.

[25] *See* N.Y. UNCONSOL. LAW § 8905 (McKinney 1997). The law effectively bans combative sports from taking place in New York state. *Id.* Textually, the ban in 2016 defines combative sports as "any

Combative Sports Ban, the New York State Attorney General may criminally prosecute those who violate the act;[26] however, to date no such actions have been pursued.[27] Although the New York State Athletic Commission (NYSAC) is tasked with issuing licenses and permits for professional sporting events, it lacks the authority to enforce them because that authority has

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professional match or exhibition other than boxing, sparring, wrestling or martial arts wherein the contestants deliver, or are not forbidden by the applicable rules thereof from delivering kicks, punches or blows of any kind to the body of an opponent or opponents." N.Y. UNCONSOL. LAW § 8905-a (McKinney 2016).

Further, the law narrowly defines "martial arts" for purposes of what is allowed under the ban as any professional match or exhibition which is sanctioned by any of the following organizations: U.S. Judo Association, U.S. Judo, Inc., U.S. Judo Federation, U.S. Tae Kwon Do Union, North American Sport Karate Association, U.S.A. Karate Foundation, U.S. Karate, Inc., World Karate Association, Professional Karate Association, Karate International, International Kenpo Association, and the World Wide Kenpo Association. *Id.* The law grants power to the New York State Athletic Association to remove or add martial art organizations to the list of professional organizations exempt from the law. *Id.* at 1(A)-(C); *see also* Steven Rondina, *MMA Still Banned in New York: Bill Once Again Fails to Reach Vote in Assembly,* BLEACHER REPORT (Jun. 25, 2015, 7:52 PM), http://bleacherreport.com/articles/2500677-mma-still-banned-in-new-york-bill-once-again-fails-to-reach-vote-in-assembly (suggesting that the New York MMA ban was enacted in response to media backlash after event was planned there in 1997).

For a political take on why MMA is illegal in New York, see Matthew Doarnberger*, Why is Mixed Martial Arts Banned Only in New York?,* NEWSWEEK (July 28, 2015, 5:01 PM), http://www.newsweek.com/why-mixed-martial-arts-banned-only-new-york-357899 (suggesting that UFC is banned in New York because of conflicts between UFC executives and powerful labor unions); Jillian Kay Melchior, *A Union's Low Blow to MMA Fighters*, NY POST (Nov. 20, 2013, 1:59 AM), http://nypost.com/2013/11/20/a-unions-low-blow-to-mma-fighters (claiming that strong demands in New York for UFC fights remain unmet due to a Nevada union circumventing the democratic process to serve its own political ends).

[26] N.Y. UNCONSOL. LAW § 8905-a(3)(d) (McKinney 2016).

[27] Jones v. Schneiderman, 101 F. Supp. 3d 283, 288 (S.D.N.Y. 2015) (stating that the New York Office of the Attorney General has never prosecuted anyone under the Combative Sports Ban).

been vested in the state's Attorney General.[28] Nevertheless, the Combative Sports Ban empowers the NYSAC to withhold licensing matches or exhibitions for outlawed combative sports.[29]

To combat the Act's blanket ban on combative sports, the UFC's parent company, Zuffa, filed a civil action against New York State in 2011.[30] It alleged that the Act was unconstitutional.[31] The plaintiffs of the case included Zuffa, professional fighters, amateur fighters, trainers, and MMA fans in New York State.[32] These plaintiffs alleged a variety of constitutional infringements, including violations of the First Amendment, the equal protection clause, and the due process clause.[33] The first judgment issued in this legal battle dismissed two of the plaintiffs' allegations for failing to state a claim.[34] In

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[28] *Id.* at 287 ("The NYSAC lacks such prosecutorial authority, although it may refer potential statutory violations to the OAG for investigation.").

[29] N.Y. UNCONSOL. LAW § 8905-a(2) (McKinney2016) ("No combative sport shall be conducted, held or given within the state of New York, and no licenses may be approved by the commission for such matches or exhibitions."). *See* N.Y. ALCO. BEV. CONT. LAW § 106(6-c)(c) (McKinney 2016) (granting the New York State Liquor Authority the power to institute "a proceeding to suspend, cancel or revoke the license" of any business entity that violates N.Y. UNCONSOL. LAW § 8905-a). Because losing a liquor license for a major venue would amount to a major loss of revenue, this liquor law effectively acts as a second "back up ban" on the New York MMA ban. *Id.*

[30] Jones v. Schneiderman, 888 F. Supp. 2d 421, 422 (S.D.N.Y. 2012).

[31] *Id.*

[32] *Id.* at 422.

[33] *Id.* Zuffa, LLC alleged seven distinctive counts against New York State's Combative Sports Ban: that the law violated the plaintiff's First Amendment right of free expression; that the law violated the First Amendment due to being overbroad; that the law violated the due process clause due to being vague; that the law violated the equal protection clause; that the law violated the due process clause because it lacked a rational basis to a legitimate governmental purpose; the law violated the commerce clause; and that a separate 2001 liquor law violated the plaintiff's First Amendment right of expression.

[34] *Id.* The court dismissed the equal protection clause claim and the rational basis due process claim. *Id.* For both counts, the court

response, Zuffa's legal team amended its complaint, and reasserted all seven constitutional violations (hereinafter, "*Jones II*"). [35] This time the court dismissed all of the plaintiffs' vagueness challenges except Zuffa's.[36]

Following the disposition of *Jones II* and a lengthy discovery process, both parties filed cross motions for summary judgment on the void-for-vagueness claim.[37] But, the court found that the plaintiffs lacked standing to state a claim against New York State.[38] The court, however, left its doors open to the plaintiffs when it indicated a willingness to evaluate the merits of their claim in a future suit – so long as the standing requirements were met.[39]

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found that the law in question passed the rational basis analysis needed in order to be upheld. *Id.*

[35] Jones v. Schneiderman, 974 F. Supp. 2d 322, 327 (S.D.N.Y. 2013) [hereinafter *Jones II*]. In *Jones II* plaintiffs reasserted all seven claims as described in *Jones I*.

[36] *Id.* In dismissing six of the seven claims asserted by plaintiffs, the court noted that the First Amendment is not implicated by New York's MMA ban because any particularized message intended by MMA will probably not be understood by those viewing it on television or live in person. *Id.* at 336. Further, the court felt that New York's MMA ban was not sufficiently overbroad to warrant protections by the First Amendment. *Id.* at 338–39. Additionally, the court noted that the law was not unconstitutionally facially vague because "[a] vagueness challenge based on a speculative threat of arbitrary enforcement" would be premature before a broad use of the ban is implemented. *Id.* at 347 (quoting Richmond Boro Gun Club v. City of New York, 97 F.3d 681, 686 (2d Cir. 1996)). Further, the court ruled out any challenge based on equal protection or due process because the law survives rational basis scrutiny. *Id.* at 348–49. Lastly, the court found that the ban did not violate the commerce clause because it did not burden or discriminate against interstate commerce and "[d]oes [n]ot [h]ave the [p]ractical [e]ffect of [e]xtraterritorial [c]ontrol of [c]ommerce[.]" *Id.* at 349–52.

[37] Jones v. Schneiderman, 101 F. Supp. 3d 283, 287 (S.D.N.Y. 2015) (noting summary judgment pleadings by both plaintiffs and defendants).

[38] *Id.* at 293.

[39] *Id.* at 299 ("Plaintiffs, particularly Zuffa, may consider filing new vagueness claims based on events that occurred after this lawsuit commenced….").

II. BACKGROUND: THE RULES OF THE BOUT: THE LAW SURROUNDING STANDING AND THE CREATION OF AN UNWIELDY DOCTRINE

A. THE CREATION AND HISTORY OF THE STANDING DOCTRINE

The judicial power of the federal government is limited to certain cases and controversies which are deemed justiciable.[40] To satisfy this justiciability standard, the plaintiff must meet the initial burden of standing.[41] The threshold question for determining exactly what cases and controversies are eligible for federal jurisdiction is embodied in the constitutional doctrine of standing.[42]

In *Lujan v. Defenders of Wildlife*,[43] the Supreme Court established a three prong test to determine whether or not standing exists: (1) an injury in fact, (2) causation by the defendant, and (3) redressability by a favorable ruling in court.[44] In *Lujan*, the Secretary of the Interior interpreted the Endangered Species Act in a way that reduced the Act's scope and

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[40] U.S. CONST. art. III, § 2.

[41] Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) ("The litigant must . . . set forth facts sufficient to satisfy . . . Art. III standing requirements.").

[42] *Id.* (stating that standing doctrine determines which cases and controversies are eligible for judicial review); *see also* F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 57 (2012) (noting that courts use standing to determine what cases are eligible for jurisdiction under the federal judiciary).

[43] 504 U.S. 555 (1992).

[44] *Id.* at 560–61 ("Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements[:] . . . injury in fact . . . fairly traceable to [the] . . . defendant . . . that will be redressed by a favorable decision"); *see also* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (identifying injury, causation, and redressability as necessary to establish Article III standing); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103–04 (1998) ("[the] triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence"); Bennet v. Spear, 520 U.S. 154, 162 (1997) (There must be injury in fact that is fairly traceable to the defendant and a favorable decision must be able to solve the problem.); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 62 (Vicki Been et al., eds., 4th ed. 2011).

effectiveness.[45] The plaintiffs in *Lujan*, who intended to travel to the affected lands at some point in the distant future, claimed they would be injured by the Secretary's interpretation because it diminished the number of endangered species eligible for viewing.[46] The Court ruled in favor of the defendant reasoning that the injury-in-fact prong had not been satisfied.[47] It explained that this prong requires more than just "an injury to a cognizable interest."[48] Because the plaintiffs failed to express any concrete or imminent plans to travel to the affected lands in the future, the Court found that there was no injury in fact.[49]

Following *Lujan*, courts further developed the Standing Doctrine so as to better fit a wider array of controversies.[50] In 2007, the Supreme Court decided *Massachusetts v. EPA*, which further altered the imminent injury aspect of the standing test.[51]

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[45] 504 U.S. at 558–59.

[46] *Id.* at 562–64.

[47] *Id.* at 562–68.

[48] *Id.* at 563 (stating that injury to interest is not enough to amount to standing but injury to oneself is).

[49] *Id.* at 564 ("Such 'some day' intentions–without any description of concrete plans, or indeed even any specification of *when* the some day will be–do not support a finding of the 'actual or imminent' injury that our cases require.") (emphasis in original).

[50] *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1143 (2013) (elaborating on when a claimed injury is too speculative for purposes of standing); Summers v. Earth Island Inst., 555 U.S. 488, 493–97 (2009) (analyzing the concreteness of the aspect of claimed injury); Massachusetts v. EPA, 549 U.S. 497, 526 (2007) (finding standing for Massachusetts in the fear and injury resulting from global warming); Wolfson v. Brammer, 616 F.3d 1045, 1058 (9th Cir. 2010) (discussing when threatened prosecution can amount to injury for purposes of standing); San Diego Cty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996) (discussing when potential prosecution amounts to injury for purposes of standing); *see also* Bradford C. Mank, *Reading the Standing Tea Leaves in* Am. Elec. Power Co. v. Connecticut, 46 U. RICH. L. REV. 543 (2012). Professor Mank's article focuses on how the Supreme Court was evenly divided on a standing issue presented to them in a case based on greenhouse gas emissions. *Id.* at 543–45. He theorizes that this division in the Court showcased the Court's apprehension in allowing standing for "generalized grievances." *Id.* at 598–602.

[51] 549 U.S. at 521–23 (noting that progressive global warming and rising of ocean levels is sufficient injury to Massachusetts to show injury for purposes of standing); *see also* Fed. Election Comm'n v.

In *EPA*, Massachusetts, among other states, brought suit against the EPA to force it to regulate greenhouse gasses more effectively.[52] To satisfy the injury-in-fact prong, Massachusetts explained that an increase in greenhouse gasses would lead to higher global temperatures and rising ocean levels which, in turn, would threaten Massachusetts's coastlines.[53] Here, the Court ruled that Massachusetts had standing.[54] It explained that, although the injury of rising sea levels may not be imminent, the injury was nevertheless real and concrete.[55] The Court also noted that, although the risks associated with climate change are widely shared, Massachusetts was particularly in danger of suffering great harm because of its extensive coastal land.[56] Therefore, because Massachusetts could show a concrete injury caused, in part, by the EPA, it had standing to bring a claim.[57]

The immanency aspect of the injury-in-fact requirement was further developed in *Summers v. Earth Island Inst.*,[58] which discussed the attenuation of a claimed injury.[59] In *Summers*, the

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Akins, 524 U.S. 11, 24 (1998) ("[W]here a harm is concrete, though widely shared, the Court has 'found injury in fact.'") (internal quotations omitted).

[52] EPA, 549 U.S. at 505 n.2, 514 (identifying California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington as states suing, and elaborating on the cause of action giving rise to this claim).

[53] *Id.* at 521–23 (alleging rise in ocean levels is concrete danger that threatens states with coastal land like Massachusetts).

[54] *Id.* at 526.

[55] *Id.* at 522 ("[R]ising seas have already begun to swallow Massachusetts' coastal land."). Further, the Court put great weight into the fact that the Massachusetts Commonwealth owns a large portion of the state's coastal land, thus adding to the level of particularity of the injury. *Id.* at 522–23 (noting that if coastal waters continue to rise the significance of this identified injury will only increase).

[56] *Id.* at 522.

[57] *Id.* at 526.

[58] 555 U.S. 488, 488 (2009).

[59] *Id.* at 494 ("We know of no precedent for the proposition that when a plaintiff has sued to challenge . . . the basis for that action . . . apart from any concrete application that threatens imminent harm to his interests."); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 64 (Vicki Been et al. eds., 4th ed. 2011) (noting the importance that plaintiff be the individual suffering actual harm not general harm).

United States Forest Service (USFS) approved a salvage sale of timber on 238 acres of forest damaged by fire.[60] This, however, was in violation of the Forest Service Decision Making and Appeals Reform Act, which requires the USFS to utilize a notice, comment, and appeals process for USFS actions that implement certain land and resource management plans.[61] The plaintiffs were a group of forest protection organizations.[62] They challenged the USFS's compliance with the Forest Service Decision Making and Appeals Reform Act.[63] However, the Supreme Court found that they did not have standing because they lacked a "concrete, particularized injury in fact."[64] The Court reasoned that the plaintiffs alleged only that they planned to return to the affected forest sites someday in the future.[65] Further, the Court found that even if it was within the realm of possibility that one of the plaintiffs would potentially be affected by the actions of the USFS, "speculation does not suffice."[66] The majority specifically noted that a "vague desire to return is insufficient to satisfy the requirement of imminent injury."[67] While plaintiffs claimed that they could properly show injury in fact if they could introduce new facts into the record post

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[60] *Summers*, 555 U.S. at 491.

[61] *Id.* at 490–92.

[62] *Id.* at 490.

[63] *Id.* at 490–92.

[64] *Id.* at 496 (explaining that in order to meet the injury requirement, there must be a finding that "actual or imminent" injury will occur) (quoting Lujan 504 U.S. at 564).

[65] *Id*.

[66] *Id.* at 499 (noting that standing requires a "factual showing of perceptible harm"). The Majority rejects the standard for standing suggested by the Dissent, specifically that "a realistic threat that reoccurrence of the challenged activity would cause [the plaintiff] harm in the reasonably near future." *Id.* at 499–500 (alteration in original) (internal quotations omitted). However, the Dissent suggested that "precedent nowhere suggests that the 'realistic threat' standard contains identification requirements more stringent than the word 'realistic' implies." *Id.* at 505 (Breyer, J., dissenting). The Dissent relied on Los Angeles v. Lyons, 461 U.S. 95 (1983), where the plaintiff attempted to sue in order to get an injunction requiring that the police stop using chokeholds on arrestees. *Id.* In *Lyons*¸ the Court claimed that the plaintiff would have standing if he could show a "realistic threat" that he would be subject to a police chokehold in the "reasonably near future." *Lyons*, 461 U.S. at 106 n.7, 107–08.

[67] *Summers*, 555 U.S. at 496.

appeal—a suggestion that found some traction with the dissent [68] —the majority conclusively did away with that suggestion when it reasoned that adding new facts into the record is not a practice that had been done before.[69]

In recent years, "the imminence of injury" required to show standing has become somewhat of a malleable element in the standing analysis.[70] In *Monsanto Co. v. Geerston Seed Farms*,[71] two farms brought suit against Monsanto, alleging that Monsanto's new variety of alfalfa would contaminate and subsequently lead to the disappearance of the farmers' brand of alfalfa.[72] Although injury in the traditional sense of standing could not be shown, a "reasonable probability" of harm was deemed sufficient to find standing.[73] Other cases reaching the Supreme Court have been held to the same lax standard, suggesting that the ruling in *Monsanto* was not limited to the specific facts in that case.[74] The departure from precedent seen in *Monsanto* exemplifies the variety of standards utilized when evaluating standing, and adds credibility to the critiques of

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[68] *Summers*, 555 U.S. at 508–09 (Breyer, J., dissenting).

[69] *Id.* at 500 ("[t]he dissent cites no instance in which 'supplementation' has been permitted to resurrect and alter the outcome in a case").

[70] *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (quoting Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2138–39 n.2 (1992) ("Imminence is concededly a somewhat elastic concept, [but] it cannot be stretched beyond its purpose.").

[71] 561 U.S. 139 (2010).

[72] *Id.* at 144–49.

[73] *Id.* at 153–54 (finding that a reasonable probability of cross contamination is a sufficient injury for purposes of standing).

[74] *See, e.g.*, MedImmune, Inc. v. Genetech, Inc., 549 U.S. 118, 129 (2007) (observing a 'genuine threat of prosecution' standard); Dep't of Commerce v. U.S. House of Reps., 525 U.S. 316, 332–33 (1999) (observing a 'substantially likely' standard); Clinton v. City of New York, 524 U.S. 417, 432 (1998) (observing a 'sufficient likelihood of economic injury' standard); Pennell v. San Jose, 485 U.S. 1, 8 (1988) (applying a 'realistic danger' standard); Buckley v. Valeo, 424 U.S. 1, 74 (1976) (observing a 'reasonable probability' standard).

commentators who suggest that the Standing Doctrine has become incoherent.[75]

In *Clapper v. Amnesty Int'l USA*,[76] plaintiffs claimed that the Foreign Intelligence Surveillance Act of 1978 would imminently harm them because it authorized the surveillance of persons who were not United States citizens.[77] Here, the plaintiffs were United States citizens who regularly communicated with foreign individuals who could be targeted by surveillance.[78] The Court held that this possible injury was too attenuated to amount to an injury that was certainly impending.[79] Led by Justice Breyer, the dissent prescribed to the idea that the harm or injury in this case was not too speculative to find standing because there was a very high likelihood that the

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[75] *See, e.g.*, Gene R. Nichol, Jr., *Standing For Privilege: The Failure of Injury Analysis*, 82 B.U.L. REV. 301 (2002) (noting how standing is an incomprehensible area of the law).

[76] 133 S. Ct. 1138 (2013).

[77] *Id.* at 1143.

[78] *Id.* at 1145.

[79] *Id.* at 1147–49 (asserting that "threatened injury must be *certainly impending* to constitute injury in fact") (emphasis in original) (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)). Another issue pertaining to the plaintiffs' standing in *Clapper* was the plaintiffs' claim that they had undertaken "costly and burdensome" precautions in order to ensure confidentiality in their communications. *Id.* at 1145–46. However, the Court rejected this argument, stating that injury in fact cannot be created by choosing to harm oneself economically due to the fear of a possible future harm. *Id.* at 1150–51 ("[Plaintiffs] cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.").

In a footnote, the *Clapper* Court admitted that the Standing Doctrine is not held to a uniform standard. *Id.* at 1150, n.5 ("Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. . . . [W]e have found standing based on a 'substantial risk' that harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.") (internal quotations omitted). The Court goes on to claim that even if the "substantial risk" standard is lower than the "certainly impending'" standard, the plaintiffs in this case fail to meet even that bar. *Id.*

government would intercept at least *some* of the plaintiffs' communications.[80]

1. The Recognition of Imminent Threat of Prosecution as an Injury

In some standing disputes, the claimed injury stems from the possible enforcement of a statute that the plaintiff believes is unconstitutional.[81] For example, *Babbitt v. United Farm Workers Nat'l Union*[82] discussed when threat of prosecution rises to the level of imminent injury needed for a claim to be justiciable as a case or controversy.[83] In *Babbitt*, a farmworker's union sued over certain provisions of Arizona's Farm Labor Statute.[84] In finding that the plaintiffs had standing, the Supreme Court outlined when imminent prosecution rises to the level needed to establish an injury in fact.[85] The Court held "it is not necessary

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[80] *Id.* at 1156–57 (Breyer, J., dissenting) (noting that "there is a very high likelihood that Government . . . will intercept at least some of the communications"). However, Justice Breyer reached this decision without citing to any expert testimony or studies, instead subscribing to the plaintiffs' argument that, because they frequently communicate with individuals living in the Middle East, there is a higher likelihood that their communications will be intercepted. *Id.* at 1157–60. Further, Justice Breyer felt that the claimed injury in *Clapper* was almost tangentially identical in Monsanto Co. v. Geerston Seed Farms, 561 U.S. 139 (2010), where the plaintiff had to take steps in order to avoid harm. *Id.* at 1163–64; *see also* Bradford C. Mank, *Clapper v. Amnesty International: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211 (discussing the implications of the *Clapper* decision and how its disposition will affect future cases).

[81] Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979) (analyzing standing where plaintiffs feared prosecution under Arizona's farm labor statute); *see also* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014) (analyzing standing as stemming from threatened prosecution of a statute); Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (holding the same).

[82] 442 U.S. 289 (1979).

[83] *Id.* at 298–314 (discussing when threat of prosecution can amount to imminent injury sufficient to find Article III standing).

[84] *Id.* at 292–97.

[85] *Id.* at 298–99 (noting that "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statutes operation or enforcement").

that the plaintiff first expose himself to actual . . . prosecution to be entitled to challenge the statute that he claims deters the exercise of his constitutional rights."[86] However, the Court reasoned that this lower standard of determining standing should apply only when the plaintiff's *conduct* contains a constitutional interest.[87] In regards to the statute in *Babbitt*, the Court found that the threat of prosecution was an imminent injury in fact because "the State has not disavowed any intention of invoking the [statute's] criminal penalt[ies]."[88] Thus, the Court concluded that this imminent threat of prosecution was sufficient to warrant Article III jurisdiction as a case or controversy.[89]

B. HOW THEY FIGHT IN THE BIG APPLE: THE STANDING DOCTRINE ACCORDING TO THE SECOND CIRCUIT

The Second Circuit has also decided a number of cases pertaining to the standing doctrine.[90] Generally, the Second Circuit has rejected a rigid test when analyzing standing.[91] In

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[86] *Id.* at 298 (quoting Steffel v. Thompson, 415 U.S. 452, 459 (1974)). The Court elaborated on standing with reference to constitutional interests, claiming that when a constitutional interest is involved and an actual threat of prosecution exists, the plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Id*. (quoting Doe v. Bolton, 410 U.S. 179, 188 (1973)). Additionally, the Court went on to explain that the threat of prosecution must be objectively credible and cannot be abstract or uncertain. *Id.* at 298–99. *See also* MedImmune v. Genetech, 549 U.S. 118, 129 (2007) (discussing the threat of prosecution standard generally).

[87] *See Babbitt,* 442 U.S. at 298–99.

[88] *Id.* at 302 (finding that parties in this case are objectively contrary to each other, thereby warranting the credible threat of prosecution standard).

[89] *Id.* at 302–03 (finding sufficient standing for plaintiffs to bring claim).

[90] *See, e.g.*, Fulton v. Goord, 591 F.3d 37 (2d. Cir. 2009) (finding standing for plaintiff who claimed injury based on failure to accommodate under the Americans with Disabilities Act); Lamar Advert. of Penn., LLC v. Town of Orchard Park, 356 F.3d 365 (2d Cir. 2004) (discussing standing and aspects of concreteness of plans for injury); Aguilar v. Immigration & Customs Enforcement Div. of the U.S. Dep't of Homeland Sec., 811 F. Supp. 2d 803 (S.D.N.Y. 2011) (discussing standing to seek injunctive relief by plaintiffs).

[91] *See, e.g.*, NRDC, Inc. v. United States FDA, 710 F.3d 71, 81 (2d Cir. 2013) (noting that the "injury-in-fact analysis is highly

Lafleur v. Whitman,[92] petitioners brought a suit challenging the construction of a waste management facility, alleging that the new facility would harm them by releasing noxious gasses harmful to petitioners' health.[93] The respondents countered by arguing that the injury would be too attenuated in order to meet standing requirements because there was only a chance that the petitioners would come in contact with the gasses.[94] The Second Circuit, however, found that the petitioners had standing in this case because of the "likely exposure" petitioners may have to the gasses released from the facility.[95] This decision is relevant because it seems to impose a more liberal interpretation of the injury requirement. The Second Circuit even stated that "[t]he injury-in-fact necessary for standing 'need not be large, an identifiable trifle will suffice.'"[96]

In 2004, the Second Circuit further elaborated on its interpretation of the standing doctrine in *Lamar Adver. of Penn., LLC v. Orchard Park*.[97] In *Lamar*, the petitioner claimed that a town ordinance banning certain sizes of signs was unconstitutional.[98] The respondents argued that petitioner could

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case-specific, and the risk of harm necessary to support standing cannot be defined according to a universal standard.") (internal quotations omitted) (quoting Baur v. Veneman, 352 F.3d 625, 637 (2d Cir. 2003)).

[92] 300 F.3d 256 (2d. Cir. 2002).

[93] *Id.* at 262–63, 269–72. Specifically, petitioners complained that the waste management facility will release sulfur dioxide into their breathing air, which has a foul odor. *Id.* at 270. Further, the court, relying on a decision from another circuit, noted that increased levels of sulfur dioxide "directly impairs human health." *Id.* (internal quotations omitted) (quoting American Lung Ass'n v. EPA, 134 F.3d 388, 389 (D.C. Cir. 1998)).

[94] *Lafleur*, 300 F.3d at 271–72.

[95] *Id.* at 270 "Petitioner's likely exposure to additional [sulfur dioxide] in the air where she works is certainly an 'injury-in-fact' sufficient to confer standing."). Further, the court noted that this injury will be specific enough to the petitioner in order to survive scrutiny under the test set forth in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). *Lafleur*, 300 F.3d at 269–71.

[96] *Lafleur*, 300 F.3d at 270 (internal quotations omitted) (quoting Sierra Club v. Cedar Point Oil Co., Inc., 73 F.3d 546, 557 (5th Cir. 1996)).

[97] 356 F.3d 365 (2d. Cir. 2004).

[98] *Id.* at 368–71.

not have been injured by the ordinance because he had yet to file and be approved for a permit for his planned signs.[99] In finding that the petitioner did have standing and had in fact been injured, the court noted "[petitioner] need not have first sought and been denied any permit prior to filing a facial challenge."[100] Thus, the court did not focus on the concreteness of the alleged injury, but instead looked only to the likeliness that the injury would occur.[101] These cases seem to suggest that the Second Circuit has a more relaxed interpretation of the standing doctrine, as suggested in the *Clapper* dissent.[102]

1. Float Like a Butterfly, Sting Like a Bee: The Second Circuit's Interpretation of the Threat of Prosecution Standard

The Second Circuit has also dealt with cases premised on the applicability of the credible threat of prosecution standard.[103] For example, in *Hedges v. Obama*,[104] the court struggled with determining what standard should be applied to the immanency of injury prong of the standing analysis.[105] The *Hedges* decision stemmed from a lawsuit against the government

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[99] *Id.* at 374. (explaining that the defendant argued that petitioner would not have been approved for the permits, so there is no way that he could say he was injured without first having sought approval).

[100] *Id.*; *see also* MacDonald v. Safir, 206 F.3d 183, 189 (2d. Cir. 2000) ("There is no need for a party actually to apply or to request a permit in order to bring a facial challenge to an ordinance. . . .").

[101] *Lamar*, 356 F.3d at 375.

[102] *See Clapper*, 133 S. Ct. 1138.

[103] *See, e.g.*, Hedges v. Obama, 724 F.3d 170 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1936 (2014) (discussing potential prosecution under federal allowing detention of United States citizens); Pac. Cap. Bank, N.A. v. Connecticut, 542 F.3d 341 (2d Cir. 2008) (discussing potential prosecution under statute that limits interest rates for banks); Int'l Longshoremen's Assoc. v. Waterfront Comm'n of N.Y. Harbor, 495 F. Supp. 1101 (S.D.N.Y. 1980), *aff'd in relevant part* 642 F.2d 666 (2d Cir. 1981) (discussing specificity required for threats to amount to credible threat of prosecution); Linehan v. Waterfront Comm'n, 116 F. Supp. 401, 404 (S.D.N.Y. 1953).

[104] 724 F.3d 170 (2d Cir. 2013), *cert. denied,* 134 S. Ct. 1936 (2014).

[105] *Id.* at 195–204 (discussing the applicability of "fear based standing" and "credible threat of prosecution" standards).

over a law that allowed detention of American citizens.[106] The plaintiffs argued that a more permissive standard should be used for determining standing because this case dealt with the constitutionality of a law.[107] Specifically, the court analyzed case law suggesting that the credible threat of prosecution standard is lax because it assumes that the law in question will be enforced "as long as the relevant statute is 'recent and not moribund.'"[108] The court remarked, however, that a crucial aspect to attaining this lower standard for standing is that the statute in question must clearly and unequivocally proscribe the activity that the plaintiff wishes to perform.[109] In *Hedges,* because the statute in question did not clearly proscribe the activity, the court determined that the plaintiffs lacked standing to challenge the ban.[110]

Even though the plaintiffs in *Hedges* were unsuccessful, the Second Circuit has upheld this lower bar for standing in other decisions. For instance, it has held that "if a plaintiff's interpretation of a statute is reasonable enough and under that interpretation the plaintiff may legitimately fear that it will face enforcement of the statute, then the plaintiff has standing to challenge the statute." [111] In *Pac. Capital Bank, N.A. v.*

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[106] *Id.* at 173–86. (dealing with the constitutionality of the National Defense Authorization Act of 2012, codified at 50 U.S.C. § 1541).

[107] *Id.* at 195–97.

[108] *Id.* at 197 (internal quotations omitted) (quoting Doe v. Bolton, 410 U.S. 179, 188 (1973)).

[109] *Id.* (noting that, if the statute at issue clearly proscribes what plaintiff plans to do, then there is no burden on plaintiff to show that government intends to enforce statute against plaintiff).

[110] *Id.* at 204–05 (finding that plaintiffs lack Article III standing because the statute at issue does not clearly allow government to detain citizens).

[111] Pac. Capital Bank, N.A. v. Connecticut, 542 F.3d 341, 350 (2nd Cir. 2008); *see also, e.g.*, Hedges v. Obama, 724 F.3d 170, 199–200 (2nd Cir. 2013), *cert. denied*, 134 S. Ct. 1936 (2014) ("A plaintiff has standing when it may legitimately fear that it will face enforcement under its reasonable interpretation of the statute."); Vermont Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 382 (2nd Cir. 2000) ("A plaintiff bringing a pre-enforcement facial challenge against a statute need not demonstrate to a certainty that it will be prosecuted under the

Connecticut, [112] the court found standing based on this lax standard even though the dispute at issue did not stem from conduct with a constitutional interest. [113] The issue in *Pac. Capital Bank* stemmed from a dispute of applying federal or state law, and involved a claim under the supremacy clause.[114] Thus, even though the court found standing under the low standard of the *Babbitt* test, it was the claim that engendered a constitutional interest, not the conduct of the parties.[115]

Another important aspect for claiming impending prosecution as an injury is the specificity of the threatened prosecution. [116] In *Int'l Longshoremen's Assoc. v. Waterfront Comm'n of New York Harbor*, [117] a section of the waterfront commission act was challenged as unconstitutional.[118] The court found a credible threat of imminent prosecution because the plaintiffs received actual warning letters from the commission alleging that their conduct was illegal.[119] However, in *Linehan v. Waterfront Comm'n,* [120] the threat of prosecution was very

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statute to show injury, but only that it has an actual and well-founded fear that the law will be enforced against it.").

[112] 542 F.3d 341 (2nd. Cir. 2008).

[113] *Id.* at 346–49. In *Pac. Capital Bank*, Connecticut passed a statute, Conn. Gen. Stat. § 42-480(a)(2), that would regulate the refund anticipation loans of all banks within its borders. Generally, the claim asserted by Pacific Capital Bank was that, pursuant to the supremacy clause, they did not have to follow Connecticut's state law because they were a national bank. *Id.* at 346–49. Thus, the constitutional aspect is rooted in their claim, not their conduct. *Id.*

[114] *Id.* at 346–49.

[115] *Pac. Capital Bank*, 542 F.3d at 346.

[116] *See, e.g.*, Int'l Longshoremen's Ass'n v. Waterfront Comm'n of N.Y. Harbor, 495 F. Supp. 1101 (S.D.N.Y. 1980), *aff'd in relevant part*, 642 F.2d 666 (2nd. Cir. 1981) (discussing specificity required for threatened prosecution to amount to injury for purposes of standing); Linehan v. Waterfront Comm'n, 116 F. Supp. 401 (S.D.N.Y. 1953).

[117] 495 F. Supp. 1101 (S.D.N.Y. 1980), *aff'd in relevant part*, 642 F.2d 666 (2nd. Cir. 1981).

[118] *Id.*

[119] *Id.* at 1110, n.7 (holding that, without specific warning letters directed at plaintiffs, standing to state claim may have not been found).

[120] 116 F. Supp. 401, 404 (S.D.N.Y. 1953).

general.[121] By comparing these two cases, the specificity required for injury via threat of prosecution is illuminated.[122]

C. FIGHT WEEK: WHAT FACTS CAN BE USED TO SHOW STANDING AND WHAT STANDARDS ARE EMPLOYED BY COURTS?

Another crucial aspect in analyzing standing is determining what facts can come into the record in order to show standing.[123] In a litany of cases, it has been conclusively determined that "standing is to be determined as of the commencement of suit."[124] Thus, after a lawsuit has been filed in federal court, only facts up to that date can be utilized to show standing.[125] Further, because the Standing Doctrine can be very fact specific, and the case law on the topic is massive, a few different paths of analysis have surfaced, specifically in regards to the imminence of injury prong.[126] Various standards have

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[121] *Id.* ("[T]he district attorneys of the five counties in New York City and the attorney general intend to enforce the law promptly and vigorously . . . .").

[122] *Compare id.* (finding that general statement of intent to enforce law vigorously is not sufficient to amount to threat of prosecution) *with Int'l Longshoreman*, 495 F. Supp. at 1110, n.7 (finding credible threat of prosecution where plaintiffs received warning letters informing them that their conduct would be illegal under governing statute). Thus, a threat of prosecution must be specific towards the plaintiff in order to support a finding of injury by imminent prosecution. *See also* Wolfson v. Brammer, 616 F.3d 1045 (9th Cir. 2010). *Wolfson* enumerated the requirements for showing a genuine threat of imminent prosecution as (1) the plaintiff has concrete plans to break the law, (2) the prosecuting authorities have given the plaintiff a specific warning or threat to initiate proceedings, and (3) there is a history of prosecution under the statute. *Id.* at 1058.

[123] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 566–67 (1992) (proposing that facts to prove standing must stem from actions taking place prior to commencement of lawsuit).

[124] *Id.* at 570, n.5; *see also, e.g.*, Fenstermaker v. Obama, 354 F. App'x 452, 455, n.1 (2d Cir. 2009) (noting that only facts prior to commencing lawsuit can be used to show standing); Comer v. Cisneros, 37 F.3d 775, 791 (2d Cir. 1994) (noting that only facts prior to commencing lawsuit can be used to show standing).

[125] *See Linehan*, 116 F. Supp. at 404.

[126] *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1143 (2013) (adopting a "certainly impending" standard). In *Clapper*, the

developed in order to evaluate whether a claimant's injury meets the constitutional minimum needed for standing.[127] As discussed previously, courts have applied a "substantial risk" standard, a "certainly impending" standard, and a "credible threat of prosecution" standard, among others, when evaluating the injury claimed by a plaintiff.[128] Although all three of these standards are grounded and applied to specific niches of the standing doctrine, all three become relevant in the disposition of *Jones III*.[129]

III. NARRATIVE ANALYSIS: STEPPING INTO THE CAGE: HOW STANDING WAS THE DETERMINATIVE FACTOR IN *JONES III*

In finding that the plaintiffs lacked standing to present their claim, the court utilizes a highly nuanced discussion and analysis of the various facets of the Standing Doctrine.[130] First, the court framed the discussion by outlining the basis for standing and identifying Article III as the constitutional basis for granting judicial power.[131] The court further identified three separate standards for satisfying the injury-in-fact element of the irreducible constitutional minimum of standing that could apply in *Jones III*: (1) a "certainly impending" injury, (2) a "substantial risk" that injury will surface, and (3) a "credible threat of prosecution."[132]

A. STAND AND TRADE, OR GO FOR THE TAKEDOWN: DETERMINING WHAT STANDARD SHOULD APPLY IN *JONES III*

1. Knocking Out the "Credible Threat of Prosecution" Standard

At the outset, the court identified the need to determine which of the three above-mentioned standards should apply to

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Court also pointed out that in some instances, a "substantial risk" standard will be the proper bar to assess standing. (quoting Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 298 (1979) (adopting a 'credible threat of prosecution' standard)). *See Clapper* at 1150, n.5.

[127] *See, e.g.*, *Clapper*, 133 S. Ct. at 1150, n.5.

[128] *Id.*

[129] *See* Jones v. Schneiderman, 101 F. Supp. 3d 283, 289 (S.D.N.Y. 2015).

[130] *Id.* at 289–93.

[131] *Id.* at 289.

[132] *Id.* at 289, nn.4–5.

the plaintiffs in *Jones III*.[133] First, in a footnote, the court determined that the "credible threat of prosecution" standard, the laxest standard, should not be applied here.[134] In support of this determination, the court noted that the "credible threat of prosecution" standard should only be utilized when a constitutional interest is at stake.[135] Although the plaintiffs had asserted a vagueness challenge, which implicates constitutional due process, courts have held that the constitutional interest must stem from the plaintiff's conduct, not their claims, in order to invoke the "credible threat of prosecution" standard.[136] Here, because the Combative Sports Ban did not prohibit speech or conduct, the court determined that the "credible threat of prosecution" standard should not be applied.[137]

The court did, however, reason that standing may be found even if the threatened conduct does not have a constitutional interest.[138] However, a distinction between the conduct and a claim still controls.[139] The Court reasoned that, even if conduct threatened by prosecution does not have a constitutional interest inherent in it, a claim alone is insufficient

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[133] *Id.* at 289.

[134] *Id.* at 289 n.4 (stating that plaintiffs failed to show that the conduct is affected with a constitutional interest) (citing Babbit v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (holding that the credible threat of prosecution standard is used to establish injury in fact when the plaintiff has alleged an intention to engage in conduct affected with a constitutional interest)).

[135] *Id.*

[136] *Id.*; *cf.* Knife Rights, Inc. v. Vance, 802 F.3d 377, 384 (2d Cir. 2015) (applying "certainly impending" standard to a claim that did not deal with constitutionally protected conduct).

[137] *Jones*, 101 F. Supp. 3d at 289 n.4.

[138] *Id.* at 289, n.5; *cf.* MedImmune, Inc. v. Genetech, Inc., 549 U.S. 118, 128–29 (2007) (holding that "where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced," and citing as examples several cases in which the threatened enforcement at issue did not target constitutionally protected conduct).

[139] *Jones,* 101 F. Supp. 3d at 289, nn.4–5 (stating that for the lower standard of "credible threat of prosecution" to control, the plaintiff must assert that his constitutionally protected conduct is at risk, not merely the constitutional interest of his claim); *see also MedImmune*, 549 U.S. at 128–29.

grounds for applying the credible threat of prosecution standard.[140]

2. In the Opponents Corner: Analysis Under "Substantially Certain" and "Certainly Impending"

Before jumping into an analysis under either the "substantially certain" standard or the "certainly impending" standard, the court further elaborated on the imminent injury prong of a standing analysis.[141] Specifically, the court noted that an imminent prosecution amounts to harm only when the party has concrete plans to perform.[142] As discussed earlier in this article, several cases laid out the level of certainty needed to establish concrete plans – they must amount to more than an intent to "'some day' . . . commit an act, without 'any specification of *when* the some day will be.'"[143]

The court also discussed the amount of specificity needed before a threatened prosecution can amount to "imminent harm."[144] Specifically, the court explained that general promises to uphold a law are not enough to amount to imminent harm.[145] Before a threatened prosecution can be categorized as an imminent injury, targeted and specific threats must be made against the plaintiff.[146]

B. ANALYZING ZUFFA'S STANDING

1. Professional Sanctioned MMA

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[140] *Jones*, 101 F. Supp. 3d at 289, nn.4–5.

[141] *Id.* at 290 ("The concept of imminent injury warrants further elaboration specific to the claims in this case.").

[142] *Id.* at 291 (finding that in order for prosecution to be imminent plaintiff must have concrete plans to perform allegedly illegal conduct); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992) (discussing the level of concreteness required for plans in analyzing standing).

[143] *Jones*, 101 F. Supp. 3d at 291 (quoting *Lujan*, 504 U.S. at 564).

[144] *Id.* at 292 (noting that threat of imminent prosecution must be targeted and specific in order to amount to injury).

[145] *Id.* at 291 ("A government official's statement that a statute prohibits a type of conduct in the abstract . . . is usually insufficient to, without more, to establish that prosecution is imminent against a particular plaintiff.").

[146] *Id.*

Before analyzing Zuffa's standing, the court noted that it almost exclusively relied on facts that occurred after the commencement of the lawsuit in order to show standing.[147] Because standing is an inherently jurisdictional issue, the court emphasized that only facts that occurred before the commencement of the lawsuit can be used to show standing.[148] Zuffa's proclaimed injury was that the New York Attorney General's office threatened to prosecute even if it attempted to promote an MMA event with an organization that was exempt from the Combative Sports Ban.[149] However, because Zuffa was never contacted about possible prosecution prior to this lawsuit's filing, the court found this fact to be irrelevant to standing.[150]

However, the court found that Zuffa asserted other injuries relevant to standing.[151] For instance, it claimed that the NYSAC would not "provide assurances that a hypothetical sanctioned professional MMA event would not be shut down."[152] Nevertheless, the court found this reasoning unpersuasive for several reasons.[153] First, the NYSAC does not have prosecutorial authority, and therefore any failure to "provide assurances"

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[147] *Jones*, 101 F. Supp. 3d at 294.

[148] *Jones*, 101 F. Supp. 3d at 294. For further discussion of the law surrounding this specific topic, *see supra* notes 119 to 125 and accompanying text.

[149] *Jones*, 101 F. Supp. 3d at 294. Specifically, the court looked to the drastic change of position taken by the New York Attorney General during the litigation of this claim. *Id.* After the commencement of this suit, the New York Attorney General suggested that Zuffa could promote a professional MMA event with one of the exempt organizations listed in the Combative Sports Ban. *Id.* However, during the litigation, the New York Attorney General indicated that any and all professional MMA events would be illegal under the law, even those which were promoted by an exempt organization. *Jones*, 101 F. Supp. 3d at 294. This change of stance was directly catalyzed by the UFC and Zuffa beginning to plan an MMA event with an exempt organization. *Id.*

[150] *Id.*

[151] *Id.* at 294.

[152] *Id.*

[153] *Id.* at 294–95.

cannot be misinterpreted as a threat of prosecution.[154] Secondly, the court found that the NYSAC never claimed that professional MMA was illegal in New York State.[155] Rather, it believed the NYSAC's stance was a "justifiably cautious approach" to "promises of immunity for prospective conduct."[156] Finally, the court stated that even if the NYSAC had prosecutorial authority and stated that MMA was illegal, an imminent threat of prosecution could not be found because there was no specific targeting of Zuffa.[157] Zuffa argued that this should be irrelevant because they had purposefully avoided planning professional MMA in New York in fear of being prosecuted.[158] However, the court opined that Zuffa's choice to refrain from activity in New York could not be equated with an injury.[159]

2. Professional MMA on Tribal Land

The court also held that Zuffa failed to show an imminent threat of prosecution when promoting professional MMA on tribal land.[160] Similarly, the court found that Zuffa was not the specific target of the threat for legal action.[161] The court further reasoned that Zuffa lacked any concrete plans to even

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[154] *Id.* at 294 (noting that prosecutorial authority in this instance was with the New York State Attorney General and law enforcement agencies).

[155] *Id.* at 294.

[156] *Id.* at 295.

[157] *Id.*; *see supra* notes 112–119 for a discussion of the specificity required for threatened prosecution to amount to injury for purposes of standing.

[158] *Id.*

[159] *Jones v. Schneiderman*, 101 F. Supp. 3d 283, 295 (S.D.N.Y. 2015) ("[Zuffa's] decision to refrain from economic activity, however, is not alone sufficient to demonstrate an injury in fact in this case."); *see also* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1151 (2013) ("[plaintiffs] cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."). The Majority in *Clapper* elaborated on this point by reasoning that if manufactured injury by the plaintiffs could be used to prove injury for standing, then "an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a [sic] nonparanoid fear." *Id.*

[160] Jones v. Schneiderman, 101 F. Supp. 3d 283, 295 (S.D.N.Y. 2015).

[161] *Id.*

promote MMA on tribal land, and therefore lacked any real threat of imminent prosecution.[162] This analysis echoes the thematic overtones of the previous analysis – Zuffa's inactivity and concurrent lack of a prosecutorial threat disqualified its standing under Article III.[163]

IV. CRITICAL ANALYSIS: DID THE REFEREE MISS AN ILLEGAL BLOW BY NEW YORK STATE?

A. *JONES III* UNDER THE 'SUBSTANTIALLY CERTAIN' AND 'CERTAINLY IMPENDING' STANDARDS

As *Jones III* demonstrates the standard applied in a standing analysis has a huge impact on the outcome of a case.[164] In eliminating the possibility of analyzing standing based on a "credible threat of prosecution," the court made it much more difficult for a plaintiff to show standing.[165] Under both the "substantially certain" and "certainly impending" standards, nothing is assumed to be in favor of the plaintiff.[166] Instead, each prong in the standing analysis must be conclusively proven to the same extent as other assertions made by a moving party.[167]

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[162] *Id.*

[163] *See id.* The Court also observed that Zuffa does not participate in the business of promoting amateur MMA, so the Court did not analyze Zuffa's standing in that regard because it was not applicable to Zuffa. *Id.* Further, because there were a number of plaintiffs in this case, the Court analyzed the standing claims of only some of them. *Id.* at 292–93. A large portion of the plaintiffs stipulated to give no additional testimony at the outset of the litigation, and thus they were easily found to lack standing. *Id*. Further, two of the other plaintiffs, Don Lilly and Shannon Miller, who are also fight promoters, were found to lack standing for the same reasons Zuffa was found to lack standing. *Id.* at 295–99.

[164] *See, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147–49 (2013) (discussing what standard should apply when evaluating standing); *see also, e.g.*, Hedges v. Obama, 724 F.3d 170, 199–200 (2d. Cir. 2013), *cert. denied*, 134 S. Ct. 1936 (2014) (discussing what standard should apply when evaluating standing); Pacific Capital Bank, N.A. v. Connecticut, 542 F.3d 341, 350 (2d. Cir. 2008) (discussing what standard should apply when evaluating standing).

[165] *See* Jones, 101 F. Supp. 3d at 289.

[166] *Id.*, n.4.

[167] *Id.*

In *Jones III*, the plaintiffs could have met this burden if some aspects of the analysis were decided in their favor.[168] For example, under a liberal interpretation found in some cases, Zuffa's interaction with the NYSAC could have amounted to a threat of imminent injury.[169] In *MedImmune v. Gennetech*, the Court noted that there is no need to expose oneself to prosecution when the potential threat is "action by *government*."[170] A literal reading of this passage makes it seem that the NYSAC would fit this description because the NYSAC is an arm of New York State's government.[171] Thus, fearing prosecution because of a failure of assurances by the NYSAC seems to fit squarely within the language of *MedImmune*.[172] Further, because the NYSAC reports violations of the Combative Sports Ban directly to the Attorney General,[173] the NYSAC effectively acts as a proxy prosecutor for the Combative Sports Ban.

Even under the most conservative reading of the Combative Sports Ban there is no conceivable way that MMA would *not* be illegal. The statute plainly outlaws any event in which the contestants deliver blows to one another that is not sanctioned by an exempt organization.[174] Thus, the fact that the NYSAC didn't specify that MMA was illegal should not be controlling on the outcome of analyzing Zuffa's standing.[175]

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[168] *See* notes 163 to 177.

[169] *See, e.g.*, MedImmune v. Genetech, 549 U.S. 118, 128–29 (2007) (noting that plaintiff need not expose himself to liability when plaintiff faces action by government).

[170] *Id.* at 128.

[171] NEW YORK STATE ATHLETIC COMMISSION, http://www.dos.ny.gov/athletic/about.html (last visited Oct. 8, 2015) (noting that the New York State Athletic Commission is authorized to regulate professional boxing and wrestling contests, matches, and exhibitions within the State of New York pursuant to Title 25 of the Unconsolidated Laws).

[172] *See MedImmune*, 549 U.S. at 128–29.

[173] Jones v. Schneiderman, 101 F. Supp. 3d 283, 287 (S.D.N.Y. Mar. 31, 2015) ("The NYSAC . . . may refer potential statutory violations to the [Attorney General] for investigation").

[174] *Id.*

[175] *See* Pac. Capital Bank v. Connecticut, 542 F.3d 341, 350 (2d Cir. 2008) ("If a plaintiff's interpretation of a statute is 'reasonable enough' and under that interpretation that plaintiff 'may legitimately

Lastly, by looking to cases decided in the Second Circuit, it is possible to find the specific threats required to find injury under the imminent threat of prosecution standard.[176] One of the problems facing Zuffa in proving specificity is that it failed to inquire about the legality of a specific event.[177] However, when viewed through the rose colored glasses of *Lamar*, a more abstract inquiry like Zuffa's may be sufficient.[178] Like in *Lamar*, where the plaintiff lacked permits for the signs he wanted, the lack of concrete plans and a subsequent inquiry of those plans' legality should not amount to a lack of injury.[179] When Zuffa inquired about the legality of MMA generally in New York State and was not provided with assurances that it would not be prosecuted, there seems to be some grounds to show an injury for purposes of standing.[180] However, even though such a reading does not contradict case law, it requires a liberal interpretation.[181] Thus, under the standard applied, it

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fear that it will face enforcement of the statute,' then the plaintiff has standing to challenge the statute.").

[176] *See, e.g.*, Lamar Advert. of Penn., LLC v. Orchard Park, 356 F.3d 365 at 374 (2d Cir. 2004) (noting plaintiffs never inquired specifically about the legality of their potential signs and never obtained permits for them); *see also infra* notes 178–85.

[177] *See* Jones v. Schneiderman, 101 F. Supp. 3d 283, 295 (S.D.N.Y. 2015) ("Zuffa appears to have inquired only about sanctioned professional MMA in the abstract, and not about a particular event.").

[178] *See Lamar*, 356 F.3d at 374. The *Lamar* court found that even though the plaintiff did not have permits for the signs he sought, he still had standing. *Id.* However, the plaintiff's failure to show he had been approved for a sign was not a bar to facial challenge of the sign. *Id.*

[179] *Id.*

[180] *Compare id.* at 375 (noting that standing was found for plaintiff even where plaintiff did not have concrete plans to erect signs because plaintiff did not have permits for said signs), *with* Jones, 101 F. Supp. 3d at 296 (noting that standing was not found in part because the plaintiff failed to present concrete plans of breaking the law).

[181] *See MedImmune*, 549 U.S. 118, 128–29 (2007) (noting language used suggests threatened action by government generally not only government entities with prosecutorial authority); *see also* Lamar, 356 F.3d at 374. Because the court found standing for the plaintiff in *Lamar* even without permits for the signs at issue, it suggests that the concreteness of future plans may be a lower bar than that which was

seems that the court reached the safest and most logical conclusion.[182]

B. THE KNOCKOUT SHOT: THE 'CREDIBLE THREAT OF PROSECUTION' STANDARD AND *JONES III*

1. Should Jones III have been analyzed under the 'credible threat of prosecution' standard?

Zuffa tried to persuade the court to adopt the more lax standard for the injury analysis, requiring only a "credible threat of prosecution."[183] The court, however, found that this standard should not apply because only Zuffa's claim, and not its conduct, had a constitutional interest.[184] The court drew this distinction between claim and conduct based on where the constitutional interest of the plaintiff lies.[185] For example, if the plaintiff asserted a violation of the First Amendment, its conduct would have a constitutional interest because the First Amendment

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utilized in *Jones III*. *See id.* For more on the topic of liberal construction of case law and its impact on the standing doctrine, see Daniel Ho & Erica Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591 (2010) (suggesting liberal justices in high courts developed the Standing Doctrine).

One of the theories on the origins of the Standing Doctrine suggests that standing was developed to protect administrative agencies from the federal courts' power of judicial review. *See id.* at 597–603. This is referred to as the Insulation Thesis. *Id.*; *see also* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432, 1436–38 (1988). Recently, this theory gained some credence by way of an empirical study. *See* Daniel Ho, *supra*. Specifically, prior to 1940, liberal Justices asymmetrically denied standing to plaintiffs challenging the actions of administrative agencies. *Id.* at 634–55. However, after 1940, liberal justices were found to be more likely to find standing for plaintiffs. *Id.* This suggests that perhaps standing is *not* used to evaluate the merits of a plaintiffs' claim prior to actually evaluating the merits of a claim. *Id.* at 647–48.

[182] *See* Jones, 101 F. Supp. 3d at 295–96.

[183] *Id.* at 289, n.4 ("Plaintiffs suggest, unpersuasively, that *Babbitt's* credible threat of prosecution standard should apply to their as-applied vagueness challenges.") (internal quotations omitted).

[184] *Id.* (noting that it is conduct that must be affected with constitutional interest).

[185] *Id.*

protects free speech, a conduct that is inherently constitutional.[186] A vagueness challenge, like the one in *Jones III*, is merely a claim based on constitutional principles. No conduct protected by the constitution – like free speech – is at issue.[187] *Pac. Capital Bank*, though, may provide an argument that Zuffa's claim is sufficient to warrant the credible threat of prosecution standard, or that there was conduct with a constitutional interest underlying it.

Zuffa could argue that even though only their claim has a constitutional interest, it is still sufficient to find standing based on the Second Circuit's interpretation of the Standing Doctrine.[188] For example, in *Pac. Capital Bank*, the court found injury when the bank could not offer refund anticipation loans at a desired interest rate which caused the plaintiff financial hardship.[189] The plaintiff violated no laws.[190] But, the potential prosecution alone was sufficient to find standing.[191]

Similarly, in *Jones III*, the plaintiffs violated no laws – they chose to avoid doing business in New York because they

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[186] *See* Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 298, 302 (1979) (suggesting that the "credible threat of prosecution standard" should only apply if plaintiffs claim is "affected with a constitutional interest"); *see also* Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383, 393 (1988) (allowing pre-enforcement lawsuit where proscribed conduct was affected by the First Amendment). However, this contention does not seem to be strictly adhered to in the Second Circuit. *See, e.g.*, Pac. Capital Bank, N.A. v. Connecticut, 542 F.3d 341, 350 (2d Cir. 2008) (applying credible threat of prosecution standard for standing analysis where claim was brought under supremacy clause).

[187] *See Jones*, 101 F. Supp. 3d at 289, nn. 4–5.

[188] *See id.* at 283.

[189] *Pac. Capital Bank*, 542 F.3d at 347–51 (finding that the plaintiffs have standing to challenge a law based on their supremacy clause claim).

[190] *Id.* at 347.

[191] *Id.* at 350. Specifically, the court even went so far as to write: "The State Officials' suggestion that Pacific lacks standing on the theory that its reduction of its [refund anticipation loan] interest rates in Connecticut below its nationwide standard to the levels permitted by [statute] in the wake of that enactment was purely a matter of choice, untraceable to [statute], is thus untenable." *Id.*

did not want to expose themselves to criminal prosecution.[192] Thus, the injury sustained by Zuffa in *Jones III* is analogous to the injury in *Pac. Capital Bank*.[193] Further, like the law in *Jones III*, nobody had ever been prosecuted under the law in *Pac. Capital Bank*.[194] The fact that a law has not been enforced should not be a bar to showing that there is still a sincere threat of prosecution.[195] Thus, under *Pac. Capital Bank*, it is entirely possible that the "credible threat of prosecution" standard could apply to Zuffa in *Jones III*.[196]

Moreover, under this relaxed standard, Zuffa probably would have been able to set forth facts sufficient to establish standing.[197] If a court applies the credible threat of prosecution standard, then it is assumed that the law in question will be enforced against the plaintiff should they conduct a course of conduct in direct violation of the law.[198] However, Zuffa would need to show that their fear of prosecution was actual and reasonable, which wouldn't be difficult because, as discussed previously, virtually any reading of the Combative Sports Ban would outlaw the promotion of a professional MMA event.[199]

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[192] *Jones*, 101 F. Supp. 3d at 283 (finding that "Zuffa's briefing emphasizes that before this lawsuit began, the company refrained from involvement with professional MMA in New York because of its concerns about the [Combative Sports] Ban.").

[193] *Compare Pac. Capital Bank*, 542 F.3d at 347–51 (noting injury sustained by plaintiff was inaction stemming from potential prosecution), *with Jones*, 101 F. Supp. 3d at 295 (noting that Zuffa claimed they refrained from business in New York because of potential prosecution).

[194] *Pac. Capital Bank*, 542 F.3d at 350 (noting that the state had never enforced the statute against any bank in the state).

[195] *See id.*; s*ee also Lujan*, 504 U.S. at 566–67. *But see* Wolfson v. Brammer, 616 F.3d 1045 (9th Cir. 2010) (noting that to meet the credible threat of prosecution standard, the law at issue must have some history of enforcement).

[196] *See Pac. Capital Bank*, 542 F.3d at 350; *see also Lujan*, 504 U.S. at 566–67.

[197] *See Jones*, 101 F. Supp. 3d at 294.

[198] Hedges v. Obama, 724 F.3d 170, 197 ("[I]n numerous preenforcement [sic] cases where the Supreme Court has found standing on a showing that a statute indisputably proscribed the conduct at issue, it did not place the burden on the plaintiff to show an intent by the government to enforce the law against it . . . it presumed such intent . . . .").

[199] *See* N.Y. UNCONSOL. LAW § 8905-a(3)(d).

Because Zuffa likely could have shown an injury under the credible threat of prosecution standard, it would probably be found to have standing. The injury prong of the standing analysis was the biggest hurdle for Zuffa to surmount, as it could have easily show that the injury is traceable to New York State and that a favorable decision would remedy the injury.[200] Thus, Zuffa could most likely establish standing if its claimed injury was analyzed under a credible threat of prosecution standard.

V. HOW NEW YORK'S VICTORY BECAME A NO CONTEST AFTER ALL

Given the prominence of the UFC and MMA, *Jones III* brought an array of attention to the Southern District of New York Court System.[201] In light of the continued climb in popularity of MMA in the world of sports, New York Legislature finally overturned the combative sports ban in the spring of 2016.[202] However, because standing impacts every case brought in federal court, the disposition of *Jones III* is still relevant in the legal world.[203] Because the Standing Doctrine

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[200] *Jones*, 101 F. Supp. 3d 283, 294 (S.D.N.Y. 2015) (finding that Zuffa's claim was dismissed because they failed to show substantial risk of prosecution or that prosecution was certainly impending in regards to analyzing injury in the context of standing).

[201] *See, e.g.*, Paul Gift, *UFC Loses Challenge to New York's MMA Ban for Lack of Standing*, SB NATION (Apr. 1, 2015, 11:00 AM), http://www.bloodyelbow.com/2015/4/1/8324843/ufc-loses-new-york-lawsuit-ban-lack-of-standing-mma; Kevin Iole, *Judge Throws Out UFC Suit, But it's Far From a Total Defeat for MMA in New York*, YAHOO! SPORTS (Mar. 31, 2015, 5:23 PM), http://sports.yahoo.com/blogs/mma-cagewriter/judge-throws-out-ufc-suit--but-it-s-far-from-a-total-defeat-for-mma-in-new-york-002312374.html; Luke Thomas, *Court Dismisses UFC's Lawsuit Challenging New York's Ban on Mixed Martial Arts*, MMA FIGHTING (Mar. 31, 2015, 10:15 PM), http://www.mmafighting.com/2015/3/31/8323759/court-dismisses-ufcs-lawsuit-challenging-new-yorks-ban-on-mixed.

[202] *Governor Cuomo Signs Legislation Legalizing Mixed Martial Arts in New York State,* NEW YORK STATE (April 14, 2016), https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-legalizing-mixed-martial-arts-new-york-state.

[203] *See, e.g.*, *Amnesty Int'l U.S.*, 568 U.S. ___, ___, 133 S. Ct. 1138, 1146 (2013) ("One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue.") (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)).

involves a fact specific analysis, each new case analyzing and interpreting aspects of standing becomes a useful instrument in deciphering the mixed opinions of the federal courts.[204]

The court also refused to comply with the criticism of commentators who suggested that standing is a way to evaluate the merits of a case before actually evaluating the merits of a case.[205] In two passages of the opinion, the court indicated that the conduct of the Attorney General during the litigation could support a finding of standing.[206] This suggests that Zuffa would have been successful in at least taking its fight to the later rounds in a subsequent lawsuit or appeal.[207] In two passages of the opinion, the court indicated that the conduct of the Attorney General during the litigation could support a finding of standing.[208] This suggests that Zuffa may have been successful in its fight at the later rounds through a subsequent lawsuit or appeal.[209] And even though Zuffa did file a new lawsuit and began the appeal process through *Jones III*, the pursuit of these

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[204] Gene R. Nichol, *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 303–04, 306 (2002) (discussing how facts of injury decide whether a case meets standing requirements).

[205] *Compare Jones*, 101 F. Supp. 3d at 294, 299 (suggesting that if Zuffa filed new lawsuit they would potentially have standing), *with supra* note 15 and accompanying text.

[206] *Jones*, 101 F. Supp. 3d at 299 ("Zuffa [] may consider filing new vagueness claims based on events that occurred after this lawsuit commenced, including the [Attorney General's] recent statements that the [combative Sports Ban] prohibits sanctioned professional MMA[.]").

[207] *See* Jim Genia, *Despite Finding that New York is Misapplying its MMA Law, Court Dismisses on a Technicality UFC's lawsuit Challenging the Law*, THE MMA JOURNALIST (Mar. 31, 2015, 7:54 PM), http://www.themmajournalist.com/search?updated-min=2015-03-01T00:00:00-05:00&updated-max=2015-04-01T00:00:00-04:00&max-results=35 (noting plaintiffs are considering appealing decision and filing new lawsuit).

[208] *Jones*, 101 F. Supp. 3d at 299.

[209] *See* Jim Genia, *Despite Finding that New York is Misapplying its MMA Law, Court Dismisses on a Technicality UFC's lawsuit Challenging the Law*, THE MMA JOURNALIST (Mar. 31, 2015, 7:54 PM), http://www.themmajournalist.com/search?updated-min=2015-03-01T00:00:00-05:00&updated-max=2015-04-01T00:00:00-04:00&max-results=35 (noting plaintiffs are considering appealing decision and filing new lawsuit).

measures was unnecessary after the Combative Sports ban was overturned.[210]

Jones III also showcased why the standing doctrine needs the attention of the Supreme Court more now than ever.[211] Standing has generally been classified as one of the most expansive—and criticized—areas of the law, which can be regarded as an implicit cry for guidance from the Supreme Court.[212] For example, as discussed *infra*, some cases that could

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[210] Stephen Rex Brown, *UFC Sues to Overturn State Law Banning Events in New York*, NYDAILYNEWS.COM (Sept. 28, 2015, 12:52 PM), http://www.nydailynews.com/new-york/ufc-sues-overturn-ban-events-new-york-article-1.2377077; Tristen Critchfield, *UFC Hires Former U.S. Solicitor General to Appeal New York's MMA Ban*, SHERDOG (Apr. 21, 2015), http://www.sherdog.com/news/news/UFC-Hires-Former-US-Solicitor-General-to-Appeal-New-Yorks-MMA-Ban-85033. For information regarding New York overturning the Combative Sports Ban, see *Governor Cuomo Signs Legislation Legalizing Mixed Martial Arts in New York State*, NEW YORK STATE (April 14, 2016), https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-legalizing-mixed-martial-arts-new-york-state.

[211] *See Jones*, 101 F. Supp. 3d at 283 nn.4–5 (noting various standards that could be potentially applicable in analyzing plaintiffs' claims); *see also* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1160–61 (2013) (Breyer, J., dissenting) (showcasing various standards utilized in standing by the court); Bradford C. Mank, *Clapper v. Amnesty International: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211, 215 (2014) (noting how fractured the Court seemed in determining what standard to apply in *Clapper*); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002) (noting complexity and incoherence of injury analysis for standing).

[212] Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of [Article III] standing has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it…."); Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 300 (2015) ("Scholars have long criticized the incoherence of standing doctrine…."); John Paredes, *The Lawlessness of Standing*, 26 LOY. CONSUMER L. REV. 247, 248 (2014) (noting that "no one is happy with the standing doctrine."); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1426 (1995) ("The law of standing is in a state of notorious disarray."); Christian B. Sundquist, *The First Principles of Standing: Privilege, System Justification, and*

have changed the disposition of *Jones III* received no mention in the opinion of the court.[213] This suggests that the jurisprudence surrounding standing is too voluminous to be workable.[214] Perhaps, then, it is time for the Supreme Court to rule on another "landmark" standing case in order to clarify the standing doctrine. Another option is that courts should heed the suggestions of commentators and completely overhaul the standing doctrine in order to better serve its judicial purpose.[215]

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the Predictable Incoherence of Article III, 1 COLUM. J. RACE & L. 119, 134 (2011) ("The indeterminate nature of standing doctrine is well-documented."); Michael A. Wolff, *Standing to Sue: Capricious Application of Direct Injury Standard*, 20 ST. LOUIS U. L. J. 663, 663 (1976) ("The confusing and inconsistent nature of [standing] decisions has been the subject of judicial and scholarly comment.").

[213] *See, e.g.*, Pac. Capital Bank, N.A. v. Connecticut, 542 F.3d 341, 347, 350–51 (2d Cir. 2008) (utilizing credible threat of prosecution standard for analysis under tangentially similar facts); Lamar Advert. Of Penn, LLC v. Orchard Park, 356 F.3d 365, 374 (2d Cir. 2004) (suggesting threshold of 'concrete plans' aspect of imminence may be lower than applied in *Jones III*).

[214] F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 57 (2012) (noting large amount of scholarly commentary on Standing Doctrine); Nichol, Jr., *supra* note 215, at 302 n.4 ("The literature critical of the Supreme Court's treatment of the standing requirement is voluminous."); *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221, 223 (1988) (suggesting "that we abandon the attempt to capture the question of who should be able to enforce legal rights in a single formula, abandon the idea that standing is a preliminary jurisdictional issue, and abandon the idea that Article III requires a showing of 'injury in fact.'").

[215] Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73 (2007). Professor Siegel suggests that standing and justiciability concerns "should serve to enhance the performance of the judicial function." *Id.* at 138. However, this is very difficult to do because the constitution does not elaborate on the goals of justiciability doctrines. *Id.* at 86. Thus, most doctrines of justiciability, particularly standing, are left underdeveloped, misguided, and in need of reform *after* clear purposes of the doctrines have been determined. *Id.* at 129. With that in mind, Professor Siegel suggests that the Standing Doctrine "be refocused in light of what little it can do to further the purpose of enhancing the judicial function." *Id.* at 135.

Other commentators have limited the bulk of their critiques to certain aspects of standing, like the injury analysis. *See* Nichol Jr., *supra* note 215. Professor Nichol suggests "standing rulings of the past three decades demonstrate that the injury standard is not only unstable

A wide array of standing law can be a good thing, especially for such a fact specific analysis.[216] However, many scholars would agree that the standing doctrine has surpassed a point of helpful breadth and reached a point of incomprehension and confusion.[217] Thus, courts are left with too much discretionary power to pick and choose what aspects of standing should be applied, and what standards should be utilized in determining the standing of plaintiffs.[218]

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and inconsistent, but that it also systematically favors the powerful over the powerless." *Id.* at 304. As a result, Professor Nichol suggests the adoption of a much more general interpretation of the injury requirement, and "a significant presumption in favor of the plaintiff's claim of harm." *Id.* at 337–38. Further, Professor Nichol suggests that adopting such general guidelines and presumptions would "dismantle . . . one of the most manipulated, result-oriented arenas of constitutional law." *Id.* at 339.

Some critics have suggested that standing is highly manipulated, and employed to avoid the adjudication of claims that judges see as meritless. Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–42 (1999) (arguing judges use standing to further their political ideologies in courts); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977) (suggesting standing decisions are manipulated based on claims' merits). For other discussions of how and why the standing doctrine should be overhauled, *see* Fletcher, *infra* note 218, at 290–91 (suggesting that standing should hinge on whether or not plaintiff has right to enforce legal duty); Saul Zipkin, *Democratic Standing*, 26 J. L. & POL. 179, 236–37 (2011) (suggesting adopting new guidelines and framework for analyzing standing). *But see* Ernest A. Young, *In Praise of Judge Fletcher – and of General Standing Principles*, 65 ALA. L. REV. 473, 498–99 (2013) (arguing that standing should remain unchanged).

[216] *See Jones*, 101 F. Supp. 3d at 293–99.

[217] *See id.* at 289 nn.4–5, 299.

[218] *See* Mank, *supra* note 213, at 215 (noting various standards to be applied for analyzing standing); *see also Clapper*, 133 S. Ct. at 1160–62 (2013) (Breyer, J., dissenting) (noting different language utilized by Supreme Court analyzing similar aspects of standing).

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IMPLICATIONS OF NCAA MANDATED GENETIC TESTING: LOOKING OUT FOR THE ATHLETES AND LOOKING TO THE FUTURE

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INTRODUCTION

In 2010, the NCAA initiated a mandatory program for all athletes to be screened for sickle cell trait, starting with Division I athletes.[1] A settlement agreement between Dale Lloyd II's family and the NCAA stipulated that the NCAA initiate testing of athletes to prevent future deaths, like the one their son suffered.[2] Lloyd, an NCAA athlete, died from complications of sickle cell trait after a football practice in 2006.[3] This article will show how mandatory genetic testing is a matter of great significance, and not just of legal utility for the NCAA. It will discuss what other tests the NCAA should initiate in the future and how genetic testing could change the face of college athletics. The article will then cover the history and future of genetic testing, the NCAA rules regarding genetic testing, and whether the Genetic Information Nondiscrimination Act of 2008 (GINA) impacts collegiate testing. Finally, this article will show how the NCAA can benefit from the major advances in genetic testing, and that testing by the NCAA is important for reasons other than a legal settlement agreement.

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[1] Susan L. Smith & Miriam Shuchman, *Sickle Cell Screening of College Athletes: Legal Obligations Fulfilled, Moral Obligations Lacking*, 92 OR. L. REV. 1127, 1127 (2014).

[2] *Id.* at 1128.

[3] *Id*.

I. HISTORY OF GENETIC TESTING

The first case of large scale genetic testing began in 1962 in Massachusetts.[4] The purpose was to test newborns for phenylketonuria (PKU), and soon after, other states followed Massachusetts' lead.[5] Over the years, genetic testing of infants continued to expand.[6] Government agencies now recommend that states test infants for thirty-two different genetic traits.[7] Testing is available for more than sixty different disorders and all fifty states test for sickle cell anemia.[8]

Sickle cell anemia is one form of sickle cell disease, but sickle cell trait is not considered a form of sickle cell disease.[9] Newborn screenings may show a sickle cell trait, but the parents may not be informed of the finding.[10] State-mandated newborn screenings are the most common type of mandated testing in the United States, covering about 4 million babies per year.[11] The NCAA's mandated testing of collegiate athletes is second in scope only to the infant testing required by states.[12] NCAA has

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[4] Leila Barraza & Lauren Burkhart, *The Expansion of Newborn Screening: Implications for Public Health and Policy*, ANNALS OF HEALTH L., Special Edition 2014, at 44, http://www.annalsofhealthlaw.com/annalsofhealthlaw/vol23issue2?pg=1#pg1.

[5] *Id.*

[6] *Id.* at 44–45.

[7] *See* BABY'S FIRST TEST, http://www.babysfirsttest.org (last visited Jan. 30, 2016). This website is supported by the Health Resources and Services Administration (HRSA) of the U.S. Department of Health and Human Services (HHS).

[8] *Id.* This information was found by referencing the list of items tested for which appears when one clicks a state in the map of the United States.

[9] *Sickle cell Disease*, CDC, www.cdc.gov/sicklecell (last visited Jan. 30, 2016) (found under the Sickle cell trait Fact Sheet).

[10] *See* HRSA, www.hrsa.gov/advisory (last visited Nov. 8, 2016) (shows committees with the title Screening US College Athletes for their Sickle cell Disease Carrier Status on page 8–9).

[11] Barraza & Burkhart, *supra* note 4, at 44–45.

[12] Smith & Shuchman, *supra* note 1, at 1128.

tested more than 460,000 NCAA athletes.[13] No evidence of other large scale mandatory genetic testing was found.

The NCAA implemented phase one of its mandated testing for sickle cell trait among Division I athletes in 2010.[14] Phases two and three were implemented in 2012 and 2014, respectively.[15] Phase two included testing Division II athletes, and phase three included testing Division III athletes.[16] The results of those screenings and their impact on the NCAA are not publicly known. Each Division determined how it wanted to implement the mandatory testing.[17] Prior to this mandate, genetic testing for sickle cell trait was not done in college. Most college athletes are screened for sickle cell disease as newborns, but may be unaware of whether they carry the sickle cell trait.[18]

Currently, the NCAA tests for sickle cell trait as a condition resulting from the terms of its settlement with Lloyd's heirs; however, it also has the best interests of the athletes in mind.[19] Those opposed to the mandated test are concerned that the information will be used to discriminate against the affected athletes.[20] This worry stems from the 1970's, a time when mandated testing for sickle cell disease was used to discriminate

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[13] *See id.* at 1127–28 (stating that "[i]n 2010, the [NCAA] implemented a policy requiring all NCAA Division I athletes to be screened for . . . sickle cell . . ." and this requirement was extended to all athletes in 2014–2015, "placing it among the largest mandatory genetic screening programs in the United States."); *see also How The NCAA Works*, NCAA, http://www.ncaa.org/champion/how-ncaa-works (last viewed Oct. 20, 2016) (noting that the NCAA is composed of over 460,000 student-athletes).

[14] Smith & Shuchman, *supra* note 1, at 1127.

[15] *Id.* at 1128.

[16] *Id.*

[17] *See 2013 NCAA Division II Convention Legislative Proposals Question and Answer Guide*, NCAA 9–14, http://cdn.e2ma.net/userdata/1367819/assets/docs/2013qadocument_-_final.pdf (notes that Div. I and II have their own rule making boards, by asking how the proposal relates to Div I and II rules).

[18] Barraza & Burkhart, *supra* note 4, at 42–44.

[19] Smith & Schuchman, *supra* note 1, at 1128.

[20] Madison Park, *NCAA Genetic Screening Rule Sparks Discrimination Concerns,* CNN (Aug. 4, 2010), http://www.cnn.com/2010/HEALTH/08/04/ncaa.sickle.genetic.screening.

against African-Americans, since they are at highest risk for the disease.[21] Beth Tarini and her associates took data from the 2007-08 academic year to determine the number of athletes impacted by the new testing policy.[22] Tarini and her associates worked with Health Services Research and estimated 2,147 Division I athletes would test positive for sickle cell trait during the 2007-08 academic year.[23] Tarini concluded, "[a]longside a 100 percent effective intervention, screening could prevent the deaths of seven student-athletes over a 10-year period."[24]

Seven deaths over the span of ten years does not seem sufficient to warrant the cost and controversy of mandating genetic testing of all athletes before they participate in or condition for an NCAA sport; however, saving almost one athlete per year is worth the trouble, not only financially and legally, but also in changing training protocols to better protect athletes from harm.[25] The costs of genetic testing will be discussed later in this article. The NCAA wants to ensure player safety, and mandated testing is one of many safety precautions in place to accomplish this end.

Athletes are not the only ones to suffer from the normally innate sickle cell trait. A study conducted in the 1980's showed sickle cell trait contributed to issues with military personnel during the physical exertion of basic training, leading to unexplained deaths.[26] The military did not implement mandatory genetic testing of all military personnel and recruits, but instead changed its training regimen to better incorporate guidelines for hydration, rest monitoring, and increased awareness of heat related illnesses, all of which reduce the chances of blood cell sickling in those with Sickle cell trait.[27]

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[21] *See* H.R. REP. NO. 110–28, at § 2(3) (2007).

[22] Beth A. Tarini et al., *A Policy Impact Analysis of the Mandatory NCAA Sickle cell trait Screening Program*, 47 HEALTH SERV. RES. 446, 446–61 (2012).

[23] *Id.* at 452.

[24] *Id.* at 453.

[25] *See generally id.* at 446, 447, 453.

[26] Alexis A. Thompson, *Sickle cell trait Testing and Athletic Participation: A Solution in Search of a Problem?*, 2013 SPORTS MED. IN HEMATOLOGY 632, 632–37 (2013).

[27] *Id.* at 634.

Universal precautions and changes in training regimens were not available as options to the NCAA due to the settlement agreement reached with Lloyd's family.[28] Those opposed to the mandatory testing look to the military's response as a solution that the NCAA should follow instead of its current mandated testing protocol.[29] Perhaps if the NCAA had taken a more proactive position to protect athletes from sudden death, universal precautions would be in place instead of mandatory testing. During settlement negotiations with the Lloyd family, the NCAA could have looked at best practices from the military or other areas to determine the best way to avoid mandatory genetic testing, the concern of discrimination based on genetic testing results, and being seen as not having the athletes' best interests in mind. However, mandatory testing does not preclude the NCAA from initiating universal training protocols to better protect all athletes. NCAA implementation of universal training protocols would help silence critic concerns about discrimination against those athletes in need of abridged training, as well as critics saying that testing is not in the best interest of the athletes.

The NCAA faced harsh criticism from a number of groups including the American Society of Hematology, the Sickle Cell Disease Association of America, and the American Academy of Pediatrics.[30] Their position is that mandated testing would lead to discrimination, and the link between sickle cell trait and death is not strong enough to require mandated testing.[31] Although there are other ways to protect athletes with sickle cell trait, the settlement agreement with the Lloyd family calls for testing athletes to determine potential health risks.[32] The critics of the mandated testing raise valid points, but the NCAA is not at liberty to go against the terms of its settlement agreement.

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[28] Smith & Shuchman, *supra* note 1.

[29] Thompson, *supra* note 26, at 634.

[30] Rosalie Ferrari et al., *Sickle cell trait Screening of Collegiate Athletes: Ethical Reasons for Program Reform,* 24 J. OF GENETIC COUNSELING 873, 874 (2015).

[31] *Id*.

[32] Smith & Shuchman, *supra* note 1, at 1127–28.

II. NCAA RULES FOR GENETIC TESTING

The NCAA now requires all student-athletes to either know of or be tested for sickle cell trait prior to participating in college sports, including weight training prior to the sport season.[33] Each division implemented this testing requirement at different times, and each division has chosen slightly different methods of implementation.[34]

Division III of the NCAA has made education a large part of its sickle cell trait screenings.[35] The rule gives an athlete three options: (1) to present documentation of the athlete's sickle cell status; (2) to have testing of sickle cell status pending, which requires a waiver to participate until the results are known; or (3) to opt out of testing all together, which also requires a waiver to participate.[36] Options two and three also have the additional requirement of education before the waiver is signed.[37] The increased education about the trait not only benefits the athlete, but the NCAA hopes that it will keep the number of athletes who opt-out of testing low.[38] Jack Ohle, the vice chair of the NCAA President's Council believes that sickle cell screening is essential, stating, "[t]he key point is that our student-athletes are safer knowing their status and allowing our institutions to accommodate for that status. For a small, yet equally important, number of student-athletes, this knowledge is a matter of life or death."[39]

Division I and Division II have adopted similar requirements, but Division III is the only one with a strong

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[33] *Sickle cell trait*, NCAA, http://www.ncaa.org/health-and-safety/medical-conditions/sickle-cell-trait (last updated Jan. 17, 2014).

[34] Gary Brown, *Education Campaign Informs DIII Decision on Sickle Cell Legislation,* NCAA (Nov. 8, 2012, 12:00 AM), http://www.ncaa.org/about/resources/media-center/news/education-campaign-informs-diii-decision-sickle-cell-trait [hereinafter Brown, *Education Campaign*].

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id*.

[39] Gary Brown, *Division III Approves Sickle Cell Measure,* NCAA (Jan. 19, 2013, 12:00 AM), http://www.ncaa.org/about/resources/media-center/news/diii-approves-sickle-cell-measure.

educational component.[40] The NCAA believes it is in the best interest of all student-athletes to know their status.[41] Brian Hainline, Chief Medical Officer for the NCAA, stated, "[s]ometimes we just have to go forward with proposals we believe are protective of not only the athletes but also the institutions. And that is what the NCAA has done in this case."[42] At the NCAA Division III annual meeting, the issue of privacy for the student-athlete was discussed, where opponents to the mandatory testing looked to discrimination and privacy as reasons justifying their opposition.[43] Livingston Alexander addressed these issues:

> Athletic trainers already deal with medically sensitive issues every day. We have established procedures to handle confidential information in a professional manner that is still in the best interests of the student-athlete. There is no reason to suggest we would not address sickle cell trait status in the same professional manner.[44]

Division III's requirement that all student-athletes be educated about sickle cell trait makes the mandated testing less discriminatory.[45] In its education program initiated before screening, the NCAA included information that anyone can be a carrier of sickle cell trait, regardless of their race.[46]

III. THE FUTURE OF GENETIC TESTING

As genetic testing becomes more specialized and accurate, the NCAA should expand its genetic testing to include risk factors for a variety of injuries to develop better training protocols for all student-athletes. These training protocols would help athletes with sickle cell trait or a variety of other conditions that lead to a higher occurrence of grave harm including

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[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Brown, *Education Campaign*, *supra* note 34.
[46] *See id.*; *see also* Brown, *Division III Approves Sickle Cell Measure*, *supra* note 39.

concussion susceptibility, the risk of injury to major tendons (tendinopathy) [47] Marfan Syndrome, [48] and Hypertrophic Cardiomyopathy.[49] If the NCAA took a more proactive approach in checking athletes for these types of conditions, it could avoid potential harm to its reputation from another lawsuit for negligence in caring for its athletes.

A. CONCUSSION SUSCEPTIBILITY

A 2013 study on how genes relate to a person's ability to recover from a concussion found that certain people have a harder time recovering from head injuries than others because of genetic factors.[50] These findings will have a dramatic impact on sports such as football and soccer.[51] This information can help determine which players are at greater risk for a longer recovery and a potentially career ending head trauma.[52] This information will also change the way those athletes train for the sport.[53] Increased monitoring and greater precautions can be taken by athletic trainers for soccer and football players at greater risk for long-term damage.

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[47] *See* Roger Collier, *Genetic Tests for Athletic Ability: Science or Snake Oil?*, 184 CAN. MED. ASS'N. J. 43, 43 (2012); *see generally* Nicola Maffulli, et al., *The Genetics of Sports Injuries and Athletic Performance,* 3 MUSCLE, LIGAMENTS, AND TENDONS J. 173, 173 (2013) (discussing tendinopathy susceptibility in athletics).

[48] *What is Marfan Syndrome?*, NAT'L HEART, LUNG, AND BLOOD INST. (Oct. 1, 2010), http://www.nhlbi.nih.gov/health/health-topics/topics/mar#.

[49] Martha Pyron, *Hypertrophic Cardiomyopathy: A Cause of Athlete Sudden Death*, AM. C. OF SPORTS MED. (Oct. 7, 2016), http://www.acsm.org/public-information/articles/2016/10/07/hypertrophic-cardiomyopathy-a-cause-of-athlete-sudden-death.

[50] Eric Niiler, *Finding a Link Between Genes and Brain Injury: Are Some People Predisposed to Trauma*, WASH. POST (May 5, 2014), https://www.washingtonpost.com/national/health-science/finding-a-link-between-genes-and-brain-injury-are-some-people-predisposed-to-trauma/2014/05/05/c2d9dd06-c49e-11e3-bcec-b71ee10e9bc3_story.html.

[51] *See id.*

[52] *See id.*

[53] *See id.*

Granted, all sports have inherent risks; however, if an athlete can be more informed about how those risks relate to his or her genetic makeup, the amount of sport-injury related lawsuits and overall athlete suffering will likely decrease. The more information an athlete has about her genetic makeup, the more likely she will be able to determine the safest sports to be engaged in. This will lead to more informed decisions for participation in sports.

Here, the NCAA can get ahead of the game in protecting its athletes from the serious repercussions of concussions. The scientific discovery of the Apolipoprotein E (APOE) gene,[54] and how it affects concussion susceptibility, should be the next area of testing mandated by the NCAA. Although the NCAA would be wise to wait until the science is more conclusive before putting funds into testing all soccer and football players, it would be unwise to wait too long and risk not being on top of critical safety measures that protect athletes. College football is a huge revenue source,[55] and the member colleges and universities of the NCAA need to stay informed of the ever-changing science in concussion prevention to maintain its image of caring for the safety of all its athletes.

Sport related concussions account for up to 3.8 million injuries annually.[56] A 2010 study of the APOE gene looked at three different alleles associated with the gene.[57] The researchers found that if an athlete carries the promotor allele, they are more likely to suffer more concussions.[58] "In our sample, 89% (8 of 9) of athletes with multiple concussions carried the promoter rare allele . . . ."[59] Another study of the APOE alleles conducted at

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[54] Ryan T. Tierney et al., *Apolipoprotein E Genotype and Concussion in College Athletes*, 20 CLINICAL J. OF SPORTS MED. 464, 464 (2010).

[55] *See* Chris Smith, *College Football's Most Valuable Teams 2015: Texas, Notre Dame And . . . Tennessee?*, FORBES (Dec. 22, 2015, 12:00 PM), http://www.forbes.com/sites/chrissmith/2015/12/22/college-footballs-most-valuable-teams-2015-texas-notre-dame-and-tennessee/#f923cb551300.

[56] Tierney et al., *supra* note 54.

[57] *Id.*

[58] *Id.* at 466.

[59] *Id.*

Penn State University shows a link between the e4 allele and more severe symptoms associated with concussions.[60]

Arizona State University (ASU) has teamed up with Riddell and Translational Genomics Research Institute (TGen) for three consecutive years to research the connection between genetics and concussions in football players.[61] The research project uses the Riddell Sideline Response System (SRS) along with genetic samples from participating athletes to determine how the body responds to different head impacts.[62] These studies are an example of the continued research on the connection of genetics and concussion recovery.

The program is beneficial for all three entities involved. Riddell hopes to use this information to build a helmet that is better able to protect the athlete from concussions.[63] Dan Arment, President of Riddell, said, "[t]ogether we are advancing player protection and furthering important research that has the potential to forever change athlete concussion diagnosis and treatment in football and beyond."[64] Riddell's commitment is to "Smarter Football."[65] TGen will use the information gathered to further its research on concussion susceptibility and to "develop a definitive test that will objectively define when an athlete is injured."[66]

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[60] Kristie Auman-Bauer, *Genetics Affects Concussion Recovery*, PENN ST. NEWS (Nov. 20, 2015), http://news.psu.edu/story/381653/2015/11/20/research/genetics-affects-concussion-recovery.

[61] *Riddell and TGen Begin Third Year of Research Collaboration with Arizona State University's Football Program*, RIDELL NEWSROOM (Sep. 8, 2015), http://news.riddell.com/info/releases/riddell-and-tgen-begin-third-year-of-research-collaboration-with-arizona-state-universitys-football-program [hereinafter *Riddell*].

[62] *Riddell and TGen Team Up with Arizona State University's Football Program to Further Genetic Research into Athlete Concussion Detection and Treatment*, TRANSLATIONAL GENOMICS RES. INST. (Aug. 25, 2014), https://www.tgen.org/home/news/archive/2014-media-releases/riddell-and-tgen-team-up-with-arizona-state-universitys-football-program-to-further-genetic-research-into-athlete-concussion-detection-and-treatment.aspx#.WBZWoZMrJE4.

[63] *Id.*

[64] *Riddell*, *supra* note 61.

[65] *Id*.

[66] *Id*.

ASU hopes the information gained by the other two entities will translate into better equipment to keep ASU football players safe.[67] Ray Anderson, ASU's Athletics Director, stated, "[w]e pride ourselves on being innovative and on our willingness to help further a game we all value, and, along with industry leaders Riddell and TGen, we are looking forward to spending another season helping shape the future of football."[68] The NCAA needs to stay apprised of current research, such as that conducted by ASU, TGen, and Riddell, and do all it can to protect the future of its athletes. More programs, like the one ASU is involved with, will bring greater information to the equipment makers who, in turn, can make sports safer because their equipment is of higher quality.

This program works for football, but concussions in soccer still needs to be addressed. Genetic testing of soccer players for concussion susceptibility or risk for severe symptoms is important information for coaches and athletic trainers to have to best serve the student-athlete. When TGen develops the definitive test for concussions, it will be of great value to all sports.

B. TENDINOPATHY

The NCAA can also follow the studies describing the different tendon issues that arise in sports and how genetics can be used to determine an athlete's risk of developing such a tendon injury.[69] Once the specific genes responsible for tendon injury susceptibility can be isolated along with the genes that control the body's ability to heal, then genetic information will have huge implications for athletes and their careers. The potential is phenomenal. Genetic testing can be used to adjust training programs specifically to the athlete. Genetic technology can help the athlete heal quicker and more efficiently. The draw back to this future ideal is that athletes who can afford individualized training and the best genetic treatments will be able to play longer, whereas the athletes without those means will be at a disadvantage. Regulations on use of the information, and the types of treatment available, would need improvement to

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[67] *See id.*
[68] *Id.*
[69] *See* Maffulli, *supra* note 47.

better protect the individual and the sport. If the wealthy alone can afford to play sports longer due to the genetic information they could take advantage of, then sports will suffer, and those less advantaged will lose the opportunity to play.

Currently, the NCAA mandates only sickle cell trait testing.[70] The sections above discuss two areas of potential growth, but these health issues do not cause death. There are other genetic diseases that can lead to death among athletes if undiscovered.[71] In the future, the NCAA should consider including screenings for other genetic diseases, along with the sickle cell trait, known to cause death to student-athletes. If it is mandating the test for the health and welfare of its athletes, just as the states mandate newborn screenings for the welfare of its citizens, the NCAA needs to consider expanding its testing to include other genetic conditions which also lead to sudden death in athletes. Two such diseases are Marfan syndrome and hypertrophic cardiomyopathy.[72]

C. MARFAN SYNDROME

Marfan syndrome is a genetic condition that causes the connective tissue of the heart and blood vessels to be weak and prone to bursting.[73] This can lead to the aorta rupturing and sudden death.[74] Although Marfan syndrome is a genetic condition, twenty-five percent of the time it can occur without inheriting the condition.[75] Marfan syndrome also affects the long bones of the body, which causes outward signs of the condition, including longer than normal arms, fingers, and legs.[76] These traits are useful to basketball players, such as Isaiah Austin,[77] yet his basketball career ended in college due to a pre NBA-draft

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[70] *See* Brown, *Division III Approves Sickle Cell Measure*, *supra* note 39.

[71] *See* NAT'L HEART, LUNG, AND BLOOD INST., *supra* note 48.

[72] *Id.*; *see also* Pyron, *supra* note 49.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *See id.*

[77] *See* Miriam Falco, *What is Marfan Syndrome?*, CNN (June 23. 2014, 6:25 PM), http://www.cnn.com/2014/06/23/health/marfan-syndrome-nba-player.

physical which showed he had Marfan syndrome.[78] He was told he would not be able to play competitive basketball any longer, ending his hopes of playing in the NBA.[79] Austin played for Baylor University and was unaware of his condition until the NBA tested him during the pre-NBA draft physical.[80] If the NCAA had tested him as part of their pre-entry physical, Austin would have known earlier that a career in the NBA would not be in his future. The choice to play for Baylor University would have been a better-informed choice had Austin known his medical status.

Austin played for Baylor not knowing his heart could rupture during physical exertion. The NCAA is lucky Austin's heart did not rupture during game-play or it would have potentially faced another lawsuit like the action brought by Dale Lloyd II's family. Critics of the mandated sickle cell trait screening claim that the NCAA is protecting its own interests, not those of the athletes.[81] Since the mandate to test arose from the settlement of a negligence lawsuit, the NCAA's response is perceived as an appeasement of a family who suffered the untimely loss of their son, which could have been avoided.[82] The NCAA wants mandated testing to be perceived as a result of concern for their athletes. If this is true, the NCAA should also be testing for Marfan Syndrome and Hypertrophic Cardiomyopathy to protect itself from future liability lawsuits.

D. HYPERTROPHIC CARDIOMYOPATHY

Hypertrophic cardiomyopathy (HCM) is another genetic condition that can cause sudden death in athletes.[83] Dr. Martha Pyron, in an article for the American College of Sports Medicine states, "[hypertrophic cardiomyopathy is the leading cause of sudden death in young athletes."[84] An athlete suffering from

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[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] Madison Park, *NCAA Genetic Screening Rule Sparks Discrimination Concerns*, CNN (Aug. 4, 2010, 8:13 AM), http://www.cnn.com/2010/HEALTH/08/04/ncaa.sickle.genetic.screening.

[82] *See id.*

[83] Pyron, *supra* note 51.

[84] *Id.*

HCM has an enlarged heart, which, if left undiscovered and untreated, eventually causes the heart muscle itself to block the flow of blood to the body.[85] This reaction can cause ventricular fibrillation which leads to death.[86] The severity of the condition varies and can become more significant over time.[87] People with this condition are "likely to be held from all athletic activity."[88] However, having this condition does not mean that the athlete can no longer play the sport they love. In fact, with proper monitoring and training regimens, the athlete can still play at a high level.[89] NCAA screening for this condition could save lives or promote the monitoring of the condition.

Cuttino Mobley is one example of an athlete with HCM who still played at a competitive level without the effects of his disease manifesting during his career.[90] Mobley acts as an exception to the rule of withholding persons with HCM from participating in athletics.[91] Mobley, who was diagnosed with HCM, played in the NBA from 1998 until 2008.[92] After ten years in the league, two separate cardiologists declared Mobley unfit to play in the NBA.[93] Both cardiologists are opposed to allowing people with HCM to participate in athletics.[94] Allegedly, these two specific cardiologists were chosen by the New York Knicks to find Mobley unfit to play to avoid paying a luxury tax for being above the salary cap.[95] Mobley's story illustrates both sides of the genetic testing issue, namely the protection of the athlete versus the use of the genetic information to discriminate against the player, which is the fear of critics of the mandated NCAA screening. This is another example of why regulations

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[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *See, e.g.*, Mobley v. Madison Square Garden LP, 11 Civ. 8290 (DAB), 2013 U.S. Dist. LEXIS 46341, at *2 (S.D.N.Y. Mar. 15, 2013).
[90] *Id.*
[91] *Id.*
[92] *Id.* at *3–*4.
[93] *Id.*
[94] *Id.*
[95] *Id.* at *5–*6.

need to be in place to protect the genetic information of all people tested so the information cannot be used to harm them.

IV. GINA'S IMPACT ON COLLEGE ATHLETICS

A small step toward the protection of people's genetic test results comes from the Genetic Information Nondiscrimination Act of 2008, known as GINA.[96] Large scale mandated genetic testing is not found outside of newborn screenings and the NCAA due, in part, to GINA.[97] The federal government's implementation of GINA took place over several years and prohibits employers and health insurance companies from discriminating on the basis of genetic test results, including family members' genetic results.[98] However, GINA does not protect people's genetic information from other types of insurance coverage evaluation or areas of life.[99] It only protects the information from employers and health insurance.[100]

GINA was originally introduced in both the House of Representatives and the Senate in 2003.[101] It was brought up again in 2005.[102] In 2007, GINA was introduced in the House of Representatives once again.[103] After many subcommittee hearings and testimony from various industries, the bill was

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[96] 1 HEALTH CARE REFORM: LAW AND PRACTICE § 9.04 (Matthew Bender).

[97] *Screening U.S. College Athletes for their Sickle cell Disease Carrier Status*, SEC'Y'S ADVISORY COMM. ON HERITABLE DISORDERS IN NEWBORNS AND CHILDREN (Oct. 11, 2010), http://www.hrsa.gov/advisorycommittees/mchbadvisory/heritabledisorders/recommendations/correspondence/briefingcarrierstatus.pdf.

[98] Amanda L. Laedtke et al., *Family Physicians' Awareness and Knowledge of the Genetic Information Non-Discrimination Act (GINA)*, 21 J. GENETIC COUNSELING 345, 346 (2012).

[99] *Id.*

[100] *Id.*

[101] Genetic Nondiscrimination in Health Insurance and Employment Act, H.R. 1910, 108th Cong. (2003); Genetic Information Nondiscrimination Act of 2003, S. 1053, 108th Cong. (2003).

[102] Genetic Information Nondiscrimination Act of 2005, H.R. 1227, 109th Cong. (2005); Genetic Information Nondiscrimination Act of 2005, S. 306, 109th Cong. (2005).

[103] Genetic Information Nondiscrimination Act of 2008, H.R. 493, 110th Cong. (2007).

passed and sent to the Senate for a vote.[104] The Senate amended the bill and approved it, sending it back to the House of Representatives for another vote, and finally to President George Bush for his signature, making it law.[105] The two sides of the debate came from insurance companies and actuaries against the promoters of genetic testing, civil rights, the disabled, and the public's ability to not fear using the science available to them.[106]

The need for genetic information to be protected stems from state laws of the 1900's which allowed for the sterilization of people with certain defects.[107] These laws continued in one form or another until the 1980's and included discrimination against African-Americans due to their sickle cell tendency.[108] In 1972, Congress passed the National Sickle Cell Anemia Control Act to discourage states from maintaining laws requiring mandatory testing for sickle cell by withholding funding.[109] Since GINA's protection is limited, its impact on college athletics is not readily apparent. However, GINA plays a role when a university or college under the NCAA insures an athlete's future earnings.[110] This type of insurance coverage is a long-term disability policy, not a health insurance policy.[111] Since it is not health insurance, any and all genetic test results are available for the insurance company to consider in its decision of whether to insure an athlete. This leaves the athlete open to discrimination outside of employment and health insurance protections of GINA due to the mandatory testing.

Even though GINA is just one part of understanding and dealing with the need for protection of genetic information, it is not enough to protect people from having their genetic information used against them. The NCAA is trying to protect its athletes from harm, but because of lack of regulation regarding

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[104] *Id.*

[105] *Id.*

[106] H.R. REP. NO. 110-28, pt. 3, at 30 (2007); H.R. Rep. No. 110-28, pt. 1, at 28–29 (2007).

[107] H.R. REP. NO. 110-28, pt. 1, at 39–40 (2007).

[108] H.R. REP. NO. 110-28, pt. 2, at 2 (2007).

[109] *See id*.

[110] *Loss of Value White Paper Insurance Programs to Protect Future Earnings*, NCAA, http://www.ncaa.org/about/resources/insurance/loss-value-white-paper (last visited Feb. 1, 2016).

[111] *See id*.

access to genetic test results, the mandated testing could harm the exceptional college athlete looking to enter professional sports. GINA would protect that athlete once the athlete is an employee of a professional sports franchise, but by then it may be too late. If at some point college athletes are considered employees of the university's sports programs, then GINA would apply based on the university's employer status, protecting the information the NCAA is requiring the athletes to provide.

V. COSTS OF GENETIC TESTING

Genetic testing comes at a price. There are, of course, financial costs. However, there are also numerous social costs that attach themselves to genetic testing, even without touching genetic enhancements.

The financial costs are easier to address than the emotional and social costs. The NCAA, through a deal with Quest Diagnostics, tests the athletes for sickle cell trait for $8.50, with some tests ranging up to $32.50.[112] The NCAA does not require the schools to pay for the test; it leaves the choice of who pays up to the individual institutions.[113] The NCAA has also granted a one-time payment in the amount of $500.00 to institutions to help defray the cost of testing.[114] The price of the testing for sickle cell trait is minimal enough for the student-athletes to pay for the testing themselves.

Prior to the mandate and disclosure of sickle cell trait, schools took into account the cost of a lawsuit brought by families of student-athletes who died during training.[115] One family was awarded ten million dollars by a Florida jury.[116] However, the Court of Appeals found that the University of

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[112] *NCAA Sickle cell trait (SCT) Testing – What You Need to Know*, NCAA (2014), https://www.ncaa.org/sites/default/files/SCT%20testing%20brief%202014.pdf.

[113] Brown, *Division III Approves Sickle Cell Measure*, *supra* note 39.

[114] *See id*.

[115] Alicia Jessop, *A Costly Decision: Sickle cell trait Testing of NCAA Student-Athletes*, THE BUS. OF C. SPORTS (July 21, 2011), http://businessofcollegesports.com/2011/07/21/a-costly-decision-sickle-cell-trait-testing-of-ncaa-student-athletes.

[116] *See id*.

Central Florida Athletic Association was a part of the University and thus was eligible for limited sovereign immunity, and therefore was protected from the large jury award.[117] However, the cost of litigation is still a consideration.

The costs associated with the implementation of the mandated testing include the test itself, the required educational component, and genetic counseling after testing positive for sickle cell trait. The NCAA has developed videos and pamphlets outlining why testing is important and basic information about sickle cell trait.[118] The focus is having student-athletes make educated decisions regarding their sickle cell trait status, and the implications their status can have on their participation in their given sport.[119] Each school has an athletic training staff to help ensure all athletes, not just those with sickle cell trait, stay well-hydrated during workouts.[120] Maintaining hydration and preventing heat related illnesses are key to keeping blood cells from sickling.[121] Trainers also watch for signs associated with complications from sickle cell trait and let athletes or coaches know when a break is required as a matter of safety.

The mandate by the NCAA protects its schools from any further liability in the area of negligence due to an athlete's unknown sickle cell trait status.[122] The waiver, if signed by the non-tested athlete, prohibits the athlete or their estate from bringing a suit against the school.[123] Even though the athlete could pay for the test herself, it is in the best interest of the school to make testing or waiver as easy as possible so as to further protect the school's financial interests and the best interests of its athletes.

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[117] UCF Ath. Ass'n v. Plancher, 121 So. 3d 1097 (Fla. Dist. Ct. App. 2013).

[118] *Sickle cell trait*, NCAA, http://www.ncaa.org/health-and-safety/medical-conditions/sickle-cell-trait (last updated Jan. 17, 2014) [hereinafter NCAA].

[119] *See id*.

[120] *See id*.

[121] Kevin M. Conley et al., *National Athletic Trainers' Association Position Statement: Pre-participation Physical Examinations and Disqualifying Conditions*, 49 J. ATHLETIC TRAINING 112, 112 (2014).

[122] *See* NCAA, *supra* note 118.

[123] *See id*.

Marfan syndrome testing is much more expensive than the cost of sickle cell testing and not as reliable.[124] The cost for a Marfan syndrome test for the first person in a family is $1,400 to $2,000, with insurance coverage varying.[125] Once the family genetic mutation is found, the cost for testing other family members decreases to between $250 and $400.[126]

The reliability of the Marfan genetic test is also in question.[127] To determine if someone has Marfan, the genetic tests are evaluated to find a mutation in the FBN1 gene.[128] However, in five to ten percent of individuals with clinical traits of Marfan syndrome, there is no genetic finding of the disease.[129] The reliability is also affected by other conditions showing up on the same gene sequence as Marfan syndrome.[130] Perhaps the limitations of cost and reliability are why the NCAA has not mandated athletes to be tested for Marfan. Clinical diagnosis may be more effective, followed by testing to validate, instead of testing first. Clinical diagnosis may be more effective, followed by testing to validate, instead of testing first. Since testing misses five to ten percent of clear-cut cases of Marfan, clinical evaluation is essential. Marfan syndrome is missed in many cases, which led to a letter from 26 members of Congress urging the U.S. Department of Health and Human Services and the Department of Education to do a better job screening high school students for Marfan syndrome.[131] Perhaps the NCAA will not need to test for the syndrome if it is done at the high school level instead.

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[124] *Genetic Testing and Marfan Syndrome,* THE MARFAN FOUND. 4, https://www.marfan.org/download/file/fid/968/Genetic%20Testing%20and%20Marfan%20Syndrome.pdf (last visited April 24, 2016).

[125] *Id.* at 4.

[126] *Id.* at 4.

[127] *See id.* at 4, 6.

[128] *See id*. at 1–3.

[129] *Id.* at 3.

[130] *Id*. at 3–5.

[131] *Congressional Representatives Take Steps Towards Enhanced Athletic Screening*, THE MARFAN FOUND., https://www.marfan.org/about-us/news/2016/03/03/congressional-representatives-take-steps-towards-enhanced-athletic (last visited Apr. 24, 2016).

The cost of genetic testing for HCM is around $3,000.[132] Traditionally, HCM was diagnosed and evaluated by a series of echocardiographs.[133] This may still be the most cost effective way to test for the disease since it causes mutations on eight different genes.[134] In Europe, countries recommend that testing for HCM not be done on athletes.[135] "Genetic testing is not recommended for diagnosis of HCM . . . outside the setting of expert clinical and detailed family assessment (e.g. to evaluate an athlete's heart)."[136] The critical impact that Europeans place upon the need for genetic testing to be done via families illustrates the costs outside the financial realm. These non-financial costs are discussed below.

For concussion susceptibility, the cost for an APOE genetic test is $250 to $300.[137] The danger of incorporating this testing into the NCAA protocol is that APOE allele 4 is associated with Alzheimer's Disease as well as concussion susceptibility.[138] If testing is mandated, this genetic information could be used by long term care insurance to discriminate against the athlete or their family members.

The NCAA has the best interests of its student-athletes in mind by requiring education regarding sickle cell trait and the

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[132] Thomas H. Hauser & Warren J. Manning, *Screening for Hypertrophic Cardiomyopathy: A Cost Analysis of Echocardiography, Cardiac Magnetic Resonance and Genetic Testing,* J. OF CARDIOVASCULAR MAGNETIC RESONANCE, Jan. – Feb. 2009, at 57.

[133] *See id.*

[134] Michael J. Ackerman et al., *HRS/ EHRA Expert Consensus Statement on the State of Genetic Testing for the Channelopathies and Cardiomyopathies,* 13 EUROPACE 1077, 1091 (2011).

[135] *Id.* at 1082.

[136] *Id.* at 1092.

[137] Christina Domingues, *Doctors: Genetic Test Can Determine if Your Child is Concussion-Prone*, TIME WARNER CABLE NEWS (Apr. 28, 2015, 5:24 PM), http://www.twcnews.com/nys/rochester/news/2015/04/28/concussion-gene.html; Ben Locwin, *Sports and War: When it Comes to Concussions, Not Much Difference Between Football and Fighting*, GENETIC LITERACY PROJECT (Jan. 11, 2016), https://www.geneticliteracyproject.org/2016/01/11/sports-war-comes-concussions-not-much-difference-football-fighting (noting that the $250 test is offered by the Rochester Holistic Center and both tests are cheek swabs that test for alleles of the APOE gene).

[138] Locwin, *supra* note 137.

dangers associated with not knowing one's status before allowing the athlete to sign a waiver.[139] The schools are not only looking to protect their financial interests, but want to make sure they provide a safe training environment for their athletes.

Genetic testing by its nature does not only affect the individual athlete, but, potentially, their entire family and future generations. Since NCAA testing deals with genetic traits that can lead to death if not monitored correctly, the biggest social implication is the psychological impact upon the athletes and their families.[140] Other social concerns include discrimination and family implications.[141] These non-financial costs are just as, if not more, important than the financial costs.

Psychological concerns include the fear associated with not being able to play a sport any longer after loving the game for so long and investing countless hours. Another concern that weighs heavily on the psyche is the financial repercussions. If an athlete were no longer eligible to play, the university must determine what happens to the athlete's athletic scholarship. One must also consider the psychological damage of the loss of hope to play professionally, along with the income that profession provides. Not all of these psychological factors apply to sickle cell trait, since athletes are allowed to continue playing with altered training and closer monitoring.[142] However, for Marfan syndrome and HCM, the discovery of the condition usually means the end of a career in the sport.[143]

There can also be a heavy psychological burden upon the athlete in worrying about what other family members may be affected. Jeffrey Botkin's article describes how adult siblings of the person tested have strong feelings about whether they want to know their carrier status.[144] This can cause anxiety and

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[139] *See* UCF Ath. Ass'n v. Plancher, 121 So. 3d 1097, 1104 (Fla. Dist. Ct. App. 2013).

[140] Jeffrey R. Botkin, et.al., *Points to Consider: Ethical, Legal and Psychosocial Implications of Genetic Testing in Children and Adolescents*, 57 AM. J. OF HUM. GENETICS 1233, 1234 (2015).

[141] *Id.*

[142] *See* Heather R. Quick, *Privacy for Safety: The NCAA Sickle-Cell Trait Testing Policy and the Potential for Future Discrimination,* 97 IOWA L. REV. 665, 672 (2012).

[143] Ferrari, *supra* note 30; Pyron, *supra* note 49.

[144] Botkin*, supra* note 140, at 10.

depression for all involved.[145] The athlete may also have concerns about being treated differently by their teammates or fear the loss of camaraderie that comes along with athletic participation.

Along with the psychological impact, there is the difficulty of finding balance. The balance is between the benefits of knowing about the genetic condition so proper treatment can begin, against the love of playing a sport and the economic impact that not playing will have upon a family. For some athletes, this is not a challenge; the loss of life is far greater than the loss of playing a sport. Yet for others, the impact of the loss of income and the sport is a more difficult adjustment.

CONCLUSION

In the spirit of care and concern for its athletes, the NCAA needs to be more aware of other genetic conditions that can cause sudden death in athletes. Marfan syndrome and HCM are deadly if undetected.[146] Since genetic testing for these two conditions is not feasible for the NCAA at this time, the NCAA needs to be proactive by establishing screening programs to assess athletes for these conditions. This will help protect the NCAA from further negligence lawsuits as well as protect the athletes. Educational programs that address these other genetic diseases, along with screenings, can be just as effective in reducing athlete deaths as mandatory testing. The more information an athlete has about a condition, the more aware the athlete can be as to whether there is a need to consider that condition further on a personal level beyond the possible screenings. The NCAA also needs to follow the current research regarding the connection between genetics and concussion susceptibility and recovery times. By being aware of the risks and the current research, the NCAA and its members will be best prepared to protect the athletes and everyone's best interests.

To make the sickle cell trait testing more effective, the NCAA needs to improve how athletes are informed about the genetic tests. Some athletes did not even realize they had been

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[145] *Id.*

[146] NATIONAL HEART, LUNG, AND BLOOD INSTITUTE, s*upra* note 71.

tested.[147] Genetic counseling should also be included as part of the genetic testing.[148] NCAA member schools all have training staff and team physicians; perhaps a genetic counselor can be added to that list of medical personnel. Without better-informed students, the NCAA will continue to have the appearance of only caring about the outcome of lawsuits, not the athletes themselves.

With implementation of better informed consent for the athletes and counseling for the athletes and their families regarding the benefits and risks of testing, the NCAA will gain greater respect from the athletes it serves, as well as from the larger community. With the knowledge gained through such mass testing, better and safer training programs can be established, and there will be better outcomes for all involved.

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[147] Smith & Shuchman, *supra* note 1, at 1140–41.
[148] *Id.* at 1135–36.

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MMA FIGHTING IS A RIGHT WORTHY OF PROTECTION UNDER THE FIRST AMENDMENT

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> The men who take part in these fights are as hard as nails, and it is not worthwhile to feel sentimental about their receiving punishment which as a matter of fact they do not mind. Of course, the men who look on ought to be able to stand up with the gloves, or without them, themselves; I have scant use for the type of sportsmanship which consists merely in looking on at the feats of someone else.[1]
>
> –Theodore Roosevelt

INTRODUCTION

There is a greater purpose to fighting than bruising and knocking out your opponent.[2] There is a greater purpose to winning a belt or trophy than placing it on your home mantel for visitors to view.[3] Most people recognize that MMA fighting is mental and physical. But it is more than that. This introduction will explain how MMA fighting is (1) a platform for fighters to express their ideas and views, (2) spiritual, and (3) similar to

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[1] Brett McKay & Kate McKay, *Boxing: A Manly History of the Sweet Science of Bruising*, THE ART OF MANLINESS (May 30, 2009), http://www.artofmanliness.com/2009/05/30/boxing-a-manly-history-of-the-sweet-science-of-bruising.

[2] Henry Cejudo is the #2 Flyweight UFC champion with a 10-1-0 record as of November 20, 2016. *Henry Cejudo*, UFC, http://www.ufc.com/fighter/henry-Cejudo?id= (last visited Nov. 20, 2016).

[3] *Id*.

dancing.[4] Specifically, this portion of the introduction will describe that MMA fighting is a **hybrid right** because it is spiritual and expressive. Next, this introduction will (4) briefly explain why MMA is a positive influence for our children and (5) give a brief overview of New York's MMA ban (now overturned). Finally, the introduction will conclude with (6) an overview of this note's argument.

(1) Henry Cejudo: Expressing Ideas and Views

Henry Cejudo[5] aids us in understanding how MMA is a platform for fighters to express their ideas and views by demonstrating that fighting and achieving success is not all that matters.[6] Cejudo explains that, through fighting, he has been able to prove there is no circumstance that is too difficult to overcome.[7] In an interview, Cejudo stated that he knows what success is, and success in MMA fighting is not what everyone thinks it is.[8] Cejudo clarifies that it is merely a tool and platform for a greater message, and from there is where his nickname, "The Messenger," comes.[9] The UFC and a world title is Cejudo's platform for something greater.[10] Cejudo's story is one of many prime illustrations in which fighting has served as a platform for persons to spread their ideas and values.[11]

Cejudo was not always an inspirational figure.[12] His story is one of rags to riches—a Mexican-American born in Los Angeles to undocumented immigrants.[13] Without a father figure,

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[4] Arvind Gupta, *Why Do I Fight in a Cage? Spiritual Lessons from Mixed Martial* Arts, MBG (Apr. 11, 2013), http://www.mindbodygreen.com/0-8238/why-do-i-fight-in-a-cage-spiritual-lessons-from-mixed-martial-arts.html.

[5] Cejudo, *supra* note 2.

[6] Mike Bohn, *Henry Cejudo: UFC's Immigrant Son Fights for the American Dream*, ROLLING STONE (Nov. 20, 2015), http://www.rollingstone.com/sports/videos/henry-cejudo-ufcs-immigrant-son-fights-for-the-american-dream-20151120.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] The Associated Press, *Son of Illegal Immigrants Henry Cejudo Gives U.S. Olympic Gold*, DAILY NEWS (Aug. 19, 2008, 10:43

Cejudo took charge of his life and began wrestling.[14] By the age of 21, he took gold at the Beijing Olympics and became the youngest American athlete to earn a medal in wresting.[15] Today, Cejudo works closely with numerous charities, outreach programs and non-profit organizations, adamant that "anything is possible if you set your mind, your body, your soul and your faith to it."[16] He also published a book called *American Victory*, which he describes as a more momentous accomplishment than winning a trophy or medal.[17]

(2) Brian Wood: Fighting is Spiritual

Brian Seraiah Wood began wrestling at the young age of nine, but eventually his path led him to MMA and a quest for self-experience and self-control.[18] Wood studied extensively alongside Kung Fu masters, absorbing multiple styles of Kung Fu: Wing Chun, Muay Thai, Qigong.[19] Eventually, Wood created his own style—Dragon Tao—which had its own unique flow and energy.[20] He believes that meditation is the missing link, not only in his personal life, but in athletics as well.[21] His passion for Yoga and meditation steered him to China and Thailand, where he studied Buddhist and Taoist meditation. Wood also believes that dancing is, "one of his most cherished forms of opening both the heart and soul to greater freedom and personal awareness of self."[22] He suggests that no type of mental

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AM), http://www.nydailynews.com/latino/son-illegal-immigrants-henry-cejudo-u-s-olympic-gold-article-1.314601.

[14] *Id.* at 7.

[15] *Id.* at 7, 13.

[16] Bohn, *supra* note 6.

[17] *Id.*

[18] *Martial Arts*, DRAGONTAOSERAIAH.COM, http://www.seraiah.com/martial-arts.html (last visited Sep. 11, 2016).

[19] *Id.*

[20] *Id.*; *see also Dragon Tao Systems*, DRAGONTAOSERAIAH.COM, http://www.seraiah.com/dragon-tao.html (last visited Nov. 15, 2016) (stating that Dragon Tao "is reminiscent of Bruce Lee's Jeet Kune Do" because "it meshes many styles into one ever-evolving and expanding system").

[21] *Seraiah Training Bio*, DRAGONTAOSEARAIAH.COM, http://www.seraiah.com/training-bio.html (last visited Nov. 15, 2016).

[22] *Id.*

and physical training can break through patterns of conditioning the way dance does.[23] Wood further explains:

> I believe that the true purpose of the human being is to experience life as a spirit within the mortal shell . . . I am reminded of the words of Bruce Lee "To me, martial arts means honestly expressing oneself." I remind myself regularly that the purpose of training is to cultivate oneself and to experience enlightenment through the searching of the soul. I believe that the faith I have in my training, conditioning and mental preparedness allows me to understand that a win only comes with sacrifice and a humble heart filled with humility.[24]

(3) Artem Lobov: Dancing and MMA

Artem Lobov is not the emblematic MMA fighter you normally see.[25] Lobov's "footwork, awkward stance, distance and hand movement set him apart from anyone else in the sport."[26] Lobov does not have an MMA background and did not start practicing MMA until he was 21 years old.[27] His mother did not want him to fight, so, at the age of seven, Lobov took up dancing instead.[28] His training in ballroom dance is the reason Lobov has established a particular elegance inside the ring that few can match.[29] Lobov moves easily and naturally around the ring.[30] Lobov knows how his body works and moves, and he believes it is due to his experience with ballroom dancing.[31] His coach proclaims he has yet to meet a good fighter who is a bad

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[23] *Id.*

[24] Jamie Squires, *Spirituality on the MMA Mat?*, ELEPHANT J. (Feb. 9, 2012), http://www.elephantjournal.com/2012/02/spirituality-on-the-mma-mat-jamie-squires.

[25] Shawn Smith, *Artem Lobov, MMA, and the Art of Ballroom Dancing*, FIGHTLAND (Aug. 27, 2014), http://fightland.vice.com/blog/artem-lobov-mma-and-the-art-of-ballroom-dancing.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *See id.*

[30] *See id.*

[31] *Id.*

dancer.[32] He further asserts that there is unquestionably a correlation between the two.[33]

(4) MMA is a Positive Influence for our Children

Although fighting has proven to be an incredibly positive influence on fighters' lives, there is a common fallacy that children should not participate in MMA because it will make them more violent, aggressive, and predisposed to starting a fight.[34] However, fighting may actually do the opposite.[35] Studies have shown that "[p]utting kids in a controlled environment that gives them a safe and fun place to get out aggression is an excellent way to make sure they aren't overly aggressive outside of the gym."[36] It teaches children to live a healthy lifestyle and teaches them self-defense.[37] To date, there are approximately 3.2 million children under the age of thirteen who participate in MMA.[38] Like Henry Cejudo, many of these children have poor upbringings and MMA can provide them with an outlet to change their lives.[39]

(5) Overturning New York's MMA Ban

In 1997, the New York State Senate approved a bill banning professional MMA fighting.[40] To date, New York has been the only state that had a ban on professional MMA fighting,

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[32] *Id.*

[33] *Id.*

[34] Jayden Bell, *Why Children Benefit from MMA*, SCI FIGHTING (May 3, 2013, 8:30 AM), http://www.scifighting.com /2013/05/03/3737/why-children-can-benefit-from-mma.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] Conor Orr, *The Star-Ledger: Still Illegal in New York, MMA Fighting Continues to Benefit New Jersey Hosts*, MMAFACTS (Feb. 9, 2011, 6:30 AM), http://www.mmafacts.com/index.cfm?fa=main.news &ContentGroupID=.

[40] Mike McAndrew, *Senate Passes Bill to Legalize Mixed Martial Arts in New York*, SYRACUSE.COM (Feb. 1, 2016, 4:39 PM), http://www.syracuse.com/state/index.ssf/2016/02/senate_passes_bill_to _legalize_mixed_martial_arts_in_new_york.html.

while the other 49 states simply regulated the sport.[41] However, in March of 2016 the New York State Senate approved a bill overturning its ban on MMA fighting.[42] It is now time for the legislators and courts to recognize the constitutionality of professional MMA fighting.

(6) Overview

The stories of Henry Cejudo, Brian Wood, and Artem Lobov illustrate the tremendous opportunities that MMA fighting may provide for athletes; opportunities that go above improving their life financially, providing a platform to convey their stories and spiritual beliefs. Despite the influence that fighting has had on American culture and individuals' lives, courts have yet to recognize fighting as an activity protected by the First Amendment. This note will argue that fighting has had a tremendous role in providing an outlet for individuals to express their culture, ideas, and spirituality, and that courts should recognize MMA fighting as a form of "expressive conduct" deserving First Amendment protection. In support of this proposal, this note will proceed as follows: Section I will provide background information and will include three parts. Part A will describe the history and development of MMA fighting. Part B will discuss spiritual development in MMA. Part C will discuss the types of activities that have traditionally garnered protection under the First Amendment and the First Amendment tests that courts have applied in determining what sort of activities constitute "expressive conduct." Section II will argue that MMA fighting should be deemed a form of "expressive conduct" under the First Amendment. Section III will discuss why MMA fighting is a hybrid right. Finally, Section IV will provide alternative arguments as to why MMA fighting deserves First Amendment protection.

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[41] Michelle Breidenbach, *Mixed Martial Arts vs New York: Banned Sport Closer to Decision in Albany*, SYRACUSE.COM (Apr. 6, 2015, 9:00 AM), http://www.syracuse.com/politics/index.ssf/2015/04/mixed_martial_arts_vs_new_york_moving_closer_to_decision_in_albany.html.

[42] Damon Martin, *New York Legalizes MMA After Nearly 20 Year Ban on the Sport*, FOX SPORTS (Mar. 22, 2016, 6:30 PM), http://www.foxsports.com/ufc/story/ufc-new-york-legalizes-mma-after-nearly-20-year-ban-on-the-sport-032216.

BACKGROUND

A. THE HISTORY OF FIGHTING IN THE UNITED STATES

The influence of fighting in American culture cannot be easily described; nevertheless, fighting is an enormous part of American culture and the success of many.[43] Beginning with the championship reign (1908-15) of the prominent African American boxer Jack Johnson, "boxing has been a crucible for issues of race and masculinity."[44] Many of these boxers were minorities who all wanted the same thing: to escape poverty.[45] During the 20th century, the U.S. economy boomed and immigrants arrived to pursue a safe haven in the "New World."[46] By 1915, the Irish became the dominant national group in boxing.[47] African Americans also excelled in boxing, and in 1908 Jack Johnson became the first African-American champion heavyweight boxer.[48] As a result of the rampant societal racism against African-Americans, Jack Johnson's victory caused uproar because Mike Sullivan, a professional Irish-American boxer, refused to defend his World Champion title against Johnson.[49] This type of persecution lasted until the last quarter of the 20th century when African-American fighters dominated the sport of boxing.[50] The early 20th century often promoted fights that operated on ethnic and racial antagonisms.[51]

In the latter half of the 20th century, advocates within the Muscular Christianity movement began boxing, viewing sports as a way to increase a man's physical strength, and more

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[43] GARY W. MCDONOGH ET AL., ENCYCLOPEDIA OF CONTEMP. AM. CULTURE 98 (2001).

[44] *Id.* at 154.

[45] *Id.*

[46] *The History of Fighting*, FIGHT CLUB AMERICA, http://fightclubamerica.com/about/history-of-boxing/ (last visited Nov. 16, 2016).

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id*. Some notable boxers—Henry Armstrong, "Sugar" Ray Robinson, Archie Moore, Ezzard Charles, "Jersey" Joe Wolcott, Floyd Patterson, Sonny Liston, Muhammad Ali, and Joe Frazier all won World Champion titles in various weight groups.

[51] McKay, *supra* note 1.

importantly, his moral strength.[52] Theodore Roosevelt was a firm advocate of the movement and was nervous that American men would lose their masculinity.[53] In fact, Roosevelt boxed throughout college and his Presidency.[54] While sparring, Roosevelt was struck and blinded in his left eye.[55] Roosevelt, however, did not give up fighting altogether; instead, he gave up boxing and took up jujitsu.[56]

Two of the critical figures that increased the public awareness of boxing were Muhammad Ali and Mike Tyson.[57] Not only was Ali a boxing star, but many looked up to him for his anti-war and "black is beautiful" activism, which inevitably made him one of the most famous men alive.[58] Although not as publicly vocal as Ali, Mike Tyson was also able to express important concerns of African American culture.[59] Tyson's rise to popularity was largely due to his troubled upbringing.[60] In a 2015 appearance for *The Nightly Show with Larry Wilmore*, Tyson was asked what "advice he'd give to aspiring boxers."[61] He simply responded, "go to MMA."[62]

There is debate as to when MMA first started as a professional sport.[63] Many people wrongly believe that the

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[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] Mike Conklin, *Teddy Roosevelt's Little-Known Secret*, CHICAGO TRIBUNE (Oct. 7, 2002), http://articles.chicagotribune.com/2002-10-07/features/0210070158_1_boxing-final-bout-theodore-roosevelt-association.

[57] MCDONOGH ET AL., *supra* note 43, at 99.

[58] *Id.*

[59] *Id*.

[60] *See id*. at 100.

[61] Lee Cleveland, *Boxing's Popularity Decline in the U.S.: The Real Reason Why*, FIGHT SAGA (Mar. 25, 2015, 12:07 AM), http://www.fightsaga.com/news/item/5441-Boxing-s-popularity-decline-in-the-U-S-The-real-reason-why.

[62] *Id*. (explaining a significant reason why mainstream boxing seems to be less popular is because the sport has become more competitive, and, that with more competition, it becomes "more difficult for any one nation, like the U.S., to boast a 'Dream Team' of world champions and superstars").

[63] *The History of MMA Mixed Martial Arts*, MMA HISTORY, http://mmahistory.org/who-invented-mma/ (last updated Mar. 24, 2015).

Ultimate Fighting Championship ("UFC") created MMA.[64] To be fair, there were many inspirations of modern MMA competition in the United States, even long before it became popularly known as MMA.[65] There were several innovators that developed MMA.[66] The most notable of these innovators were Bruce Lee and Gene LeBell.[67] In spreading the art of fighting, Bruce Lee would preach that the best fighter is not only a boxer, karate man, or judo man; rather, the best fighter is one who can adjust to all styles.[68] It is a fighter who "kicks too good for a boxer, throws too good for a karate man, and punches too good for a judo man."[69] However, Bruce Lee and Gene LeBell's contributions to MMA, while revolutionary, did not create an open, regulated sport.[70] Even forty years after Bruce Lee's death, his fighting philosophies can be seen in cages around the world, and fighters still idolize and credit him for his influence.[71]

One of MMA's best-kept secrets is that it was formed a decade before UFC marketing.[72] In 1993, Art Davie believed he was the first to create the Ultimate Fighting Championship.[73] To his disbelief, MMA had already started in Pittsburgh, Pennsylvania a decade earlier.[74] CV Productions[75] was a

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[64] *Id*. The Ultimate Fighting Championship (UFC) is simply an American mixed martial arts promotion company.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] Kevin Iole, *Bruce Lee's Impact on Mixed Martial Arts Felt Nearly 40 Years after His Death*, YAHOO SPORTS (Nov. 4, 2012, 7:05 PM), http://sports.yahoo.com/news/mma--bruce-lee-impact-on-mixed-martial-arts-ufc-felt-nearly-40-years-after-his-death.html.

[70] MMA HISTORY, *supra* note 63.

[71] Iole, *supra* note 69.

[72] MMA HISTORY, *supra* note 63.

[73] *Id.*

[74] *Id.*

[75] CV Productions, Inc**.** was founded in 1979 and is a Pittsburgh, Pennsylvania-based mixed martial arts company. It's considered the first MMA based company in the United States and responsible for creating the blueprint for modern mixed martial arts competition. *CV Productions*, MMA HISTORY, http://mmahistory.org/cv-productions/ (last visited Nov. 24, 2016).

premonition of the Zuffa[76] era, while UFC 1 was devised as a phenomenon that slowly transformed into a sport over time.[77] While Art Davie was a true innovator with regard to the concept of cage fighting and propagating MMA on television, he was not the first to package MMA.[78]

Whereas other sports leagues have lost many in their fan bases, the UFC is currently the "fastest-growing sports league in the country."[79] When the UFC first entered the sports world, it was hard for many martial artists to conform. MMA fighting is not about one discipline; it is a combination of boxing, wrestling, and jujitsu.[80] At first, people harvested many apprehensions about the UFC due to the assumption that fighters may be seriously injured or killed in caged combat.[81] Today, however,

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[76] Zuffa, LLC is an American sports promotion company specializing in mixed martial arts. It was founded in January 2001 in Las Vegas, Nevada, by Station Casinos executives Frank Fertitta III and Lorenzo Fertitta to be the parent entity of the Ultimate Fighting Championship (UFC) after they purchased it from the Semaphore Entertainment Group. Lorenzo Fertitta is the company's CEO and chairman while Dana White runs the day-to-day operations. Zuffa is co-owned by Fertitta brothers (40.5% each), Dana White (9%) and Flash Entertainment (10%). *What is Dana White's Net Worth?,* DAVEMANUEL.COM, http://www.davemanuel.com/net-worth/dana-white/;*History of MMA*, OCKICKBOXING.COM, http://ockickboxing.com/blog/mma/history-of-mma-mixed-martial-arts/ (last visited Nov. 24, 2016).

[77] "His vision 'There are no Rules' was a far cry from anything that resembled sport." MMA HISTORY, *supra* note 63.

[78] *Id.*

[79] *'World's Fastest Growing Sport' – Fact or Hype?*, CAGEPOTATO, http://www.cagepotato.com/worlds-fastest-growing-sport-fact-or-hype/ (last visited Mar. 9, 2016).

[80] Jay Dann, *Mixed Martial Arts: 11 Things You REALLY Need to Know About the World's Fastest Growing Sport*, MIRROR (Mar. 24, 2014, 3:34 PM), http://www.mirror.co.uk/sport/other-sports/mma/11-things-you-really-need-3277676; Joseph Eitel, *Fighting Styles in the MMA*, LIVESTRONG.COM, http://www.livestrong.com/article/477972-comparison-of-boxing-gloves-mma-type-gloves/ (last updated Aug. 13, 2015).

[81] *See* Jonathan Gottschall, *Hey UFC, Bring Back Bare-knuckle Fights to Stop Brain Trauma*, THE DAILY BEASTY (July 24, 2015, 9:13 PM), http://www.thedailybeast.com/articles/2015/07/25/hey-ufc-bring-back-bare-knuckle-fights-to-stop-brain-trauma.html; *see also* Sergio Hernandez, *MMA Isn't Safe: Concussions,*

the tap-out rule[82] makes the UFC safer than boxing.[83] The UFC's approach with *no rules* changed in 2001 when it implemented the Unified Rules of Mixed Martial Arts.[84] According to Dana White,[85] the UFC will one day grow bigger than any other fighting event in the world.[86] Dana White further explains that our youth are growing up with MMA, so they will not "be satisfied with watching a fighter employing just his fists, when he has so many other weapons and skills at his disposal."[87] To

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Brain Injuries and What Can Be Done About Them, MMA MANIA (May 3, 2012, 6:00 PM), http://www.mmamania.com/2012/5/3/2996615/mma-ufc-concussions-brain-injuries.

[82] "If one fighter achieves a submission hold, the fighter trapped in the hold can call defeat by tapping out on his opponent's body or the mat, or by making a verbal announcement. Some defeated fighters fail to tap out and become incapacitated. *MMA Rules and Regulations*, CAGEWARSNOW.COM, http://cagewarsnow.com/about/25-mma-rules-and-regulations (last visited Nov. 28, 2016). In such cases, the referee calls an end to the fight." Frank Shamrock & Mary Van Note, *Rules of Mixed Martial Arts Fighting*, DUMMIES, http://www.dummies.com/how-to/content/rules-of-mixed-martial-arts-fighting.html (last visited Mar. 9, 2016).

[83] Gregory H. Bledsoe et. al., *Incidence of Injury in Professional Mixed Martial Arts Competitions*, 5 J. OF SPORTS SCI. & MED.136, 140 (2006), http://www.jssm.org/gecjssm-05-CSSI1-136.xml.xml; *see* Luke O'Brien, *Why Brain Damage Isn't an Issue in MMA, According to Dana White and UFC Fighters*, DEADSPIN (Dec. 9, 2011, 2:30 PM), http://deadspin.com/5866683/why-brain-damage-isnt-an-issue-in-mma-according-to-dana-white-and-ufc-fighters.

[84] Robert Harding, *MMA in New York: 'The Brawl,' the Ban and UFC's Push to Legalize the Sport in 2016*, AUBURNPUB (Dec. 30, 2015), http://auburnpub.com/blogs/eye_on_ny/mma-in-new-york-the-brawl-the-ban-and-ufc/article_c827a11c-adae-11e5-9e5e-ffb95d3a6c8f.html; *see Unified Rules and Other Important Regulations of Mixed Martial Arts*, UFC, http://media.ufc.tv//discover-ufc/Unified_Rules_MMA.pdf (last visited Mar. 8, 2016).

[85] Dana White is the President of UFC. Lara O'Reilly, *The Hugely Popular Mixed Martial Arts League UFC Has Been Sold for $4 Billion*, BUSINESS INSIDER (July 11, 2016, 5:04 AM), http://www.businessinsider.com/mixed-martial-arts-league-ufc-sold-for-4-billion-to-wme-img-2016-7?r=UK&IR=T.

[86] Marc Wickert*, Dana White and the Future of UFC*, FIGHT TIMES (Oct. 1, 2004), https://magazine.fighttimes.com/dana-white-and-the-future-of-ufc.

[87] *Id.*

top off the rise of the sport, in the next 20 years, MMA will likely be included in the Olympic Games because of the growing participation by so many countries.[88]

B. SPIRITUAL DEVELOPMENT IN MARTIAL ARTS

How do we define the term *spiritual*? With an air of mystery and flexibility, the term is defined at least twelve different ways.[89] "Spirituality is derived from the Latin word spiritus, which means 'breath of life.'"[90] Fighters use their spirituality to focus and prepare their mind, body, and spirit in order to address weaknesses and "face both victory and defeat with equal reflection and respect."[91] MMA fighters believe that mind, body, and spirit are what make a complete mixed martial artist.[92] Some fighters claim that a true martial artist appreciates the spiritual aspect of fighting.[93] In fact, any individual who has trained in MMA can confirm that the experience is ethereal because the innate sense of fulfillment cannot be simply described.[94]

MMA is not merely about war or self-defense; it is a form of art, "created to help human beings maximize their potential on many different levels in order to live life to the fullest."[95] Essentially, an unconscious state of mind (empty-mindedness) is free of all distractions and applies to all creative activities, including, "*dancing* and swordplay."[96] While

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[88] Patrick Johnston, *Mixed Martial Arts Will Be an Olympic Sport, Say UFC*, REUTERS (Aug. 30, 2013, 6:02 AM), http://www.reuters.com/article/us-olympics-mma-idUSBRE97T0BK20130830.

[89] K.G. McGlade, *The Way: Fighting and Spirituality*, THE LOWDOWN (Feb. 1, 2010), http://thelowdown-juvenile.blogspot.com/2010/02/way-fighting-and-spirituality_01.html.

[90] *Id.*

[91] *Id.*

[92] *See id.*

[93] *Id.*; *see also Most Spiritual Fighter*, TAPOLOGY (last visited Nov. 17, 2016), http://www.tapology.com/rankings/378-most-spiritual-fighter (listing some of the most spiritual MMA fighters).

[94] Eric Higaonna, *Martial Arts Through the Ages*, IOGKF INT'L (last visited Nov. 17, 2016), http://www.iogkf.com/newsletter/edition_2010_3/articles_pg_06.htm.

[95] *Id.*

[96] *See* Robert James Buratti, *The Spiritual Dimensions of the Martial Arts*, NEW DAWN (Jan. 15, 2014),

numerous types of martial arts in the world exist through many diverse cultures, one aspect is common: the "soul of the art itself." [97] Because MMA is universal, it bonds like-minded people that are on a journey to connect mind, body, and spirit.[98] While perfection is unattainable, the idea of perfection yields perseverance.[99] Each martial artist wants to attain the goal of true, long-term happiness, which can be humbly achieved by the act of doing.[100]

MMA is not only about learning proper techniques. The true value lies with attaining specific internal qualities developed through the learning process.[101] For example, footwork teaches students about qualities such as energy, ebb, and flow, as well as creative and destructive potential.[102] Moreover, handwork patterns teach balance, dynamics, and the awareness of one's physical spirit.[103] Every distinctive movement that an MMA fighter uses—such as blocking or striking—are elements that that are often attributed to the human spirit.[104] One of the most important elements of spirituality is confronting death, as the "fear of death is the greatest obstacle for the martial artist."[105]

MMA is certainly not simply the remnants of "old cultures," but a fruitful technique to spiritual enlightenment.[106] To date, martial arts remain the oldest and most successful system to achieve spiritual development.[107] Demian Maia,[108] a professional MMA fighter, believes that competing in MMA at a

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http://www.newdawnmagazine.com/articles/the-spiritual-dimensions-of-the-martial-arts (emphasis added).

[97] *See id.*

[98] *See* McGlade, *supra* note 89.

[99] *See* Buratti, *supra* note 96.

[100] Gupta, *supra* note 4.

[101] Buratti, *supra* note 96.

[102] *Id.*

[103] *Id.*

[104] *See id.*

[105] *Id.*

[106] *Id.*

[107] *Martial Arts*, ENCYCLOPEDIA.COM, http://www.encyclopedia.com/sports-and-everyday-life/sports/sports/martial-arts (last visited Dec. 18, 2016).

[108] *See Biography*, DEMIAN MAIA JIU JITSU, http://www.demianmaia.com/demian (last visited Sept. 11, 2016).

higher level is not just about fighting, but something much deeper.[109] He explains:

> Some see the spiritual journey of a fighter, particularly those from eastern religions/philosophies as an internal battle with self. Overcoming that voice inside us that tells us to quit in the midst of struggle or have a prideful reaction to defeat. That is our ego, and a fighter must strive to confront it and constantly challenge it in order to grow in humility and evolve. If they can come to terms with who they are and the world they find themselves in, then they can be a more content and effective person and fighter.[110]

C. THE FIRST AMENDMENT

The text of the First Amendment provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[111] The First Amendment's prohibition against the infringement of an individual's freedom of speech is directed at Congress, but its protections are made applicable to the states through the Due Process Clause of the 14th Amendment.[112] As far as freedom of speech is concerned, it is unclear precisely what the First Amendment freedom actually guarantees. [113] What is known, however, is that the First Amendment "prohibits government from interfering with the individual's right to receive and disseminate ideas and

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[109] Chris Palmquist, *Demian Maia: Fighting is Spiritual*, THE UNDERGROUND (Oct. 4, 2011), http://www.mixedmartialarts.com/news/Demian-Maia-Fighting-is-spiritual.

[110] McGlade, *supra* note 89.

[111] U.S. CONST. amend. I.

[112] Angelica M. Sinopole, *"No Saggy Pants": A Review of the First Amendment Issues Presented By the State's Regulation of Fashion in Public Streets*, 113 PA. ST. L. REV. 329, 335 (2008). The author explains why an ordinance banning saggy pants violates the First Amendment rights "by targeting a particular mode of expression–clothing choice or appearance." *Id.* at 332.

[113] *Id.*

information, and to form and hold opinions or beliefs based upon that free exchange."[114] Fundamentally, communication of ideas does not always transpire through written or spoken words, but can transpire through actions.[115] This is referred to as "expressive conduct."[116] As First Amendment scholar David L. Hudson Jr. stated, "[f]lashing headlights, honking horns, armbands, crosses, tattoos and even strange-colored hair—what could they possibly have in common? Answer: They can all trigger the protections of the First Amendment free-speech clause."[117] He goes on to say that people use expressive conduct every day.[118] This shows that "our liberty extends much deeper and allows other creative ways for people to express themselves."[119]

Furthermore, in 1943, Justice Robert H. Jackson explained that expressive conduct or symbolic speech that is protected under the First Amendment involves communicative conduct that is the behavioral equivalent of speech. [120] Furthermore, in 1969, the Supreme Court held that "symbolic expression [is] 'akin to pure speech' when [students] wore black peace armbands to protest the Vietnam War."[121] As recently as 1989, courts found that statutes prohibiting the desecration of the U.S. flag restrict the free expression of speech.[122]

Plenty of outlandish First Amendment cases have plagued our judicial system. For example, the Supreme Court generally strikes down prohibitions on nudity and erotic dancing.[123] On the other hand, for example, the Supreme Court

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[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] David L. Hudson Jr., *First Amendment Protects More Than Just Words*, FIRST AMEND. CTR. (Sept. 23, 2011), http://www.firstamendmentcenter.org/first-amendment-protects-more-than-just-words.

[118] *Id.*

[119] *Id.*

[120] *See generally* W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[121] The author also noted that, in *Texas v. Johnson* (1989), the Court ruled "that the act of burning the flag was a form of free expression." Hudson, *supra* note 116.

[122] *See* Tex. v. Jonson, 491 U.S. 397 (1989).

[123] *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

upheld an Indiana statute banning nude dancing.[124] Justice Rehnquist indicated that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we viewed it as only marginally so."[125] According to the Court, the statute "furthers a substantial government interest in protecting order and morality" and the prohibition on public nudity is extraneous to the erotic significance the dancers intend to express.[126] While not all dancing is entitled to First Amendment protection, Justice David Souter explained, "dancing as a performance directed to an actual or hypothetical audience" can constitute expressive conduct where the dancing "gives expression at least to generalized emotion or feeling . . . ."[127] In the case of nude dancing, the feeling being expressed is "eroticism, carrying the endorsement of erotic experience."[128] As such, it is a form of expressive conduct deserving of protection under the First Amendment.

When "extending First Amendment protection to actions or conduct, the Court has recognized that actions often convey ideas just as well as actual words."[129] Traditionally, courts use various tests to determine whether conduct is "expressive" and thereby falls within the scope of the First Amendment.[130] In 1974 the Supreme Court established a two-part test for determining whether conduct is communicative and expressive enough to receive First Amendment protection.[131] The two-part test first requires the "speaker" to intentionally convey a particular message.[132] And, secondly, it requires that others reasonably understand the expression.[133] Using the Supreme Court's two-part test, some plaintiffs were successful in arguing that "honking" or "flashing headlights" should be held to constitute

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[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *See* Sinopole, *supra* note 111.
[130] Hudson, *supra* note 116.
[131] *Id.*
[132] *Id.*
[133] *See* Spence v. Wash., 418 U.S. 405 (1974) (protesting the National Guard shootings at Kent State University, a college student affixed peace symbols to a flag and hung it upside from his dorm window); *see also* Hudson, *supra* note 116.

"expressive conduct" that is protected by the First Amendment because the actions convey a reasonably clear message.[134]

In addition, the Free Exercise Clause of the First Amendment, attributed to the States by the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[135] Principally, the government cannot, (1) exclude religious beliefs, (2) prohibit a person's right to believe and recognize a religion, (3) induce affirmation of religious beliefs, (4) punish the expression of a religion that it believes to be untrue, (5) impose special disabilities on the basis of religious views or status, or (6) lend power to one or the other side in controversies over religious authority.[136] In *Employment Division v. Smith,* the respondents went beyond a traditional Free Exercise challenge.[137] The respondents (plaintiffs) argued that the use of peyote for their religious practice went "beyond the reach of a criminal law that is not specifically directed at their religious practice."[138] In the past, the Supreme Court barred religiously motivated action by involving other constitutional protections that attached with the Free Exercise clause (also known as a "hybrid right").[139] The Court reasoned that Respondents' free exercise claim was independent from a communicative activity.[140] Thus, the Court held that no hybrid right existed in this case.[141]

With respect to MMA fighting, whether the sport is deserving of protection hinges on whether the activity expresses messages that spectators can understand.[142] To this point, some

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[134] Hudson, *supra* note 116.

[135] U.S. CONST. amend. I.

[136] *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 717–25 (1976); Presbyterian Church v. Hull Church, 393 U.S. 440, 446–52 (1969); Sherbert v. Verner 374 U.S. 398, 402, 410 (1963); Torcaso v. Watkins, 367 U.S. 488, 492–93, 495–96 (1961); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 114–19 (1952); Cantwell v. Conneticut, 310 U.S. 296, 303 (1940).

[137] Emp't Div. v. Smith, 494 U.S. 872, 877–79 (1990).

[138] *Id.* at 878.

[139] *Id.* at 881–82.

[140] *Id.* at 882.

[141] *Id.* at 882.

[142] Genevieve Lakier, *Sport as Speech*, 16 U. OF PA. J. OF CONST. L. 1109, 1113–15 (2014).

First Amendment scholars claim that sports are vital for communication in America and have a direct impact on Americans.[143] They explain,

> there is more to the watching and the playing of sports than just the competitive and entertaining facets that it consists of. An athlete can exude and relay his way of life and certain messages through his or her play to the crowd and spectators around him. Games of spectator sports are in fact dense symbolic performances that communicate messages about, among other things, individual excellence and virtue, political identity, race, gender, sexuality, and even beauty.[144]

In *Joseph Burstyn, Inc. v. Wilson*, the Court acknowledged that public school students should not be required to pay money to participate in sports.[145] By doing so, the State is essentially choosing which student messages will or will not be heard, and if a student cannot make the payments, "they are left without the opportunity to express themselves through the sport and are effectively stripped of an important tool of expression."[146] Furthermore,

> participating in sports is in its essence more than a political or verbal expression, it is an action that is not only taken for entertainment and recreational purposes, but taken to give a visually artistic representation of a plethora of messages. Messages that can consist of form, teamwork, community enthusiasm, mastery of a skill, and excellence and even messages of a political agenda.[147]

The First Amendment, however, does not protect all activities. In *Dallas v. Stanglin*, the Supreme Court contemplated whether

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[143] Graham Fox, *Expression Through the Participation in Sports*, THE DIGITAL VOICE (Dec. 15, 2015, 2:27 PM), http://wordpress.philau.edu/thevoice/2015/12/expression-through-the-participation-in-sports-by-graham-fox.

[144] *Id.*

[145] *Id*; *see also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[146] Fox, *supra* note 142.

[147] *Id.*

"laws that prohibited certain age groups from recreational dance halls . . . embrace[] a 'right to association' in certain circumstances."[148] The Court ruled that the First Amendment does not protect recreational dancing, and that "teenagers [who] went to the Texas dance halls were not members of any organizational association, most were strangers to one another, and there was no suggestion that the people who sought to dance would take 'positions on public questions' or anything coming close to such an activity by dancing."[149] Interestingly, people who partake in sports are "typically members of an organization such as a team or in the case of individualized sporting events, still under the blanket of a community name."[150] Additionally, they are not strangers, nor are they interacting with spectators; instead, they "gather [as] a collective unit to express their personal, public, and community views as well as their artistic representation of the sports in which they play."[151] While progress has been made to extend rights to motion pictures, visual art, theater, etc., the courts have not been so eager to extend the same First Amendment protections to sports and sporting events.[152]

In general, courts have been unwilling to deem athletic participation in sports as protected by the First Amendment.[153] In support of this, they reason that the First Amendment protects speech, and sporting activities involve conduct that is generally not communicative enough to fall within the scope of the Amendment.[154] In *Justice v. NCAA*, the court held that sanctions on the right to play football did not constitute a violation of the First Amendment.[155] Similarly, in *MacDonald v. Newsome*, the Court held that surfing was not protected under the First

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[148] *Id.*

[149] *Id*; *see* Roberts v. Jaycees, 468 U.S. 609 (1984); *see also* Dallas v. Stanglin, 490 U.S. 19 (1980).

[150] Fox, *supra* note 142.

[151] *Id.*

[152] *Id.*

[153] Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp 356, 374 (D. Ariz. 1983).

[154] *Id.*

[155] *Id.* at 375.

Amendment.[156] The most important of these court decisions, as it relates to the thesis of this note, is the Court's holding in *Top Rank, Inc. v. Florida State Boxing Comm'n*.[157] In that case, the Court held that the act of boxing did not involve either pure or symbolic speech.[158] In *Sunset Amusement Co. v. Board of Police Comm'rs of Los Angeles*, holding that roller skating is not a constitutionally protected activity, the Court explained that "no case has ever held or suggested that simple physical activity falls within the ambit of the First Amendment, at least in the absence of some element of communicating or advancing ideas or beliefs."[159] The Court in *Post Newsweek Stations-Connecticut v. Travelers Insurance Co*., however, stated that entertainment involving "athletic exercise," which in this case was figure skating, "is on the periphery of protected speech."[160]

So, if other athletic sports cannot gain protection under the First Amendment, where does this leave MMA fighting?

II. DISCUSSION

This note will now discuss why MMA fighting is a form of expressive conduct and deserving of protection under the First Amendment. The discussion will progress in five parts. First, this note will discuss the similarities between MMA fighting and other forms of dance that are protected under the First Amendment. Second, this note will explain how MMA fighting's fundamental connection to American culture makes the activity a form of expressive conduct under the Supreme Court's jurisprudence. Third, this note will discuss how the spiritual component of MMA distinguishes it from other sporting activities that are not protected under the First Amendment. Fourth, this note will explain why MMA should be considered a hybrid right due to its spirituality and expressiveness. Finally, this note will conclude by explaining alternative ways MMA

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[156] MacDonald v. Newsome, 437 F. Supp. 796, 798 (E.D.N.C. 1977).

[157] Top Rank, Inc. v. Florida State Boxing Comm'n, 837 So. 2d 496, 498 (Fla. Dist. Ct. App. 2003).

[158] *Id.*

[159] Sunset Amusement Co. v. Board of Police Comm'rs of Los Angeles, 7 Cal. 3d 64, 74 (1972).

[160] Post Newsweek Stations-Connecticut, Inc. v. Travelers Ins. Co., 510 F. Supp 81, 86 (D. Conn. 1981).

fighting can be protected if the Court determines that a First Amendment argument is still insufficient.

A. MMA FIGHTING IS SIMILAR TO NUDE DANCING

Courts have previously categorized certain types of dancing as outside the protection of the First Amendment. As discussed in Part C, social dancing is not protected under the First Amendment, but nude dancing is marginally protected because it is performed directly to an actual or hypothetical audience, and the performer is expressing a generalized emotion or feeling—namely, the feeling of eroticism. Similarly, MMA is performed directly to an actual audience when a fighter is in the cage with his opponent, or to a hypothetical audience when he is practicing his moves in the gym. In addition, the MMA fighter's performance clearly expresses certain emotions and ideas, most obviously, the feeling of aggression, such that no audience could rationally believe that the activity is expressionless conduct. Each performance in the fighting cage carries with it, among others, the expression of self-development and struggle, which will be further discussed in later parts.[161]

The expression of ideas and emotions are not the only similarities between MMA fighting and dancing. Although not intuitively, the activities themselves are actually quite similar. Both MMA and dancing are governed by principles of body control, choreography, and performance.

1. Body Control

While on the exterior, MMA and nude dancing seem to be two activities located on distinct sides of a spectrum, they share many essential features. Dancing is a form of expression that allows others to see your body control through movements.[162] Dancing involves developing muscle memory to control the lines, balance, speed, and strength of your body.[163] Dancing shares an even stronger correlation with MMA fighting when one dances with a partner. When dancing with a partner,

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[161] *See infra* Sections B and C.

[162] *See* Evan Zhou, *How to Be a Cleaner Dancer*, STEEZY (June 16, 2015), http://blog.steezy.co/how-to-be-a-cleaner-dancer.

[163] *See* Johnny N, *Dance Lessons for Boxing*, EXPERTBOXING.COM (Nov. 21, 2011), http://www.expertboxing.com/boxing-techniques/body-movement/dance-lessons-for-boxing.

the goal is to control a resisting subject.[164] Usually, the lead controls the couple's movements with certain signals that allow them to achieve a synergy as well as express themselves.[165] Similarly, a fighter's goal is to control a resisting subject while using his body structure in the most efficient way for maximum effect.[166] An MMA fighter uses his body control to emphasize different angles while fighting an opponent and using muscle memory to help control his movements. It is important for an MMA fighter to use his body control to dictate his speed. A fighter who tires out too quickly will not succeed in a fight.

2. Choreography

There is no doubt that footwork is essential to dancing. It is also essential to MMA fighting. Footwork is the basis for MMA, not only as an effective strategy to attack your opponent, but also as an expression of each fighter's style.[167] At minimum, to succeed in fighting, a fighter must be able to move his feet.[168] An MMA fighter may not express himself through music and sounds, but he reacts to the movements and rhythm of his opponent in a manner that produces a unique dance. A dance that no other fighter will be able to exactly replicate. A dancer repeatedly practices the same move and always tries to make it better, because the move is his own. Likewise, a MMA fighter religiously practices his techniques. Like dancers, fighters start to develop their own unique style and moves. For example, Nate Diaz is well-known for his "Stockton slap."[169] It is a move that is uniquely his own.

3. Performance

In sum, the Supreme Court's rationale for protecting nude dancing under the First Amendment also extends to MMA fighting. Like nude dancing, MMA fighting involves the

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[164] *Id.*

[165] *Id.*

[166] *See id.*

[167] Luke Thomas, *Technique Talk: Dominick Cruz and the Deliberate Dance of Footwork*, MMA FIGHTING (Apr. 14, 2014, 9:00 AM), http://www.mmafighting.com/2014/4/14/5608650/technique-talk-dominick-cruz-and-the-delicate-dance-of-footwork.

[168] *Id.*

[169] Jack Slack, *The Stockton Slap: Why Slapping is the New Punching?*, FIGHTLAND (Mar. 9, 2016), http://fightland.vice.com/blog/the-stockton-slap-why-slapping-is-the-new-punching.

performance of a skilled and artful activity that is directed to an audience. Moreover, like nude dancing's expression of eroticism, MMA fighting also carries with it the clear expression of emotions and feelings. The precise nature of these emotions and feelings will now be further elucidated.

B. MMA FIGHTING IS INTERTWINED WITH THE AMERICAN CULTURE

Some argue that MMA is not rooted in our culture.[170] Others argue that MMA fighting has not developed to the extent that it should have.[171] Jamie Samuelson of the Detroit Free Press argues that MMA is an attraction, but not a participation sport.[172] However, how many NFL fans play football on the weekends?[173] Additionally, how many of those fans play on a recreational flag league or just play *Madden*?[174] For whatever reason, the popularity of the NFL appears unharmed.[175] Hence, just because a person has not participated in high school wrestling or has only been in a fight with a sibling, does not mean they cannot be a fan of MMA fighting.[176] As explained earlier, combat for competition has roots in America. It is hardly hyperbolic to say, "Americans love violence almost as much as they love sports" and this is not just part of American culture, but it is part of human culture.[177] Many point to this fascination with violence as a criticism of humans generally.[178] But humans have also shown that they especially enjoy violence when it is coupled with qualities like mutual respect, sportsmanship, and fair play.[179]

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[170] Ben Fowlkes, *MMA and the Hardcore Fringe of American Culture*, CAGEPOTATO, http://www.cagepotato.com/mma-and-the-hardcore-fringe-of-american-culture/ (last visited Mar. 8, 2016).

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] Fowlkes, *supra* note 169.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] Dean Burnett, *James Foley's Murder, And the Psychology of Our Fascination with the Gruesome*, THE TELEGRAPH (Aug. 20, 2014, 2:54 PM), http://www.telegraph.co.uk/news/worldnews/11045833/James-Foleys-murder-and-the-psychology-of-our-fascination-with-the-gruesome.html.

[179] Fowlkes, *supra* note 169.

The First Amendment generally protects freedom of speech from government interference. The protection under the First Amendment includes expressive conduct that manifests itself into more than just words; it manifests itself in the form of actions.[180] To reiterate, in determining whether an action falls within the scope of expressive conduct, courts will generally apply a two-part test. First, the person must intend to convey a particular message through their action.[181] Second, the message must be one that is reasonably understood by others.[182] The following discussion will apply this two-part test to MMA fighting.

1. Intent to Convey a Message

For many, participating in professional fighting is not just a sport; it is a way for them to convey their message to the world. For instance, to Henry Cejudo, fighting is not simply about winning and being the best. In each fight, Cejudo conveys a message to children and adults alike that no circumstance is too difficult to overcome.[183] Through his MMA success, Cejudo helps others by expressing his message not only inside the ring, but outside of the ring.[184] His help with charities and other organizations reflects a bigger message than just fighting; he is teaching others to believe in themselves.[185] He is expressing a clear message that whether a person wants to be a UFC champion or an astronaut, it is possible as long as they set their mind, their soul, and their faith to it. So, if one has grown up fatherless like Cejudo or grown up in other difficult situations, one can persevere and accomplish anything to which one is devoted. Men and women of all ages and backgrounds look up to MMA fighters like Cejudo; and their voices hold power that can change the lives of many. With the 3.2 million children that are participating in martial arts to date,[186] who else would be their role model if not for fighters like Cejudo? Furthermore, out of

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[180] Hudson, *supra* note 116.
[181] *Id.*
[182] *Id.*
[183] Bohn, *supra* note 6.
[184] *Id.*
[185] *Id.*
[186] *See e.g.*, *Max Holton, Martial Arts: Traditional, Modern, Pagan*, FIGHT TIMES (Oct. 28, 2011), https://magazine.fighttimes.com/martial-arts-traditional-modern-paganoh-my.

those 3.2 million children, how many of them are growing up "in a home ransacked by abuse and alcoholism" like Frank Shamrock?[187] Or, someone like Mike Tyson, who was a juvenile delinquent with a rough background that made it to fame despite his "gangster rap image."[188] And despite his background, he went on to win a title in 1988.[189] The message that all of these fighters are conveying is simple: no matter what your hardship is, you can make something of yourself by passionately devoting yourself to something that you love.

2. Reasonably understood

Fighting is deeply rooted in the American culture, which has been demonstrated continuously throughout United States history. Throughout our history, people have strongly identified with fighters like Mike Tyson, Muhammad Ali, and Jack Johnson. During the careers of these three fighters, African Americans did not have a similar platform as white Americans to display their talents and succeed in America. Boxing gave minorities a way to convey a message in a way others would reasonably understand, and with which they would identify.[190] The viewers likely understood why men like Mike Tyson, Muhammad Ali, or Jack Johnson were fighting. Jack Johnson was very outspoken about his displeasure with racism.[191] But fighting was his loudest tool.[192] His success fighting showed others that it was possible to go from rags to riches and fame, even for African Americans. In fact, his success fighting conveyed such a powerful message that many white Americans scorned him for it.[193]

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[187] Orr, *supra* note 39.

[188] ROBERT GREGG ET AL., ENCYCLOPAEDIA OF CONTEMP. AM. CULTURE 99 (Routledge 2005).

[189] *Id.*

[190] *See, e.g.*, David Mayo, *Column: Muhammad Ali Used Fists to Convey a Message of Peace and Tolerance*, MLIVE (June 4, 2016, 11:59 AM), http://www.mlive.com/boxing/index.ssf/2016/06/column_muhammad_ali_used_fists.html.

[191] *See* Gerald Early, *Rebel of the Progressive Era*, PBS (Jan. 2005), http://www.pbs.org/unforgivableblackness/rebel.

[192] *Id.*

[193] *Id.*

Fighting was a way in which an African American during this era could become a hero to his race and use the fighting arena as a platform to stand up against inequality. In doing so, all persons, black or white, could understand the fighter's message. Muhammad Ali was "one of the most famous men alive" and he would use boxing to speak out against the Vietnam War.[194] His message was fueled by his performance in the ring. Recall, a central tenet of the Muscular Christianity movement was that kicking and punching one's opponent, if done successfully, could bolster a fighter's perceived moral and physical strength.[195] Accordingly, each time Muhammad Ali stepped in the ring and knocked out his opponent through his slick footwork and unrivaled boxing prowess, he increased his perceived physical and moral strength. These perceived attributes caused his criticisms of the Vietnam War to garner tremendous support.[196] The actual physical acts of moving in the ring and punching opponents therefore contributed to Ali's message. Understood this way, the acts involved in fighting are a form of expressive conduct reasonably understood by most Americans.

C. MMA'S SPIRITUALITY DISTINGUISHES IT FROM OTHER SPORTING ACTIVITIES

The Supreme Court has unwaveringly held that sports are not considered expressive conduct because the conduct is not generally communicative enough. The Supreme Court's jurisprudence in this area raises a number of questions: Why are sports like basketball and boxing not communicative enough, while figure skating is on the verge of being expressive conduct? Why is figure skating considered "athletic exercise," but basketball and boxing are not? While there are no complete answers to these questions, a strong argument exists as to why MMA fighting is communicative enough and dissimilar from other sports.

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[194] GREGG ET AL., *supra* note 187.

[195] McKay, *supra* note 1.

[196] *See* Justin Block, *Muhammed Ali Risked It All When He Opposed the Vietnam War*, The Huffington Post (Jun. 6, 2016, 12:56 AM), http://www.huffingtonpost.com/entry/muhammad-ali-risked-it-all-when-he-opposed-the-vietnam-war_us_5751e545e4b0c3752dcda4ca.

MMA fighting is unique from other sports because of its spiritual aspect. There is undeniably no other creative activity or sport that demands the participant to alter their lifestyle the way MMA does.[197] Like many sports, MMA involves commitment and persistence. But to a greater degree than all other sports, MMA also requires practitioners to alter the way they think about the world around them in order to master the arts, which cannot be achieved without spiritual development.[198]

While other sports certainly involve the preparation of one's mind and body, the purpose and effects of doing so are distinct from MMA fighting. In other sports, one prepares his mind and body primarily to properly execute the activity and ultimately achieve success. This is not entirely distinct from MMA fighting, which requires a fighter to achieve a synergy between his mind and body to properly execute fighting techniques.

But, in MMA fighting, the true value in obtaining a spiritual synergy between one's mind and body is in attaining specific internal attributes. Proper MMA footwork teaches a fighter about qualities such as energy, ebb, and flow as well as creative and destructive potential. Handwork patterns teach balance, dynamics, and the awareness of one's human spirit. And all of the distinctive movements that an MMA fighter uses are elements that that are often attributed to the human spirit. In addition, one of the most important elements of spirituality is confronting death. Notwithstanding extraordinary cases, no other sport shares this feature. When it comes to spiritual development, therefore, MMA fighting stands on a platform of its own.

III. MMA FIGHTING IS A HYBRID RIGHT

This note separates the discussion into three focal arguments suggesting why MMA fighting should be protected under the First Amendment. But these arguments coincide with each other, differentiating MMA fighting from other sports. Those claiming that MMA fighting should be protected under the First Amendment certainly have strong arguments to rely on under the (1) *Spence v. Washington* two-part test; (2) MMA's similarity to nude dancing, and; (3) its dissimilarity from other sports. Individually, however, these arguments are not likely to

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[197] *See Biography*, *supra* note 107.
[198] *See id*.

persuade a Court that MMA fighting should be protected under the First Amendment. But, in combination, these arguments show that MMA fighting is a *hybrid right.*

Unlike in *Employment Division*, where the respondents' free exercise claim was independent from a communicative activity, MMA's spirituality is not an independent communicative activity. The Supreme Court generally has barred religiously motivated actions that do not involve other constitutional protections that attach with the Free Exercise Clause.[199] But in the case of MMA fighting, there is a cogent argument to be made that the activity's expressiveness under the First Amendment attaches with its spirituality under the Free Exercise Clause. Specifically, like nude dancing, MMA fighting is a performance of an activity that is directed at an audience while carrying clear expression, emotions, and feelings. Moreover, MMA fighting is also expressive because its expression is reasonably understood by most people, which should pass the *Spence v. Washington* two-part test.[200] MMA fighting's expressiveness, in combination with its religious spirituality, clearly shows that MMA fighting is not an independent communicative activity. Therefore, MMA fighting should be considered a hybrid right that is worthy of protection under the First Amendment.

IV. ALTERNATIVE ARGUMENTS

As discussed in Section II of this note, athletic participation in sports is usually not protected by the First Amendment because sporting activities involve conduct that is generally not communicative enough to fall within the scope of the Amendment.[201] If the Supreme Court were to find that MMA

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[199] *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708–25 (1976); Presbyterian Church v. Hull Church*,* 393 U.S. 440, 445–52 (1969); Sherbert v. Verner 374 U.S. 398 (1963); Torcaso v. Watkins, 367 U.S. 488 (1961); Kedroff v. St. Nicholas Cathedral*,* 344 U.S. 94, 95–119 (1952); *see also* Cantwell v. Conneticut, 310 U.S. 296, 303 (1940).

[200] *See* Spence v. Washington, 418 U.S. 405, 410 (1974) (discussing the portion of the two-prong test that relies on the likelihood that the message would be understood by those who viewed it).

[201] *See* Top Rank Inc. v. Florida State Boxing Comm'n, 837 So. 2d 496, 498 (Fla. Dist. Ct. App. 2003) (discussing that boxing does not involve pure or symbolic speech); Justice v. National Collegiate

fighting is still not worthy of protection under the First Amendment, state constitutional provisions can be used to protect this right. All states have constitutional provisions, but usually federal constitutional provisions cannot be amended by state legislatures or courts.[202] States, however, can ratify these constitutional provisions.[203] To date, Congress has not passed a law banning MMA fighting.[204] The issue has been left entirely to state courts.[205] While the New York MMA ban was lifted in March of 2016, no constitutional provisions in any state would stop a similar ban from reoccurring in the future.

Furthermore, due to public policy, state courts have been reluctant to accept MMA fighting as a right. The concerns largely stem from MMA fighting's violence[206] and possible steroid use.[207] Since the implementation of the Unified Rules of Mixed Martial Arts, MMA fighting in the UFC is no longer as violent as once believed.[208] Starting in September of 2016, New York is taking enormous strides to secure MMA fighters with one-million-dollar coverage for dangerous brain injuries.[209] New York's State Athletic Commission, legislature, and governor

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Athletic Ass'n, 577 F. Supp 356, 374 (D. Ariz. 1983) (holding that sanctions on the right to play football did not violate the First Amendment); MacDonald v. Newsome, 437 F. Supp. 796, 798 (E.D.N.C. 1977) (holding that surfing was not protected under the First Amendment).

[202] Phil M. Fowler, *What is a Constitutional Provision?*, LEGAL BEAGLE, http://legalbeagle.com/5806070-constitutional-provision.html (last visited Oct. 28, 2016).

[203] *Id.*

[204] *Id.*

[205] *See* Devin Burstein, *The Muhammad Ali Boxing Reform Act: Its Problems and Remedies, Including the Possibility of a United States Boxing Administration*, 21 CARDOZO ARTS & ENT. L.J. 433, 438–44 (2003).

[206] *See The Disturbing Rise of Ultimate Fighting*, THE NEW YORK TIMES (Jan. 22, 2009, 7:19 PM), http://theboard.blogs.nytimes.com/2009/01/22/the-disturbing-rise-of-ultimate-fighting.

[207] *See Steroids in UFC*, EVOLUTIONARY.ORG, http://www.evolutionary.org/ufc-steroids-busts (last visited Oct. 30, 2016).

[208] Harding, *supra* note 84.

[209] *MMA Fighters to Need $1 Mil. Insurance Policies*, WKBW BUFFALO (Jul. 19, 2016, 10:54 AM), http://www.wkbw.com/news/state-news/mma-fighters-to-need-1-mil-insurance-policies.

Andrew Cuomo are stepping up and not only legalizing MMA fighting in New York, but also addressing the state's public policy concerns.[210] In regard to steroid use, the UFC went through enormous changes in its drug testing standards.[211] The implementation of the UFC's new policy will increase drug testing and prompt harsher punishments for athletes that fail.[212] In reality, steroid use is not solely in MMA fighting, but the implementation of a stricter drug testing standard will help filter the MMA fighters who decide to continue using steroids. If every state took the initiative to address MMA fighting's public policy concerns and enact either constitutional provisions or legislation, MMA fighting would be on its way to being protected in all 50 states.

In principle, if the First Amendment is insufficient, states can enact constitutional provisions to protect MMA fighting in its state. Another alternative is for state legislators to take affirmative action, like the legislature in New York, and recognize that MMA fighting is a hybrid right worthy of protection in its state.[213] While there are many measures that have been taken with sports to be protected under the First Amendment, a lot of work remains before MMA fighting will be protected constitutionally in the United States.

CONCLUSION

MMA fighting should be protected under the First Amendment because it is a hybrid right. First Amendment jurisprudence dictates that for an activity to constitute expressive conduct, the Supreme Court's two-part test in *Spence v. Washington* must be satisfied. This test provides that an activity is expressive conduct when the activity conveys a message and the message is reasonably understood by viewers. Admittedly, not every sport activity is sufficiently communicative enough to satisfy the two-part test in *Spence v. Washington*. However, MMA fighting is different. Like nude dancing, MMA fighting

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[210] *Id.*

[211] Mookie Alexander, *UFC Drug Policy Includes Increased Punishments, Year-Round Testing Starting July 1*, BLOODY ELBOW (June 3, 2015, 4:13 PM), http://www.bloodyelbow.com/2015/6/3/8724873/ufc-usada-drug-policy-includes-increased-punishments-year-round-testing-july-1-mma-news.

[212] *Id.*

[213] New York v. United States, 505 U.S. 144, 168–71 (1992).

involves a performance to a specific audience, and it portrays clear emotions and feelings. Moreover, MMA fighting is so uniquely intertwined with the history and development of American culture that its messages speak loud and clear. The stories of Henry Cejudo, Mike Tyson and Muhammad Ali have proven this. Through fighting, these individuals have conveyed incredibly influential messages that have impacted people throughout the United States. Moreover, MMA fighting is dissimilar from other sports because of its spiritual aspect. This fact, in combination with the activity's expressiveness, makes MMA fighting a hybrid right. An activity with such a strong hybrid right is surely worthy of protection under the First Amendment.

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