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ARTICLES

More Than an Athlete: Constitutional and Contractual Analysis of Activism in Professional Sports
Sarah Brown & Natasha Brison 249

Soccer Stadiums, Where International Law, Culture and Racism Collide
Faraz Shahlaei 291

The Home Team Advantage: Why Lawmakers and the Judiciary Should Bench the Jock Tax
Addison Fontein 327

NOTES

#Copyright Infringement via Social Media Live Streaming: Shortcomings of the Digital Millenium Copyright Act
Selene Presseller 357

The College Athlete Protection Guarantee: Another Flawed Fix for the Broken System of Athletic Recruitment
Jonathan Lund.....385

SPORTS & ENTERTAINMENT LAW JOURNAL
ARIZONA STATE UNIVERSITY
VOLUME 7 SPRING 2018 ISSUE 2

MORE THAN AN ATHLETE: CONSTITUTIONAL AND CONTRACTUAL ANALYSIS OF ACTIVISM IN PROFESSIONAL SPORTS

SARAH BROWN* & NATASHA BRISON**

INTRODUCTION

Athlete activism is not a new issue. Rather, athletes at all levels and sports have used their platforms to protest long before Colin Kaepernick took a knee. During the 1960s and 1970s, at the height of the Civil Rights Movement, athletes including Muhammad Ali, Bill Russell, Jim Brown, and Arthur Ashe advocated for civil rights.[1] As the fight for civil rights settled, so did athlete activism.[2] In the 1980s, 1990s, and 2000s, prominent athletes shied away from social movements most likely due to the fear of financial repercussions, such as losing endorsements.[3] Even LeBron James, 14 time National Basketball Association (NBA) All-Star, commented in 2008 that "sports and politics just don't match."[4]

Recently social justice and civil rights issues are back at the forefront of national discussion, and athlete activism has increased.[5] While the number of athletes who engage in activism

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[1] Danielle Sarver Coombs & David Cassilo, *Athletes and/or Activists: LeBron James and Black Lives Matter*, 41 J. OF SPORT & SOC. ISSUES 425, 426 (2017).

[2] *Id.*

[3] *Id.* at 427.

[4] *Id.*

[5] *Id.*

is small, the breadth of issues addressed by athletes are vast.[6] Colin Kaepernick, a former National Football League (NFL) quarterback for the San Francisco 49ers, protested the inherent inequities within American society by kneeling during the national anthem.[7] Toni Smith, a Division III women's basketball player, protested the United States economic structure and military involvement in the Middle East by turning her back to the flag when the national anthem was played before games.[8] Kevin McMahon, a two-time Olympic champion, wore a white ribbon on his singlet during the 2001 Goodwill Games to signify "solidarity with all workers in the athletic apparel industry whose efforts and great dire circumstances are going unrecognized and underpaid."[9] Craig Hodges, a professional basketball player, wore a dashiki during the Chicago Bulls visit to the White House in 1991 and delivered a note to President Bush Sr. seeking a response for the racial injustices in the U.S.[10]

Unfortunately, athlete activism is often met with immediate, intense backlash that potentially compromises the athlete's career.[11] For instance, Denver Broncos linebacker Brandon Marshall lost two endorsement deals (CenturyLink and Air Academy Credit Union) when he kneeled during the national anthem for eight consecutive games.[12] Marshall also received hate mail and negative comments on his social media accounts,[13] a grave fear that may keep the majority of athletes silent. This harsh response likely stems from the thought that sports exist outside

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[6] Peter Kaufman, *Boos, Bans, and Other Backlash: The Consequences of Being an Activist Athlete*, 32 HUMAN & SOC'Y 216 (2008).

[7] Tom Krasovic, *Colin Kaepernick Takes a Knee During National Anthem in San Diego and is Booed*, L.A. TIMES (Sept. 1, 2016), http://www.latimes.com/sports/nfl/la-sp-chargers-kaepernick-20160901-snap-story.html.

[8] Kaufman, *supra* note 6, at 222.

[9] *Id.* at 227–228.

[10] *Id.* at 233.

[11] *Id.* at 216.

[12] Jeff Legwold, *Broncos' Brandon Marshall Loses 2nd Endorsement, Will Meet with Denver Police Chief*, ESPN (Sept. 12, 2016), http://www.espn.com/nfl/story/_/id/17531965/denver-broncos-linebacker-brandon-marshall-loses-second-endorsement-national-anthem-controversy.

[13] Lindsay H. Jones, *Von Miller May Lose Denver Endorsement Deal for Kneeling, No Surprise to Broncos Teammate*, USA TODAY (Sept. 25, 2017), https://www.usatoday.com/story/sports/nfl/broncos/2017/09/25/von-miller-loses-denver-endorsement-kneeling-national-anthem-brandon-marshall/702366001/.

social, political, and economic realms of society.[14] Furthermore, sport is considered merely a source of entertainment, not a platform for social movement.[15]

Despite this erroneous theory, some of the world's most famous athletes have foregone participation in protest. Most notably Michael Jordan and Tiger Woods remained silent throughout their prosperous careers, despite facing racism and their fellow athletes encouraging them to speak out. Jordan's apolitical attitude was solidified in 1990 when he refused to endorse a black North Carolina Democrat, Harvey Ganntt, for Senate.[16] Multiple hall of fame athletes, such as Jim Brown and Kareem Abdul-Jabbar, have criticized Jordan for putting business before social justice.[17] Tiger Woods has also displayed a meek stance when it comes to social progress.[18] For example, after Tiger won his first Master's golf tournament, Fuzzy Zoeller, referred to him as "that little boy"[19] and asked him not to request fried chicken and collard greens at the next Champions Dinner.[20] Tiger did not respond to Zoeller's comments.[21] Over a decade later, Kelly Tilghman, a Golf Channel anchor, laughed saying Tiger's competitors should lynch him in a back alley.[22] Tiger responded with a statement calling Kelly a friend, and that he knew Kelly did not have ill-intentions with her poor choice of words.[23]

The United States has witnessed athletes take a stand and suffer severe consequences, while the majority remain silent in the background. Today it seems more athletes are finding their voice

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[14] Kaufman, *supra* note 6, at 216.

[15] *Id*.

[16] Laura Wagner, *"Republicans Buy Sneakers, Too*," SLATE.COM (July 28, 2016), http://www.slate.com/articles/sports/sports_nuts/2016/07/did_michael_jordan_really_say_republicans_buy_sneakers_too.html.

[17] *Id*.

[18] Carla R. Monroe, *Tiger Woods: Black Activist, Well Sort Of*, THE DALL. WEEKLY (May 29, 2013), http://www.dallasweekly.com/opinion/article_e21f6cb2-c873-11e2-821e-001a4bcf6878.html?mode=jqm.

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] *Id*.

and are willing to risk their careers or brand image to be heard.[24] Athletes have worn hoodies and t-shirts to protest the wrongful killing of young black men, knelt during the national anthem to protest racial inequality, and made public statements addressing the social issues plaguing the United States.[25] It is this explosion of athlete activism that has given rise to the question of whether such actions are protected under the Federal Constitution.

Therefore, this article will examine the current landscape of athlete activism in the United States under various constitutional and contractual paradigms. Part I will provide a brief history of athlete protests. Part II addresses the underpinnings of the First Amendment. Part III investigates the Fourteenth Amendment and the state actor requirement. Part IV provides an analysis of constitutional law and its applicability to professional sports, specifically looking at the state actor requirement and whether a stadium is considered a public forum. Part V explores contractual agreements including Collective Bargaining Agreements (CBAs) and standard player contracts (SPC) for the NFL, Major League Baseball (MLB), and NBA. Part VI discusses the intersection of the National Labor Relations Act and professional sports. Part VII provides a short summary of the pros and cons of athlete activism from the athlete perspective, including an evaluation of morals clauses. Last, Part VIII provides a brief look at the NBA and NFL's current social responsibility initiatives.

I. A BRIEF HISTORY OF ATHLETE PROTESTS

As mentioned previously, there is a rich history of athlete activism in the United States.[26] World champion boxer Muhammad Ali used his global stage to protest the Vietnam War by refusing to enlist in the military.[27] Ali's stance cost him three of his prime boxing years and forfeiture of his championship title.[28] A few years later at the 1968 Olympics, Tommie Smith and

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[24] Charles P. Pierce, *Activist Athletes Will Not Be Silenced This Time*, SI.COM, (Nov. 8, 2017), https://www.si.com/more-sports/2017/11/08/nfl-protests-sports-athlete-activism-trump.

[25] *Id.*

[26] *See generally* Kaufman, *supra* note 6, at 220–34.

[27] *Id.* at 221.

[28] Krishnadev Calamur, *Muhammad Ali and Vietnam*, THE ATLANTIC (June 4, 2016),

John Carlos executed a carefully planned demonstration during their medal ceremony. Both men removed their shoes before stepping onto the podium to symbolize poverty, wore beads and a scarf to protest lynchings, and looked at the ground and raised their fists in the air while the national anthem played.[29] Smith and Carlos were forced to leave the Olympic Stadium, and upon their return to the United States they were suspended from the United States track team.[30] Carlos said, "I had a moral obligation to step up. Morality was a far greater force than the rules and regulations they had."[31]

Collegiate athletes also took a stand when nine Syracuse players ("Syracuse 8") decided to boycott the 1970 season.[32] At the time Syracuse was a prominent football program, with the legacy of bowl appearances and players making it into the NFL, including Jim Brown and Ernie Davis (two prominent NFL running-backs).[33] The Syracuse 8 drafted a petition requesting equal access to tutors, academic advisors, and medical staff.[34] After their requests went unanswered for over a year, the players decided to boycott the team to garner the attention of the press.[35] In response, these men were harassed and ridiculed; subsequently, none of the men were ever signed to an NFL team.[36] Thirty-six years later, the group was invited back to receive the Chancellor's Medal and their letterman jackets.[37] The University Chancellor, Nancy Cantor, recognized the men for their courageous actions to

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https://www.theatlantic.com/news/archive/2016/06/muhammad-ali-vietnam/485717/.

[29] DeNeen L. Brown, *They Didn't #TakeTheKnee*: *The Black Power Protest Salute That Shook the World in 1968*, THE WASHINGTON POST (Sept. 24, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/09/24/they-didnt-takeaknee-the-black-power-protest-salute-that-shook-the-world-in-1968/?utm_term=.03582022eca8.

[30] *Id.*

[31] *Id.*

[32] Karen Given & Shira Springer, *Before Kaepernick, The 'Syracuse 8' Were Blackballed By Pro Football*, WBUR (Nov. 17, 2017), http://www.wbur.org/onlyagame/2017/11/17/syracuse-8-football-boycott-kaepernick.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

stand up for what they believed in, despite facing strong adversity.[38]

Similarly, in protest of inequalities of prize money between women and men professional tennis players, Billy Jean King threatened to organize a boycott of the U.S. Open if men and women did not receive equal pay.[39] In 1973, the U.S. Open became the first grand slam tournament to award equal prize money to both the men and women.[40] King's action helped pave the path for future women's tennis players to continue the fight for equality.[41] More than thirty years later, Venus Williams demanded women receive the same payout as men at Wimbledon.[42] Williams first made a personal appeal to the governing body in 2005, but her request was dismissed.[43] The club chairman justified the prize discrepancy claiming men's matches were more physically demanding than women's matches.[44] Williams did not let the rejection discourage her, the next year she published a piece in the London Times stating that the prize structure:

> devalues the principle of meritocracy and diminishes the years of hard work that women on the tour have put into becoming professional tennis players. The message I like to convey to women and girls across the globe is that there is

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[38] William C. Rhoden, *Syracuse Honors Nine Players Who Took a Stand*, N.Y. TIMES (Oct. 22, 2006), http://www.nytimes.com/2006/10/22/sports/ncaafootball/22rhoden.html.

[39] Nadja Popovich, *Battle of the Sexes: Charting How Women in Tennis Achieved Equal Pay*, THE GUARDIAN (Sept. 11, 2015), https://www.theguardian.com/sport/2015/sep/11/how-women-in-tennis-achieved-equal-pay-us-open.

[40] *Id.*

[41] *See id.*

[42] The Reliable Source, *How Venus Williams Got Equal Pay for Women at Wimbledon*, WASHINGTON POST (July 2, 2013), https://www.washingtonpost.com/news/reliable-source/wp/2013/07/02/how-venus-williams-got-equal-pay-for-women-at-wimbledon/?utm_term=.a1e283db3134.

[43] *Id.*

[44] Anjana Sreedhar, *The Inspiring Story of How Venus Williams Helped Win Equal Pay for Women Players at Wimbledon*, WOMEN IN THE WORLD (July 10, 2015), http://nytlive.nytimes.com/womenintheworld/2015/07/10/the-inspiring-story-of-how-venus-williams-helped-win-equal-pay-for-women-players-at-wimbledon/.

> no glass ceiling. My fear is that Wimbledon is loudly and clearly sending the opposite message.[45]

Williams' words grabbed the attention of British politicians. When she won Wimbledon in 2007, Williams was the first female player to win the same amount of prize money as her male counterpart.[46]

In 2004, the United States invaded Iraq and Toronto Blue Jays player Carlos Delgado did not agree with the action.[47] In response, Delgado remained seated in the dugout during the playing of God Bless America, which most teams played during the seventh inning stretch post 9/11.[48]

Most recently, athletes have taken a stand against police brutality and social injustice. In 2012, LeBron James, Dwayne Wade, and other Miami Heat team members posed for a picture wearing black hoodies, their heads down and hands in their pockets in protest of the killing of Trayvon Martin, an unarmed black teenager wearing a hooded sweatshirt by a volunteer neighborhood watchman.[49] James posted the picture to his Twitter account with the hashtag #WeWantJustice.[50] In 2014, members of the then St. Louis Rams came out onto the field with their hands up to demonstrate "hands up don't shoot" in protest of the shooting of Michael Brown in Ferguson, Missouri.[51] Over the last year, several athletes have taken to social media to post videos or

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[45] *Id.*

[46] *Id.*

[47] William C. Rhoden, *Sports of the Times; Delgado Makes a Stand by Taking a Seat*, N.Y. TIMES (July 21, 2004), http://www.nytimes.com/2004/07/21/sports/sports-of-the-times-delgado-makes-a-stand-by-taking-a-seat.html.

[48] Craig Calcaterra, *Remembering Carlos Delgado's Protest in the Wake of Kaepernick*, NBC SPORTS (Aug. 29, 2016), http://mlb.nbcsports.com/2016/08/29/remembering-carlos-delgados-protest-in-the-wake-of-kaepernick/.

[49] *Heat Don Hoodies After Teen's Death,* ESPN (Mar. 24, 2012), http://www.espn.com/nba/truehoop/miamiheat/story/_/id/7728618/miami-heat-don-hoodies-response-death-teen-trayvon-martin.

[50] *Id.*

[51] *St. Louis Police Officer Angered by Rams' 'Hands Up don't Shoot' Pose*, SI.COM (Nov. 20, 2014), https://www.si.com/nfl/2014/11/30/st-louis-rams-ferguson-protests.

make statements about their stance on social injustice, and NFL players continued to kneel during the national anthem.[52]

While fans probably prefer to have sport distract them from today's cultural issues, the current climate of athlete activism climate forces fans to pay attention. In response, to Kaepernick's #TakeAKnee protest, fans boycotted the NFL, burned jerseys, memorabilia, and tickets.[53] Police officers even refused to work security for NFL games.[54] The public outcry was loud and did not go unnoticed. A Reuters' poll revealed, 72% of Americans expressed kneeling for the national anthem was unpatriotic, despite NFL players insisting the protest had nothing to do with the military.[55]

Owners have had various responses to the protest as well. New England Patriots owner, Robert Kraft, released a statement saying: "Our players are intelligent, thoughtful, and care deeply about our community and I support their right to peacefully affect social change and raise awareness in a manner that they feel is most impactful."[56] Miami Dolphins owner, Stephen Ross, also supported the players' right to protest and even contributed to the cause by setting up a nonprofit group to foster race relations.[57] The San Francisco 49ers chief executive officer, Jed York, not only

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[52] Louis Bolling, *NFL Players Use Social Media to Profess and Protest*, HUFFINGTON POST (Oct. 2, 2017), https://www.huffingtonpost.com/entry/nfl-players-use-social-media-to-profess-and protest_us_59d1baece4b0f58902e5cdb5.

[53] Cindy Boren, *Colin Kaepernick Protest Has 49ers Fans Burning Their Jerseys*, WASHINGTON POST (Aug. 28, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/08/28/colin-kaepernick-protest-has-49ers-fans-burning-their-jerseys/?utm_term=.886cc03367dd.

[54] Intisar Seraaj & Christina Zdanowicz, *From Jersey Burnings to Players Being Uninvited, Backlash to the #TakeAKnee Protest Grows,* CNN (Sept. 27, 2017), http://www.cnn.com/2017/09/25/us/anthem-protests-burning-nfl-jerseys-trnd/index.html.

[55] Kenneth Arthur, *Why Fan Reaction to NFL National Anthem Protest is about Racism, Not Patriotism*, ROLLING STONE (Sept. 26, 2017), http://www.rollingstone.com/sports/news/fan-reaction-to-nfl-national-anthem-protests-about-racism-w505387.

[56]Allan Smith, *Trump's Friend and New England Patriots Owner Robert Kraft Says He is 'Deeply Disappointed' with the President's Comments*, BUS. INSIDER (Sept. 24, 2017), http://www.businessinsider.com/robert-kraft-trump-nfl-statement-kneel-national-anthem-2017-9.

[57] Ken Belson, *Goodell and N.F.L. Owners Break from Players on Anthem Kneeling Fight*, N.Y. TIMES (Oct. 10, 2017), http://www.nytimes.com/2017/10/10/sports/football/nfl-goodell-anthem-kneeling.html.

backed his players, but also donated one million dollars to the team's community fund to demonstrate his support for Colin Kaepernick.[58] On the other hand, Jerry Jones, the Dallas Cowboys owner, claimed that if any of his players kneeled during the national anthem, they would be benched.[59]

To reiterate the league's stance on athlete protests, NFL Commissioner Rodger Goodell said in a letter to the owners: "[L]ike many of our fans, we believe that everyone should stand for the national anthem."[60] He further explained that the league cares about the issues the players are fighting for, but "the controversy over the anthem is a barrier to having honest conversations and making real progress on the underlying issues."[61] While the NFL does have a policy in place requiring players to be on the field for the national anthem and standing at attention with their helmets in their hand, the NFL has neither levied fines nor penalized players who have chosen to kneel or remain in the locker room for the national anthem.[62] Even though teams and leagues have not punished players for their activism, it is critical to understand any recourse athletes may have if their team or league opts to do so. Some have argued the right to protest is protected as free speech under the First Amendment; but, not all free speech is constitutionally protected.[63]

II. CONSTITUTIONAL CONSIDERATIONS UNDER THE FIRST AMENDMENT

The First Amendment of the Federal Constitution states: "Congress shall make no law respecting an establishment of

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[58] *Id.*

[59] Schuyler Dixon, *Cowboys' Jerry Jones Reignites Protest Conversation in NFL*, CHI. TRIBUNE (Oct. 10, 2017), http://www.chicagotribune.com/sports/sns-bc-us--anthem-protests-nfl-20171009-story.html.

[60] Lauren Kirschman, *Roger Goodell Pens Letter to NFL Owners, Believes "Everyone Should Stand" for Anthem*, PENN LIVE (Oct. 10, 2017), http://www.pennlive.com/steelers/index.ssf/2017/10/roger_goodell_letter_anthem.html.

[61] *Id.*

[62] *Id.*

[63] David Davenport, *The Myth that All 'Free Speech' is Constitutionally Protected*, FORBES (Oct. 2, 2017), https://www.forbes.com/sites/daviddavenport/2017/10/02/the-myth-that-all-free-speech-is-constitutionally-protected/#46dd8be44fcb.

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." [64] The First Amendment doctrine is complex, but can be broken down into four inter-related principles.[65] The first principle is the need to protect the rights and interests of those whose thoughts and ideals run counter to the mainstream.[66] This principle embodies the rule that government cannot impede speech based on audience reaction, unless such speech is intended to incite lawless action.[67] The second principle is the need for tolerance of those with dissenting ideals.[68] This principle is reflected in Justice Brandeis' concurring opinion in *Whitney v. California* which states, "the function of speech is to free men from bondage of irrational fears."[69] In other words, if individuals do not show tolerance for differing opinions, free speech may not be realized.[70] The third principle is dissemination of information, thoughts, ideas, and opinions. [71] This is a cornerstone of free speech which demands the greatest amount of information, ideas, and opinions from a myriad of sources. [72] Specifically, the unrestricted flow of information is central to achieving the ideals of free speech. The fourth principle is "more speech, not enforced silence."[73] Objectionable ideas should not be censored, rather those on the opposing side should defend their ideas and opinions through discussion and education. [74] This principle is rooted in *Texas v. Johnson* which stated, "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[75]

These four principles established the Brandeisian concept of counter-speech. [76] Counter-speech is the "constitutionally preferred yet somewhat suspect in security for harmful speech . .

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[64] U.S. CONST. amend. I.

[65] Howard Wasserman, *Symbolic Counter-Speech*, 12 WM. & MARY BILL RTS. J., 367, 383–84 (2004).

[66] *Id.* at 384.

[67] *Id.* at 386–387.

[68] *Id.* at 384.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 385.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 386.

[75] *Id.* at 387.

[76] *Id.*

. . When used wisely, counter speech may prove to be a very effective solution for harmful or threatening expression." [77] Counter-speech can be verbal or symbolic.[78] "Symbolic counter-speech [is a] direct response to the symbol on its own terms, employing the symbol itself as the vehicle for the counter-message." [79] For example, the American flag is the ultimate patriotic symbol, a symbol the Continental Congress passed as the United States' official flag in 1777.[80] When two New York City firefighters hoisted a worn American flag atop the carnage of the World Trade Center on September 11,[81] this action represented hope for Americans in a time of despair and a sign to those abroad of America's resiliency.[82] On the other hand, the flag can also give rise to symbolic counter-speech, such as individuals refusing to participate in the national anthem. This type of counter-speech is often met with extreme public disapproval and disgust, with some arguing that the counter-speech disrespects the soldiers who have fought or are fighting for the United States. [83] In fact, most individuals view non-participation in the national anthem the same as burning the flag, [84] because the national anthem has become more than just words; it serves as an affirmation of the United States and its ideals.[85] Standing for the national anthem symbolizes that individuals adhere and adopt these same ideals.[86]

Although First Amendment rights are broad, they are not absolute. Precedent makes it clear some forms of speech garner more protection than others.[87] For instance, incitement, fighting words, and obscenity fall outside the protection of the First

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[77] Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 BYU L. REV. 553, 555 (2000).

[78] Wasserman, *supra* note 65, at 369.

[79] *Id.* at 369.

[80] Public Broadcasting Service, *The History of the American Flag*, PBS, http://www.pbs.org/a-capitol-fourth/history/old-glory/ (last visited Jan. 31, 2017).

[81] Wasserman, *supra* note 65, at 368.

[82] *Id.*

[83] *Id.* at 370.

[84] *Id.*

[85] *Id.* at 380.

[86] *Id.* at 380–81.

[87] *What Type of Speech is Not Protected by the First Amendment*, HG.ORG, https://www.hg.org/article.asp?id=34258 (last visited Feb. 26, 2018).

Amendment.[88] *Brandenburg v. Ohio* established a test for determining whether speech rises to the level of incitement, and therefore is no longer protected under the First Amendment.[89] In *Brandenburg*, the appellant invited a reporter from the Cincinnati television station to a Ku Klux Klan (KKK) rally.[90] The reporter attended the meeting and had a cameraman film the event.[91] Parts of the KKK rally were then aired on the local station and a national network.[92] The film had a few scenes, one displayed 12 hooded figures, some with firearms, gathered around large, burning wooden crosses.[93] Most of the language was incomprehensible, but scattered racial slurs could be understood.[94] Another scene was the appellant delivering a speech:

> This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, Our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken. We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march St. Augustine, Florida, the other group to March into Mississippi. Thank you.[95]

The last scene captured a similar speech from the appellant, but with the following added language, "personally, I believe the (expletive) should be returned to Africa, the Jew returned to

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[88] *Id.*
[89] *Id.*; *see also* Brandenburg v. Ohio, 395 U.S. 444, 448 (1969).
[90] Brandenburg v. Ohio, 395 U.S. 444, 448 (1969).
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*

Israel."[96] The appellant was found guilty of violating the Ohio Syndicalism Statute, a ruling affirmed by the intermediate appellate court of Ohio.[97] In a landmark decision, the United States Supreme Court overturned the conviction and found that Brandenburg's speech was protected.[98] This decision aligns with the principle that the First Amendment guarantees do not allow the government to proscribe the "advocacy or use of force for law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[99] The Fourteenth Amendment and the Incorporation Doctrine have taken these First Amendment protections and limitations and applied them to the states.[100]

III. CONSTITUTIONAL CONSIDERATIONS UNDER THE FOURTEENTH AMENDMENT AND THE INCORPORATION DOCTRINE

Prior to the ratification of the Fourteenth Amendment, the Supreme Court in *Barron v. Baltimore* ruled that the limitations of the Bill of Rights only applied to the federal government.[101] In *Barron*, the plaintiff was an owner of a highly productive wharf in the Baltimore harbor.[102] The city, exercising its authority over the harbor, diverted streams of water from their natural course.[103] As a result, the plaintiff's wharf became valueless because the water was too shallow for vessels to ingress and regress.[104] The plaintiff brought a claim under the Fifth Amendment arguing the plaintiff was owed just compensation for his wharf.[105] The Court held the Fifth Amendment was intended solely as a limitation on the federal government and was not applicable to the states.[106]

Thirty-three years later, the Fourteenth Amendment was ratified. This amendment maintains:

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[96] *Id.* at 447.
[97] *Id.* at 1828.
[98] *Id.* at 1830.
[99] *Id.* at 1829–30.
[100] *See generally id.*
[101] *See generally* Barron v. City of Baltimore, 32 U.S. 243, 249–51 (1833).
[102] *Id.* at 243.
[103] *Id.*
[104] *Id.* at 244.
[105] *Id.* at 250.
[106] *Id.* at 251.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[107]

This language provides four critical elements. First, anyone born in the United States is guaranteed full citizenship; this included the rights of recently freed slaves at the time the amendment was enacted.[108] Second, no state can abrogate an individual's citizenship.[109] Third, all citizens are entitled to due process or fair treatment within the judicial system.[110] Fourth, all citizens are guaranteed equal protection of the laws, meaning that states cannot discriminate against certain groups of people.[111] The most crucial element of the Fourteenth Amendment is the due process clause which enabled the Incorporation Doctrine. The Incorporation Doctrine is a constitutional doctrine through which the Fourteenth Amendment's due process clause makes the first ten amendments of the Federal Constitution applicable to the states.[112]

The Incorporation Doctrine was first developed in *Chicago, B. & Q.R. CO. v. City of Chicago*.[113] In this case, the city of Chicago wanted to create a public street across the plaintiff's railroad tracks.[114] The Constitution of Illinois provided that "no

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[107] U.S. CONST. amend. XIV, § 1.

[108] *Id.*; *see also* Garrett Epps, *Second Founding: The Story of the Fourteenth Amendment,* 85 OR. L. REV. 895, 897 (2006).

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] David Hudson, *Law Review: The Fourteenth Amendment and Incorporation*, AMERICAN BAR, https://www.americanbar.org/publications/insights-on-law-and-society/2017/winter2017/law-review-the-14th-amendment-and-incorporation.html (last visited Apr. 25, 2018).

[113] Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 233 (1897).

[114] *Id.* at 230.

person shall be deprived of life, liberty or property, without due process of law."[115] Additionally, Article 2, section 13 of the Constitution of Illinois states: "[P]rivate property shall not be taken or damaged for public use without just compensation. Such compensation when not made by the state, shall be ascertained by a jury, as shall be prescribed by law."[116]

The jury's verdict for just compensation of the plaintiff was one dollar.[117] The Supreme Court of Illinois affirmed the judgment.[118] The plaintiff appealed the case to the United States Supreme Court and argued that one dollar is not just compensation, and therefore deprived the plaintiff of the plaintiff's property without due process of law.[119] The Court applied the Fifth Amendment just compensation requirement through the due process clause of the Fourteenth Amendment and ruled that the city had in fact paid just compensation because the plaintiff was still able to use the land for its intended purpose.[120] The critical precedent of *Chicago, B & Q.R. Co.* is not the outcome, but the fact that the United States Supreme Court created a mechanism, the Incorporation Doctrine, through which courts can apply the Bill of Rights restrictions to the states.

IV. APPLYING A CONSTITUTIONAL ANALYSIS TO PROFESSIONAL SPORTS TEAMS

Shortly after the Court decided *Chicago, B & Q.R. Co.*, the Court continued to apply additional amendments from the Bill of Rights through Incorporation Doctrine to the states.[121] However, for the protections of the First and Fourteenth Amendment to apply, either the state or federal government must cause the harm.[122] Accordingly, for the Federal Constitution to limit professional sports, it is necessary to prove both the team or league is a state actor and that the sport facility is a public forum.

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[115] *Id.* at 228.
[116] *Id.*
[117] *Id.* at 230.
[118] *Id.*
[119] *Id.* at 232.
[120] *Id.* at 257–58.
[121] Hudson, *supra* note 112.
[122] *Id.*

A. STATE ACTOR REQUIREMENT

Congress passed the Fourteenth Amendment to impose the First Amendment's same constitutional limits on the state governments or "state actors."[123] A state actor is a person who is acting on behalf of the state government.[124] Therefore, constitutional protection is only triggered when alleged offenders "carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."[125] Thus, the First and Fourteenth Amendments' protections typically do not extend to citizens acting in a private capacity.[126]

For several years, the Court refused to extend Fourteenth Amendment protections into the private sector. It was not until the Civil Rights Cases[127] that the Court began to broaden the boundaries of the "state actor" requirement. Cases such as *Marsh v. Alabama*,[128] *Shelley v. Kraemer*,[129] and *Burton v. Wilmington Parking Authority*[130] extended the reach of Fourteenth Amendment into the private sector. These cases set forth three theories through which state action can occur in the private sector: public function, judicial enforcement theory, and symbiotic relationship or nexus theory.[131]

The public function theory emerged in *Marsh v. Alabama*, a case involving a privately-owned town.[132] Gulf Shipbuilding Corporation owned a small town, Chickasaw.[133] The town had all of the same characteristics as any other town, including a sheriff, stores, a post office, and residential buildings.[134] A Jehovah's Witness was distributing religious literature on the sidewalks of Chickasaw when a town official told the Jehovah's Witness that

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[123] U.S. CONST. amend. XIV, § 1.

[124] Lugar v. Edmondson Oil Co., 457 U.S. 922, 923 (1982).

[125] Christopher J. McKinny, *Professional Sports Leagues and the First Amendment: A Closed Marketplace*, 13 MARQ. SPORTS L. REV. 223, 229 (2003).

[126] *Id.*

[127] The Civil Rights Cases, 109 U.S. 3, 24–25 (1883).

[128] Marsh v. Ala., 326 U.S. 501 (1946).

[129] Shelley v. Kraemer, 334 U.S. 1 (1948).

[130] Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

[131] *See* McKinny, *supra* note 125, at 230.

[132] *See Marsh*, 326 U.S. at 502–03.

[133] *Id.* at 502.

[134] *Id.* at 502–503.

she was on private property and such action was not permitted.[135] When the Witness refused to leave, town officials arrested her.[136] The Court found the company could not hide behind private property rights and abridge free speech rights.[137] The Court reasoned that the company was performing municipal functions and therefore should be bound to restrictions imposed on municipalities.[138]

The Court stated the judicial enforcement theory in *Shelley v. Kraemer*, where a group of landowners recorded a restrictive covenant stating that the properties within the specified district may only be occupied by a person of the Caucasian race.[139] Petitioners, a black family, purchased a parcel of land covered by the restrictive covenant.[140] When Petitioners purchased the parcel of land, they had no knowledge of such covenant.[141] In response, other landowners brought suit against Petitioners to enforce the restrictive covenant.[142] The state courts upheld the covenant.[143] The United States Supreme Court reviewed the state courts' decisions and held that if the restrictive covenant (a private agreement) was enforced without the assistance of the state court, there would be no Fourteenth Amendment violation.[144] However, action of the state courts to uphold the restrictive covenant triggered Fourteenth Amendment protections and prohibits the state from depriving individuals of substantive rights without notice and due process.[145] The United States Supreme Court thereby reversed the judgment of the Supreme Court of Missouri.[146]

Last, the nexus theory (or the symbiotic relationship test), is where state action and action of private parties are so entwined that the action may be attributed to the state.[147] This theory evolved out of *Burton v. Wilmington Parking Authority*, where a

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[135] *Id.* at 503.
[136] *Id.* at 503–504.
[137] *Id.* at 508–509.
[138] *See id.* at 509.
[139] *See Shelley*, 334 U.S. at 4–5.
[140] *Id.* at 5.
[141] *Id.*
[142] *Id.* at 6.
[143] *Id.*
[144] *Id.* at 13.
[145] *Id.* at 15–16.
[146] *Id.* at 22–23.
[147] McKinny, *supra* note 125, at 231.

local coffee shop refused to serve an African American customer.[148] The court found the requisite state action because the local coffee shop leased the property from the city of Wilmington.[149] The court reasoned both the privately owned coffee shop and city of Wilmington mutually benefitted from the arrangement, and therefore Fourteenth Amendment protections applied.[150]

Despite the United States Supreme Court's broadened interpretation of state action, lower courts have not applied the Federal Constitution's limits on professional sports, which are private associations.[151] Courts have consistently followed the concept of non-interference with the matters of private associations, arguing private associations are better suited to govern their internal operations.[152] Courts only get involved in the outcomes of private association processes if: "(1) the association's action adversely affects 'substantial property, contract or other economic rights' and the associations own internal procedures were inadequate or unfair, or if (2) the association acted maliciously or in bad faith."[153]

Collective bargaining agreements (CBA) govern professional sports leagues, and define and establish the relationship between players, the teams, and the league.[154] At the head of every league is a commissioner who is responsible for acting in the best interests of the league.[155] Courts engage in limited judicial review of a commissioner's decisions regarding the league or player discipline.[156] Whether the commissioner's decision is right or wrong often is beyond the courts'

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[148] *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 716–21 (1961).

[149] *Id.* at 861.

[150] *Id.*

[151] McKinny, *supra* note 125, at 232–33.

[152] *See generally* Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baler v. Kohn, 457 U.S. 830 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Clonlara, Inc. v. Runkel, 722 F.Supp. 1442 (E.D. Mich. 1989); Gemini Enterprises, Inc. v. WFMY Television Corp., 470 F.Supp. 559 (M.D.N.C. 1979); Ingram v. Steven Robert Corp., 419 F.Supp. 461 (S.D. Ala. 1976).

[153] McKinny, *supra* note 125, at 236.

[154] *See id.* at 233.

[155] *See id.* at 234.

[156] *Id.* at 236.

jurisdiction,[157] ultimately leaving the professional sports leagues to their own self-governance.

Some have argued professional sports leagues are not solely private organizations but a public-private hybrid system.[158] This is because the majority of professional stadiums are publicly funded,[159] and often a team staying in a certain city is contingent upon receipt of funding for a new stadium.[160] *Ludtke v. Kuhn* shows that courts are willing to extend constitutional protections in the professional sport setting. In *Ludtke v. Kuhn*, the Yankees banned female reporters from the players' locker room.[161] The court held a symbiotic relationship existed and therefore the stadium was a state actor because the stadium was publicly funded, the city was responsible for the upkeep of the stadium, and the city profited from the Yankees lease and attendance.[162]

The majority of professional sport stadiums are leased or subsidized by the city in which they reside.[163] Cities agree to subsidize these expensive stadium projects in hopes of benefitting from the team being present. For example, fans who travel to a game have to pay for parking, may stay at a nearby hotel, or enjoy dinner at a local restaurant.[164] Since there is shared benefit between most professional sports teams and their local cities, it is possible the professional sport team will be considered a state actor in accordance with the symbiotic relationship or nexus theory—but there is no additional precedent. In a free speech issue, once a court has found state action, the court then examines the type of forum where the speech occurred. This analysis will determine whether the restrictions on the speech violated the individual's constitutional rights.

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[157] *See Id.*

[158] Nick DeSiato, *Silencing the Crowd: Regulating Free Speech in Professional Sports Facilities*, 20 MARQ. SPORTS L. REV. 411, 413 (2010).

[159] *Id.*

[160] *Id.* at 415.

[161] Ludtke v. Kuhn, 461 F. Supp. 86, 88 (S.D.N.Y. 1978).

[162] *Id.* at 93–94.

[163] *See* Scott Wolla, *The Economics of Subsidizing Sport Stadiums*, FED. RES. BANK OF ST. LOUIS (May 2017), https://research.stlouisfed.org/publications/page1-econ/2017-05-01/the-economics-of-subsidizing-sports-stadiums/.

[164] *Id.*

B. PUBLIC FORUM REQUIREMENT

The concept of public forum grew out of *Hague v. CIO.*[165] In *Hague,* Justice Roberts wrote:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[166]

The public forum doctrine distinguishes three types of places for protest with varying levels of free speech restrictions: (1) the traditional public forum; (2) the designed public forum; and (3) the nonpublic forum.[167] First Amendment activity in a public forum may be limited only by reasonable time, place, and manner restrictions.[168] Content-neutral restrictions are only permissible if they serve a compelling state interest and the restriction is narrowly tailored to meet that interest.[169] However, not all public properties are considered public forums.[170] The critical issue is whether the manner of expression is compatible with the normal activity of place and time.[171] Some sites are not open for expression like streets and parks.[172] A designated public forum includes places that are specifically created for expressive activities.[173] This includes university meeting spaces, airports, and municipal theaters.[174] The government may implement restrictions similar to those in the traditional public forum, but cannot exercise viewpoint discrimination.[175] Last, nonpublic

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[165] Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939).
[166] *Id.* at 515.
[167] DeSiato, *supra* note 158, at 422.
[168] *Id.*
[169] Cornell Law School, *Forums*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/forums (last visited Apr. 17, 2018).
[170] *See* DeSiato, *supra* note 158, at 422–23.
[171] *See id.* at 423.
[172] *See id.* at 423–424.
[173] *See id.*
[174] *See id.* at 429.
[175] Cornell Law School, *supra* note 169.

forums are public places that are neither traditional or designated public forums.[176] Reasonable restrictions can be imposed on speech in a nonpublic forum so long as restrictions are not viewpoint discrimination.[177]

To determine if a sporting facility is a public forum, courts will consider the primary purpose of the facility's construction, the commercial nature of the facility's operation, and whether there is regular enforcement of regulations limiting expression.[178] Courts will not only examine the location of the speaker, but also examine the context of the property as a whole.[179] *Stewart v. D.C. Armory Board Decision* shows at least one court has applied the public forum analysis to a sport facility context.[180] In *Stewart*, plaintiffs hung a banner with a scripture written on it on the railings of the stadium during a Washington Redskins football game.[181] At halftime, the plaintiffs noticed someone had taken down the banner.[182] The plaintiffs hung another banner, but found that someone had removed the new banner as well.[183] Another plaintiff in the case, who was watching the game on television, observed various signs throughout the stadium, including "Capitol Punishment," "National Defense," and "Hi Kathy and Don" remained untouched for the duration of the game.[184] The plaintiff also noted that he had previously hung banners that no one had ever removed.[185] The defendant claimed stadium officials removed the signs pursuant to an NFL-created content restriction.[186]

Since Robert F. Kennedy (RFK) Memorial Stadium is government-owned property, the *Stewart* court analyzed the case under public forum doctrine.[187] First, the court considered whether the First Amendment protected the banner.[188] Given the religious nature of the expression, there is little doubt the First Amendment

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[176] *Id.*
[177] *Id.*
[178] DeSiato, *supra* note 158, at 423.
[179] *Id.*
[180] Stewart v. D.C. Armory Bd., 789 F. Supp. 402 (D.D.C 1992).
[181] *Id.* at 403–04.
[182] *Id.* at 404.
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*

protected the banner.[189] Second, the court analyzed the nature of the forum.[190] A stadium does not need to be a place traditionally devoted to expressive activities, it could be considered a public forum based on government designation.[191] The crux for determining whether a property is a designated public forum is to look at the "government's intent in establishing and maintaining the property."[192] The court found sufficient evidence to conclude that RFK Stadium was a public forum because the government's intent of operating the stadium was "to build civic pride, identity and cohesion through sponsorship of public events which brings citizens together for a common purpose."[193] To conclude, the court evaluated the justification for the restriction on speech.[194] The defense claimed that the sign was removed because they were concerned it might offend fans, football team owners, tenants, and the NFL.[195] This was not a compelling enough reason to justify the suppression of speech;[196] so, the court ruled in favor of the plaintiffs.[197]

Subsequent to the *Stewart* decision, the courts in *Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority*[198] and *Hubbard Broadcasting Inc. v. Metropolitan Sports Facilities Commission*[199] have held sport facilities are not public forums.[200] In *Krishna Consciousness, Inc.*, the plaintiffs, a religious organization, challenged a policy prohibiting outside organizations from soliciting money at the race track and stadium in the Meadowlands Sports Complex in New Jersey.[201] The court upheld the policy finding that it was uniform and non-discriminatory.[202] Further, the court noted "neither the race track

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[189] *Id.* at 405.
[190] *Id.* at 404.
[191] *Id.* at 405.
[192] *Id.*
[193] *Id.*
[194] *Id.* at 404.
[195] *Id.* at 405.
[196] *Id.* at 406.
[197] *Id.* at 407.
[198] Int'l Soc'y for Krishna Consciousness, Inc. v. N.J. Sports and Exposition Auth., 691 F.2d 155 (3rd Cir. 1982).
[199] Hubbard Broad., Inc. v. Metro. Sports Facilities Comm'n, 797 F.2d 552 (8th Cir. 1986).
[200] DeSiato, *supra* note 158, at 425.
[201] *Int'l Soc'y for Krishna Consciousness*, 691 F.2d at 158.
[202] *Id.*

nor the stadium [was] designed, built, intended or used as a public forum."[203]

In *Hubbard Broadcasting Inc.*, Hubbard, a radio and television broadcaster, claimed the Metropolitan Sports Facilities Commission violated its free speech rights by selling its competitor, Midwest Radio Television (Midwest), exclusive rights to advertise on the score board at the Metrodome in Minneapolis.[204] Hubbard claimed the advertising space on the scoreboard was a public forum.[205] The court disagreed with Hubbard, stating that in situations where the city is acting in a proprietary capacity to allow a small number of advertising spaces on government property to generate revenue, a public forum is not created.[206] Last, the court explored whether the restriction on commercial speech was reasonable and content-neutral.[207] The court agreed that exclusive ten-year contracts would elicit the most value and therefore is a reasonable objective.[208] Further, the court concluded that the policy was content-neutral, because no effort was made to suppress a specific point of view.[209]

There is no strong precedent in favor of constitutional protections being applied to the sports arena. *Ludtke v. Kuhn* is the lone case that found a sports team violated the Constitution by depriving a reporter of equal access. Furthermore, this case is distinguishable from potential constitutional protections for players because in *Ludtke*, the plaintiff was a reporter. A court would likely treat an athlete plaintiff differently because the athlete agreed to be part of a private association and abide by its rules and regulations, whereas a reporter has not made such concessions.

V. CONTRACTUAL CONSIDERATIONS UNDER THE CBA AND THE STANDARD PLAYER CONTRACT

Even if a constitutional analysis concludes professional teams are state actors and stadiums are public forums, professional athletes may have contractual obligations under the CBA and their

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[203] *Id.*
[204] *Hubbard Broad., Inc.*, 797 F.2d at 553.
[205] *Id.* at 555.
[206] *Id.* at 556.
[207] *Id.*
[208] *Id.*
[209] *Id.*

Standard Player Contracts (SPC) that restrict free speech rights.[210] Collective bargaining agreements govern the employee-employer relationship between the owners of professional sports teams and players' associations.[211] Specifically, CBAs explicitly outline treatment of players (employees) and limit employers' power by adding restraints to punishments, such as requiring "just" or reasonable" cause to punish employees.[212] CBAs do not give players blanket rights to behave however they want, but past arbitrations have shown deference to free speech rights.[213] For example, in 2000, former Atlanta Braves Pitcher John Rocker was suspended by then-Commissioner Bud Selig for seventy-three games[214] for making derogatory comments in an interview, including "Asians and Koreans and Vietnamese and Indians and Russians and Spanish people and everything up there [New York City]. How the hell did they get in this country?"[215] An arbitrator reduced the suspension to fourteen days and a $500 fine.[216] Each league has its own policies. As result, the league's and athletes' responsibilities under the CBAs and the SPCs for the NFL, MLB, and the NBA are subsequently discussed.

A. NATIONAL FOOTBALL LEAGUE

Every NFL player signs a standard contract with their team. There are two clauses in the NFL's SPC that may restrict athlete's free speech: Paragraph 2 (Employment and Services) and Paragraph 11 (Skill, Performance and Conduct).[217] Paragraph 2

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[210] McKinny, *supra* note 125, at 249.

[211] Ryan T. Dryer, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL., 267, 267 (2008).

[212] *Id.*

[213] *Id.*

[214] Jeff Pearlman, *A Reporter's Tale: The John Rocker Story 15 Years Later*, BLEACHER REP. (Apr. 4, 2014), http://bleacherreport.com/articles/2009128-a-reporters-tale-the-john-rocker-story-15-years-later.

[215] Maki Becker, Michael Finnegan & Bill Hutchinson, *ROCKER: I'M SORRY Pitcher Says He's No Racist, Amid Firestorm over Slurs*, DAILY NEWS (Dec. 23, 1999, 12:00 AM), http://www.nydailynews.com/archives/news/rocker-pitcher-no-racist-firestorm-slurs-article-1.850825.

[216] Pearlman, *supra* note 214.

[217] Michael McCann, *Can an NFL Owner Legally 'Fire' a Player for Protesting?*, SPORTS ILLUSTRATED (Sept. 23, 2017),

states that a player pledges to "conduct himself on and off the field with appropriate recognition of the fact that the success of professional football depends largely on public respect for and approval of those associated with the game."[218] This general language may allow for teams to broadly define "public respect" to capture athlete protests as a negative effect on "public respect."[219] Teams may support this claim by pointing to the 5% ratings drop for NFL games this season.[220] Paragraph 11 of the SPC states that the team may terminate a player's contract if the player "has engaged in personal conduct reasonably judged by the Club to adversely affect or reflect on the Club."[221] Similar to Paragraph 2, this clause may allow wide-ranging deference for the team to "reasonably judge" the impact of a players "personal conduct" on the team.[222]

Additionally, teams may look to Article 46 (Commissioner Discipline) of the CBA to terminate players for protesting. Article 46 grants the Commissioner with a broad power to discipline players whose "conduct [is] detrimental to the integrity of, or public confidence in, the game of professional football."[223] With the recent backlash the NFL has suffered from its players kneeling for the national anthem, it may not be farfetched to conclude that this behavior is detrimental to the integrity of professional football. However, the Commissioner's criticism of President Trump's tweet saying teams should fire players who kneel for the national anthem seems to indicate that the Commissioner will likely not be electing to use his authority to fire players for their political protests.[224] Further, neither the NFL nor a team has punished a current player for opting to kneel for the national anthem, and even if a player was punished, the

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https://www.si.com/nfl/2017/09/23/donald-trump-fired-roger-goodell-player-protest.

[218] *Id.*

[219] *Id.*

[220] Jimmy Traina, *Traina Thoughts: NFL Ratings Decline Seems like Nothing Compared to the Rest of Television*, SPORTS ILLUSTRATED (Oct. 27, 2017), https://www.si.com/extra-mustard/2017/10/27/nfl-2017-ratings-national-anthem-protests.

[221] McCann, *supra* note 217.

[222] *Id.*

[223] *Id.*

[224] *Id.*

player has the right to appeal the punishment through arbitration proceedings.[225]

Currently, the NFL rulebook does not dictate player behavior for the national anthem, but the game operations manual provides some context.[226] The game operations manual says the national anthem must be played prior to every NFL game, and all players must be on the sideline for the national anthem.[227] During the national anthem, players on the field and bench area *should* stand at attention, face the flag, and hold helmets in their left hand, and refrain from talking.[228] The home team has a duty to ensure that the American flag is in good condition.[229] Failure to be on the field by the start of the national anthem *may* result in discipline, such as fines, suspensions, or the forfeiture of draft choice(s) for violations of the above, including first offenses.[230] It should be pointed out to players and coaches that they continue to be judged by the public in how they handle the singing of the national anthem prior to games.

Unquestionably, the key word above is *may*, which gives the NFL discretion to punish both teams or players who kneel for the national anthem. Clearly, the NFL is not yet willing to punish teams or players who choose to kneel or stay in the locker room for the national anthem. Further, the NFL does not appear to be making any plans to mandate players to stand for the national anthem.[231] The NFL and National Football League Players Association (NFLPA) released a joint statement:

> Commissioner Roger Goodell reached out to the NFLPA Executive Director DeMaurice Smith today and both he and player leadership will attend the League meetings next week. There has been no change in the current policy regarding the

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[225] *Id.*

[226] Alex Fitzpatrick, *Here's What NFL Rules Say About Standing for the National Anthem*, SPORTS ILLUSTRATED (Sept. 25, 2017), https://www.si.com/nfl/2017/09/25/does-nfl-require-players-stand-national-anthem.

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] *NFL: No Mandate for Players to Stand During the National Anthem*, NFL.COM (Oct. 11, 2017), http://www.nfl.com/news/story/0ap3000000860129/article/nfl-no-mandate-for-players-to-stand-during-national-anthem.

> anthem. The agenda will be a continuation of how to make progress on the important social issues that players have vocalized.[232]

Although it appears Kaepenick's efforts were successful in getting the NFL and the NFLPA to take a stance on social issues, Kaepernick now finds himself unemployed following his year-long protest.[233] Speculation regarding the rationale for his unemployment ranged from his struggling performance as quarterback (which led him to losing his starting position) to Kaepernick's views on politics and the mixed responses from fans, team owners, and the league.[234] After being passed over numerous times in the 2017 off-season, Kaepernick filed a complaint against the NFL alleging that the owners colluded to deprive him of an employment opportunity.[235] The complaint also references President Trump's comments, arguing that the Federal government further coerced the league into blacklisting Kaepernick.[236] Kaepernick filed the complaint under Section 17 of the CBA (Anti-Collusion) using his own attorney, Mark Geragos, rather than filing through the NFLPA.[237]

Kaepernick claims the NFL engaged in calculated and coordinated activity to keep him out of the league because of his protest during the national anthem.[238] As a result, multiple NFL owners will be deposed and asked to turn over cellphone records

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[232] *Id.*

[233] Claire McNear, *If the Seahawks Won't Give Colin Kaepernick a Shot, Then Who Will?*, THE RINGER (Apr. 12, 2018), https://www.theringer.com/nfl/2018/4/12/17231582/colin-kaepernick-seattle-seahawks-quarterback-national-anthem-protest-free-agency.

[234] Jack Dickey, *There's No Credible Reason Why Colin Kaepernick Isn't on a Week 1 NFL Roster*, SPORTS ILLUSTRATED (Sept. 8, 2017), https://www.si.com/nfl/2017/09/08/colin-kaepernick-week-1-nfl-roster-not-signed.

[235] Mark W. Sanchez, *Colin Kaepernick Calls Out NFL Owners, Trump in Collusion Fight*, N.Y. POST (Oct. 15, 2017), https://nypost.com/2017/10/15/colin-kaepernick-is-taking-on-nfl-owners-with-collusion-fight/.

[236] *Id.*

[237] *Id.*

[238] Justin Terranova, *Kaepernick's Collusion Case Targets NFL Owners, Including Giants*, N.Y. POST (Nov. 3, 2017), https://nypost.com/2017/11/03/nfls-most-powerful-owners-targeted-in-kaepernicks-collusion-case/.

and emails that relate to Kaepernick's accusations.[239] Among those to be deposed are Cowboys owner Jerry Jones, Patriots owner Robert Kraft, Texans owner Bob McNair, Seahawks coach Pete Carroll, 49ers owner Jed York, and Giants owners John Mara and Steve Tisch.[240]

To win a collusion argument, Kaepernick will have to meet the burden of preponderance of the evidence and demonstrate that two or more teams cooperated together to deprive him of his collectively bargained right of employment with a team.[241] Despite numerous teams passing on Kaepernick, likely the more talented option for backup quarterback, this does not prove a collusion case. Kaepernick's legal team will have to uncover hard evidence during discovery that there was collusion between owners or the league and owners. A date has not been set for this case, but if Kaepernick's collusion case does not pan out, he can still bring suit for violation of Section 7 of the NLRA (Interfering with Employee Rights), arguing that he was denied the opportunity to engage in a concerted activity—anthem protest.[242] A more detailed discussion of the National Labor Relations Act is addressed in Part VII.

B. MAJOR LEAGUE BASEBALL

Under the MLB CBA, Article XII—Discipline, Subsection B (Conduct Detrimental or Prejudicial to Baseball), details: "Players may be disciplined for just cause for conduct that is materially prejudicial to the best interests of Baseball, including, but not limited to, engaging in conduct in violation of federal, state or local law."[243] This language provides the Commissioner or the Club with the autonomy to discipline players for a wide range of behavior. Kneeling during the national anthem could be deemed "just cause" for disciplining a player. Yet, the Club can only

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[239] *Id.*

[240] *Id.*

[241] Michael McCann, *Colin Kaepernick's Collusion Claim: Does He Have a Case?*, SPORTS ILLUSTRATED (Oct. 15, 2017), https://www.si.com/nfl/2017/10/15/colin-kaepernick-collusion-lawsuit-against-nfl.

[242] *Id.*

[243] MAJOR LEAGUE BASEBALL COLLECTIVE BARGAINING AGREEMENT, Art. XII (2017) archived at http://www.mlbplayers.com/pdf9/5450407.pdf [hereinafter MLB CBA].

discipline the player if the Commissioner concedes the disciplinary authority to the Club.[244]

Currently, the MLB does not have a rule about national anthem etiquette, but the league treats the national anthem as an important tradition.[245] "The National Anthem has been performed before all Major League games since 1942, during World War II." [246] Because only one MLB player, Oakland A's Bruce Maxwell, has knelt during the national anthem, there is not much discussion around steps to thwart protest efforts.[247] However, after Bruce Maxwell took a knee, the Oakland A's issued a statement saying "[t]he Oakland A's pride ourselves on being inclusive. We respect and support all of our players' constitutional rights and freedom of expression."[248]

Although one baseball player engaged in pre-game activism activities last season, the Seattle Mariners also displayed a position on the issue when the team suspended catcher Steve Clevenger for posting several tweets to his private Twitter account that were disseminated by his followers:[249] "Black people beating whites when a thug got shot holding a gun by a black officer haha [expletive] cracks me up! Keep kneeling for the anthem! BLM [Black Lives Matter] is pathetic again! Obama you are pathetic once again! Everyone should be locked behind bars like animals!"[250]

Mariners' general manager Jerry Dipito commented, "[a]s soon we became aware of the tweets posted by Steve, we began to examine all of our options in regard to his standing on the

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[244] *Id.*

[245] Maury Brown, *If MLB Players Protest National Anthem, Here's How League Would Respond*, FORBES (Sept. 15, 2016), https://www.forbes.com/sites/maurybrown/2016/09/15/if-mlb-players-protest-national-anthem-heres-how-league-would-respond/#450c29c92113.

[246] *Id.*

[247] Marissa Payne, *'To Single Out NFL Players for Doing This Isn't Something We Should Be Doing': A's Player Takes Up Anthem Protest*, WASHINGTON POST (Sept. 24, 2017), https://www.washingtonpost.com/news/early-lead/wp/2017/09/23/as-catcher-bruce-maxwell-first-mlb-player-to-kneel-for-the-national-anthem/?utm_term=.8f60e80960dc.

[248] *Id.*

[249] Bob Nightengale, *Steve Clevenger: How a Catcher Tweeted His Way Out of a Major League Career*, USA TODAY (Sept. 23, 2016, 9:37 PM), https://www.usatoday.com/story/sports/mlb/columnist/bob-nightengale/2016/09/23/steve-clevenger-tweets-suspended/90912142/.

[250] *Id.*

team."[251] The team suspended Clevenger through MLB's Social Media policy in accordance with Article XII of the CBA.[252] The reaction by the Seattle Mariners to Clevenger's post reiterated that any behavior contrary to the best interests of Baseball would not be tolerated (including negative comments about players who are choosing to protest by kneeling).

Without a doubt, the more interesting aspect of the MLB is not how the league will handle protests, but rather why are MLB players not joining the protest?[253] Baseball is America's past time, "it is a hyper-patriotic place."[254] Baltimore Orioles outfielder, Adam Jones, said "[b]aseball is white man's sport. We already have two strikes against us, so you might as well not kick yourself out of the game. In football, you can't kick them out. You need those players. In baseball, they don't need us."[255]

Adam Jones was one of sixty-two African Americans out of 750 players on opening day rosters in the 2017 season.[256] This is a powerful statement from Adam Jones, who also said that he will not join the protest and kneel for the national anthem because both his brother and father served in the military.[257] Additionally, in response to Bruce Maxwell's protest, Tampa Bay Rays pitcher, Chris Archer, said:

> From the feedback I've gotten from my teammates, I don't think it would be the best thing to do for me at this time. I agree with [Maxwell's] message. I believe in equality. [But] I don't want to offend anybody. No matter how you explain it or justify it, some people just can't get past the military element of it, and it's not

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[251] *Id.*

[252] MLB CBA, supra note 243, art. 12.

[253] David Lengel, *Why Protesting During the Anthem is the Ultimate Sin in Major League Baseball*, THE GUARDIAN (Sept. 14, 2016), https://www.theguardian.com/sport/blog/2016/sep/14/mlb-protest-national-anthem-ultimate-sin-adam-jones.

[254] *Id.*

[255] *Id.*

[256] Dave Sheinin & Jorge Castillo, *Amid NFL Protests and NBA Uproar, MLB still taking Cautious First Steps into Anthem Controversy*, THE WASHINGTON POST (Sept. 25, 2017), https://www.washingtonpost.com/news/sports/wp/2017/09/25/amid-nfl-protests-and-nba-uproar-mlb-still-taking-cautious-first-steps-into-anthem-controversy/?utm_term=.f8fe6f219b21.

[257] Lengel, *supra* note 253.

> something I want to do, is ruffle my teammates' feathers on my personal views that have nothing to do with baseball.[258]

While the league has not actively discussed the national anthem protest, it did release a statement that said "each of our players is an individual with his own background, perspectives and opinions," hinting that the league may not respond as harsh as its players think.[259]

C. NATIONAL BASKETBALL ASSOCIATION

Unlike the NFL and MLB, the NBA has a rule requiring players, coaches, and trainers to stand along the sidelines for the national anthem.[260] Under Paragraph 5 of the NBA Uniform Player Contract, the NBA can "enforce reasonable rules governing the conduct of players on the playing court (defined in Article XXXI, Section 9(c)) that do not violate the provisions of the [CBA]."[261] Paragraph 5 states that players must always conduct themselves "on and off the court according to the highest standards of honesty, morality, fair play and sportsmanship; and [cannot] do anything which is detrimental to the best interests of the Club or the Association."[262] The NBA reinforced this rule by sending out a memo prior to the start of the 2017 season.[263] The memo suggested teams address the current issues by having players and coaches give a joint message prior to their first home

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[258] Sheinin, *supra* note 256.

[259] *Id.*

[260] John Reid, *Unlike NFL, the NBA has a Rule that Players Must Stand During Playing of National Anthem*, NOLA (Sept. 15, 2016), http://www.nola.com/pelicans/index.ssf/2016/09/victor_oladipo_predicts_nba_pl.html.

[261] NAT'L BASKETBALL ASSOC. COLLECTIVE BARGAINING AGREEMENT, Art. 31 (Jan. 19, 2017) archived at, http://3c90sm37lsaecdwtr32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf.

[262] *Id.*

[263] Zach Lowe, *Memo Reinforces Rule that NBA Players, Coaches Stand for Anthem*, ESPN (Sept. 30, 2017), http://www.espn.com/nba/story/_/id/20864858/nba-memo-reinforces-rule-players-coaches-stand-national-anthem.

game.[264] The NBA was making an effort to establish an environment where its players were able to use their platform to discuss issues that matter to them, but it seems the NBA would not tolerate kneeling for the national anthem.[265]

The NBA has a history of zero tolerance for national anthem protests.[266] During the 1995-1996 season, Denver Nuggets guard Mahmoud Abdul-Rauf sat during the national anthem.[267] Then-Commissioner David Stern suspended Abul-Rauf for one game.[268] Thereafter, Abdul-Rauf stood for national anthem, but had his head bowed in prayer.[269] Despite this compromise, the Nuggets traded Abdul-Rauf to the Kings at the end of the season and Abdul-Rauf lost sponsorships.[270] The next season Abdul-Rauf's contract expired and he went unsigned, essentially being forced into early retirement.[271] Twenty years later, the league has changed and outwardly encouraged its players to speak about the issues, but no player has tested the waters and taken a knee.

While NBA players may not be protesting the national anthem, some players have taken a stand in other ways. For example, during the 2014 season, numerous players including LeBron James, Derrick Rose, and Kobe Bryant wore t-shirts in warm-ups with the phrase "I can't breathe."[272] "I can't breathe" were the last words of Eric Garner, a black man who died in a police chokehold.[273] NBA Commissioner Adam Silver seemed to be walking a slippery slope when he issued his statement, "I respect Derrick Rose and all of our players for voicing their personal views on important issues, but my preference would be for players to abide by our on-court attire rules."[274] The NBA rule

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[264] *Id.*

[265] *Id.*

[266] Tim Cato, *The NBA Actually has a Rule Against Kneeling for the National Anthem*, SBNATION (Sept. 29, 2017, 9:33 PM), https://www.sbnation.com/2017/9/25/16358070/national-anthem-protest-kneel-kneel-rule.

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] William Rhoden, *Social Convictions Don't Tuck Neatly into NBA's Interests*, N.Y. TIMES (Dec. 9, 2014), https://www.nytimes.com/2014/12/10/sports/basketball/adam-silver-likes-show-of-support-but-not-with-i-cant-breathe-pregame-shirts.html.

[273] *Id.*

[274] *Id.*

book outlines specific requirements and regulations for on-court attire.[275] Even though Silver could have barred the players from wearing the shirts or penalized them, he opted not to.[276]More recently, players have been using social media to communicate and advocate for certain social causes.[277] Specifically, LeBron James has taken a strong stance by posting videos to Instagram and tweets to encourage and improve race relations in the U.S.[278]

If professional athletes find themselves without legal recourse under the Federal Constitution or their leagues' CBA, SPC or rulebook, they may find reprieve in the National Labor Relations Act (NLRA).

VI. ATHLETE ACTIVISM UNDER THE NATIONAL LABOR RELATIONS ACT

If the constitutional argument fails, athletes may still be able to bring a claim under the NLRA. The NLRA gets its power from the Commerce Clause of the Federal Constitution and has jurisdiction over any labor industry that affects interstate commerce.[279] Given professional sports' interstate nature, the NLRA can apply to professional sports.[280] The National Labor Relations Board (NLRB) is "an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative."[281] The NLRB can decline jurisdiction when "in its opinion, the impact of a particular industry on interstate commerce is not so 'sufficiently substantial to warrant the exercise

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[275] *Id.*

[276] *Id.*

[277] Scott Kushner, *NBA Commissioner Adam Silver Opines on State of League, Technology, Social Media Before All-Star Game Tips,* THE ADVOCATE (Feb. 18, 2018, 6:55 PM), http://www.theadvocate.com/new_orleans/sports/pelicans/article_948037dc-150f-11e8-a58a-bfe737aad7ff.html.

[278] *LeBron James Has No Plans to 'Shut up and Dribble,'* ESPN (Feb. 18, 2018), http://www.espn.com/nba/story/_/id/22481008/lebron-james-cleveland-cavaliers-doubles-will-continue-discuss-social-issues.

[279] Cym Lowell, *Collective Bargaining and the Professional Team Sport Industry*, 38 LAW & CONTEMP. PROBS. 3, 6 (1973).

[280] *Id.*

[281] *What We Do*, NLRB, https://www.nlrb.gov/what-we-do (last visited Apr. 9, 2018).

of its jurisdiction . . . ."[282] However, the NLRB previously exercised jurisdiction over professional baseball in *American League of Professional Baseball Clubs*, where the NLRB determined that professional baseball does affect interstate commerce in a sufficiently substantial way.[283] Further, the NLRB has a history of being involved in the labor relations arena of professional sports. Some credit the NLRB with ending the 1995 baseball strike "by securing an injunction under section 10(j) of the Act requiring the baseball club owners to withdraw their unilaterally imposed changes to the negotiated system of setting wages in baseball"[284] and "the NLRB secured a $30 million back pay settlement in 1994" for NFL players who went on strike in 1987.[285]

For an athlete's action to be protected under the NLRB, the "action must be conducted in concert with co-workers, it must address an issue of relevance to their job, and it must be carried out using appropriate means"[286] Many labor experts believe that professional athlete protests meet all three conditions, and therefore teams cannot discipline athletes for participating in protests.[287] This argument hinges on a 1978 Supreme Court case where the Court ruled "that workers have a right to engage in political advocacy as long as the political theme relates to their job."[288] However, each league's CBA, as well as the SPC, could lawfully prohibit protests without violating the NLRA.[289]

Further, the NLRA can also be used by athletes to bring suit against their respective league or owner (e.g., the Local 100 and Dallas Cowboys owner, Jerry Jones).[290] For example, President Trump's tweets calling for NFL owners to fire players

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[282] Lowell, *supra* note 279, at 6.

[283] *Id.* at 7.

[284] *Impact of the NLRB on Professional Sports,* NLRB, https://www.nlrb.gov/who-we-are/our-history/impact-nlrb-professional-sports (last visited Apr. 9, 2018).

[285] *Id.*

[286] Noam Scheiber, *NFL Players May Have an Ally in Their Protests: Labor Law*, NY TIMES (Oct. 12, 2017), https://www.nytimes.com/2017/10/12/business/economy/nfl-players-kneeling-national-anthem-labor-laws.html.

[287] *Id.*

[288] *Id.*

[289] *Id.*

[290] Todd Archer, *Local Labor Union Files Complaint over Jerry Jones' Anthem Mandate*, ESPN (Oct. 11, 2017), http://www.espn.com/nfl/story/_/id/20984095/labor-union-files-complaint-cowboys-jerry-jones-national-anthem-mandate-team.

who kneel for the national anthem and threats to change tax laws to negatively affect the NFL[291] led to Jerry Jones threatening to bench any player who does not stand for the national anthem.[292] In response to Jerry Jones's threat, the Local 100 of the United Labor Union filed a complaint against the Dallas Cowboys, alleging Jerry Jones violated the NLRA by threatening players if they did not stand for the national anthem.[293] The complaint to the NLRB alleged that "the employer evidenced by repeated public statements, is attempting to threaten, coerce, and intimidate all Dallas Cowboys players on the roster to prevent them from exercising a concerted activity protected under the [A]ct by saying that he will [not play] any players involved in such concerted activity."[294] The complaint is still being investigated and no outcome has been reached.

VII. PROS AND CONS OF ATHLETE ACTIVISM—THE ATHLETE PERSPECTIVE

Athlete activism can be a critical force for positive social change. In fact, athlete activism has brought the fight for social justice back into the national conversation, and this time with league support. Both the NBA and the NFL are listening to their players' concerns and are searching for ways to effectuate change. For example, a distinguished panel was formed for the RISE Super Bowl Town Hall in Minneapolis on Super Bowl weekend.[295] The panel discussed best practices for utilizing sport as a way to improve race relations.[296] Conversations have started and plans have been put into action as a result of athletes voicing their

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[291] Tracy Jan, *Did Trump's Tweet Make it Safer for NFL Players to Kneel for the Anthem?*, WASHINGTON POST (Oct. 15, 2017), https://www.washingtonpost.com/business/economy/did-trumps-tweet-make-it-safer-for-nfl-players-to-kneel-for-the-anthem/2017/10/15/d99f20ca-af44-11e7-a908-a3470754bbb9_story.html?utm_term=.a9b270988837.

[292] Archer, *supra* note 290.

[293] *Id.*

[294] *Id.*

[295] Alain Poupart, *RISE Super Bowl Town Hall*, MIAMI DOLPHINS (Feb. 3, 2018), http://www.miamidolphins.com/news/article-1/RISE-Super-Bowl-Town-Hall/df315b19-92b4-4399-bd10-32578bb8a68f.

[296] *Id.*

concern for certain social issues. However, speaking up does not always have positive consequences.

Hollywood contracts have incorporated morals clauses since the 1920s, but such clauses also have become common in player contracts and endorsement agreements.[297] All four major professional leagues in the United States include broad morals clauses in their SPCs and CBAs.[298] Morals clauses in endorsement contracts are often the product of negotiation and are narrower in scope compared to the morals clauses in SPCs and CBAs.[299] Morals clauses must be carefully drafted to ensure intended protection for a team, league, or corporation, who invest in both an athlete's performance and reputation.[300] An athlete's off-field, or even on-field, immoral or illegal behavior may also impact the athlete's endorsers.[301] For example, when Adrian Peterson was indicted on a felony charge of injury to a child, Wheaties pulled all content related to Adrian Peterson from its website.[302] Cam Newton found himself in hot water after he responded to a question from a female reporter saying, "It's funny to hear a female talk about routes."[303] Newton felt immediate backlash from the comment and even lost an endorsement deal with Dannon.[304]

Morals clauses may play a vital role in how corporate sponsors handle athlete activism. For example, in 2013, Rashard Mendenhall sued Hanesbrands for breach of contract when Hanesbrands terminated his endorsement deal after he tweeted about Bin Laden's death and a 9/11 conspiracy theory.[305] Hanesbrands attempted to terminate the endorsement deal

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[297] William H. Baaki, *"Morals Clauses" in Sports Contracts – More Important Now Than Ever Before?*, SPORTS AND ENTERTAINMENT LAW INSIDER (Sept. 16, 2014), https://sportslawinsider.com/morals-clauses-in-sports-contracts-more-important-now-than-ever-before/.

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] Sarah Barshop, *Wheaties Pulls All Content of Vikings Adrian Peterson Off Website*, SPORTS ILLUSTRATED (Sept. 15, 2014), https://www.si.com/nfl/2014/09/15/wheaties-adrian-peterson-content-website.

[303] Jen Wilson, *Panthers' Cam Newton Losing Endorsement Deal Amid Backlash Over 'Sexist' Remark?* CHARLOTTE BUSINESS JOURNAL (Oct. 5, 2017), https://www.bizjournals.com/charlotte/news/2017/10/05/pantherscam-newton-loses-endorsement-deal-amid.html.

[304] *Id.*

[305] Rashard Mendenhall v. Hanesbrands, Inc., 856 F.Supp.2d 717, 720 (M.D.N.C. 2012).

pursuant to Paragraph 17(a) of their agreement.[306] The terms of 17(a) in the agreement state:

> If Mendenhall commits or is arrested for any crime or becomes involved in any situation or occurrence (collectively, the "Act") tending to bring Mendenhall into public disrepute, contempt, scandal, or ridicule, or tending to shock, insult or offend the majority of the consuming public or any protected class or group thereof, then we shall have the right to immediately terminate this Agreement. HBI's decision on all matters arising under this Section 17(a) shall be conclusive.[307]

The court found that a dispute of fact exists between the parties and allowed the case to move forward.[308] The parties eventually settled.[309]

In light of both the positive and negative outcomes associated with choosing to engage in activism, athletes should be both "cautious and deliberate" in their efforts.[310] This includes being strategic about the best medium and method for taking a stance on social issues. Social media has provided athletes with a global platform to disseminate their social and political perspectives.[311] Athletes are able to openly converse about numerous topics with fans. However, if the fans disagree with the athlete's viewpoint, these discussions can have negative consequences for the athlete, namely backlash and intolerance for the athlete's point of view.[312] Therefore, be it a social media post, a comment at a news conference, or wearing a t-shirt, the athlete needs to understand fans will have mixed reactions to his choosing to use his status in support of a cause.

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[306] *Id.* at 721.

[307] *Id.* at 720.

[308] *Id.* at 727–728.

[309] Marc Edelman, *Rashard Mendenhall Settles Lawsuit with Hanesbrands over Morals Clause*, FORBES (Jan. 17, 2013), https://www.forbes.com/sites/marcedelman/2013/01/17/rashard-mendenhall-settles-lawsuit-with-hanesbrands-over-morals-clause/#4bfa7da52483.

[310] Coombs & Cassilo, *supra* note 1, at 432.

[311] *See* Jimmy Sanderson, Evan Frederick & Mike Stocz, *When Athlete Activism Clashes with Group Values: Social Identity Threat Management via Social Media*, 19 MASS COMM. & SOC'Y 301, 305 (2016).

[312] *Id.* at 310.

There are also various types of political or social issue "calls to action" that an athlete may engage in, such as encouraging others to join a particular movement or even a boycott. If an athlete uses his status to encourage others to join a particular movement, he simply may be voicing his concerns to those who are able to promulgate change. The athlete may solicit others to participate in marches, to write letters to government representatives, or to join organizations supporting the cause. The athlete also may choose to take a more financial approach through a boycott. The objective of a boycott is to draw attention to undesirable behavior, and to "punish the firm [or individual] for those misdeeds."[313] In addition to convincing consumers not to buy certain products or services, the athlete can "induce consumers to buy products or services which [are] consistent with" his activism goals.[314]

Given the copious options of mediums and methods for athlete activism as well as the diverse reactions from fans, an athlete should first consider how important the issue is to him. If the issue is one where the athlete feels being silent is worse than speaking out, choosing to take a stand may be the only avenue to encourage debate and to elicit change. Second, the athlete must contemplate whether his involvement will violate their SPC or an endorsement agreement. Prior to participating in any type of activism, the athlete and the athlete's representatives should carefully review these contractual agreements for clauses that may trigger a breach of the player's contractual obligations, e.g, a morals clause. Next, the athlete must weigh both the positive and negative repercussions of his choice to lend their image and voice to a particular cause. If there is negative backlash, the athlete and his team should be prepared to appropriately handle the situation. Last, the athlete needs to determine the best call to action for the political or social issue. For example, wearing a t-shirt rather than a lengthy statement to the media may be the most effective method to bring attention to the issue.

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[313] Monroe Friedman, *A Positive Approach to Organized Consumer Action: The "Buycott" as an Alternative to the Boycott,* 19 J. OF CONSUMER POL'Y 439, 440 (1996).

[314] *Id.*

VIII. MOVING FORWARD—THE TEAM/LEAGUE PERSPECTIVE

While all four major leagues have had social responsibility programs for several years, the leagues often fall short on providing solutions to the problem of inequality.[315] However, with this spark of athlete activism, both the NFL and NBA have taken stronger stances in the fight against inequality. Specifically, the NFL proposed a partnership with its players to help influence social change.[316] The proposal includes the NFL donating nearly $100 million over a seven-year period to support causes important to the African-American communities.[317] The money comes directly from the owners and periodic fundraisers.[318] The donation is not tied to a quid pro quo for players to end their protest.[319] Although, that is the league's hope by entering into the agreement.[320]

Likewise, the NBA is not only supporting athlete activism, but encouraging its players to use their platform for social change. The 2018 NBA All-Star Weekend featured various charitable events, in addition, to the two teams playing on behalf of a community organization selected by the team captains, LeBron James and Stephen Curry.[321] The winning team's charity received a $350,000 donation and the losing team's charity received a $150,000 donation.[322] Further, Adam Silver and NBA Players Association Executive Director Michele Roberts co-signed a letter supporting athlete activism:

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[315] Jessica Ann Levy, *Good Corporate Citizenship Won't End Racism. The NFL Must do More*, WASHINGTON POST (Oct. 8, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/10/08/good-corporate-citizenship-wont-end-racism-the-nfl-must-do-more/?utm_term=.a167582888ce.

[316] Jim Trotter & Jason Reid, *Players Debating NFL's Proposed Donation to Social Justice Organizations*, ESPN (Nov. 29, 2017), http://www.espn.com/nfl/story/_/id/21606390/nfl-offers-100-million-plan-social-justice-organizations-partnership-players.

[317] *Id.*

[318] *Id.*

[319] *Id.*

[320] *Id.*

[321] 2018 *NBA All-Star Game Teams will Donate Money to Two Community-based Organizations Selected by Team LeBron and Team Stephen*, NBA.COM (Jan. 31, 2018), http://www.nba.com/article/2018/01/31/all-star-game-teams-charitable-donation-official-release.

[322] *Id.*

> None of us operates in a vacuum. Critical issues that affect our society also impact you directly. Fortunately, you are not only the world's greatest basketball players—you have real power to make a difference in the world, and we want you [to] know that the Players Association and the League are always available to help you figure out the most meaningful way to make that difference.[323]

Executive Director of the NBPA Foundation, Sherrie Deans, has worked with several teams and individual players on how to contribute to social change.[324] The Memphis Grizzlies hosted an event to discuss the issues at intersection of race and sports and the Milwaukee Bucks are partnering with the Milwaukee Police Department to create a midnight basketball league for young adults ages 18-25.[325] The NBA is committed to supporting its players in their journey to fight social injustice.[326]

CONCLUSION

Despite some fan backlash, athlete activism is steadily growing and gaining momentum as it secures the support of the professional leagues. While constitutional protections may not be applicable to athlete protest given the private nature of professional sports, it appears that does not matter. At least not yet. Both the NFL and NBA have shown support for their players' initiatives and are finding ways to improve race relations and fight social injustice. However, league CBAs and SPCs provide mechanisms through which athletes may be punished for their activism. Additionally, morals clauses in endorsement deals can restrain an athlete's ability to participate in protest. Athletes may lose such deals based on activist statements or actions that run afoul of the endorser. Nonetheless, today's athletes are not afraid

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[323] Kristian Winfield, *The NBA is Encouraging Player Activism While the NFL is Struggling with Protest*, SBNATION (Sept. 7, 2017), https://www.sbnation.com/2017/9/7/16270418/adam-silver-michele-roberts-letter-players-social-activism-nfl-colin-kaepernick.

[324] Mia Hall, *Bigger Than Basketball: How the NBA is Supporting Social Justice*, NBC (Feb. 16, 2017), https://www.nbcnews.com/news/nbcblk/bigger-basketball-how-nba-supporting-social-justice-n717901.

[325] *Id.*

[326] *Id.*

to speak up; in the words of Martin Luther King, Jr. “there comes a time when silence is betrayal.”

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SOCCER STADIUMS, WHERE INTERNATIONAL LAW, CULTURE AND RACISM COLLIDE

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ABSTRACT

Racism and xenophobia have long introduced themselves as a source of conflict in societies. Soccer stadiums have been struggling with the problem of fan-based racism for a long time. Sport governing bodies, in soccer particularly, along with the Court of Arbitration for Sports are developing a body of law with distinguished principles to fight the plague of racism and hatred in stadiums. These distinguished principles will be analyzed in this article. Despite this progress, there is still a need for cooperation between governments and sport governing bodies. The focus will be on education and dialogue in order to create a cultural change in societies.

INTRODUCTION

"…[T]he minute a goal is scored everybody hugs one another. The most important thing to remember is that the [soccer] ball doesn't care what color you are." [1]
—Clyde Best

At some point during the game, the opposing team's fans start making noise; it takes a few seconds to realize that they are

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[1] Gary Morley, *Racism in Football: 'It's Not Black and White*,*'* CNN (Feb. 23, 2012), http://edition.cnn.com/2012/02/23/sport/football/football-racism-england/index.html.

directing monkey chants at one of the players.[2] Throwing bananas at players,[3] racial abuse by chants[4] or by gestures,[5] matches being suspended,[6] and players leaving the field in tears,[7] are just a few examples of how racism is undermining one of the most popular sports in the world.

Rooted in societies and cultures, racism has penetrated soccer stadiums. "[R]acism is the belief in the superiority of a race, religion or ethnic group. It is most commonly expressed through less favorable treatment, insulting words or practices which cause disadvantage." [8] It is a complicated network of behaviors, signs, symbols, letter and number codes, runes, clothing brands, and prints, each carrying a different meaning based on social and political backgrounds.[9] Similar to organized

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[2] Alexander Wynn, *Red Card Racism: Using the Court of Arbitration for Sport (CAS) to Prevent and Punish Racist Conduct Perpetrated by Fans Attending European Soccer Games*, 13 CARDOZO J. OF CONFLICT RESOL. 313, 314 (2011).

[3] *Dani Alves: Barcelona Defender Eats Banana After It Lands on Pitch*, BBC SPORT (Apr. 28, 2014), http://www.bbc.com/sport/football/27183851.

[4] Simon Romero, *Neymar's Injury Sidelines Effort to End World Cup Racism*, N.Y. TIMES (July 7, 2014), https://www.nytimes.com/2014/07/08/world/americas/neymars-injury-sidelines-effort-to-end-world-cup-racism.html; *see also* Marcus Christenson, *Euro 2012: Mario Balotelli Threatens to 'Kill' Banana-Throwing Fans*, THE GUARDIAN (May 29, 2012), http://www.theguardian.com/football/2012/may/30/euro-2012-mario-balotelli-italy.

[5] *West Ham Fans Chant 'Hitler's Coming for You' at Tottenham Crowd*, THE TELEGRAPH (Nov. 26, 2012), http://www.telegraph.co.uk/sport/football/teams/tottenham-hotspur/9702512/West-Ham-fans-chant-Hitlers-coming-for-you-at-Tottenham-crowd.html (pointing out that fans were hissing numerous times during the game mocking the incident of gassing Jews during the second world war).

[6] *Milan Friendly Abandoned After Players Protest Against Racist Chants*, THE GUARDIAN (Jan. 3, 2013), https://www.theguardian.com/football/2013/jan/03/milan-friendly-abandoned-racist-chants.

[7] *Racist Serb Fans Torment Brazilian Footballer Everton Luiz*, BBC (Feb. 20, 2017), http://www.bbc.com/news/world-europe-39028982.

[8] Union of European Football Associations, Unite Against Racism in European Football: UEFA GUIDE TO GOOD PRACTICES 8 (July 2003), http://www.uefa.com/newsfiles/82716.pdf [hereinafter UEFA].

[9] *See* Fare Network, Monitoring Discriminatory Signs and Symbols in European football (June 2016), http://www.farenet.org/wp-content/uploads/2016/10/Signs-and-Symbols-guide-for-European-football_2016-2.pdf [hereinafter FARE NETWORK].

crime groups, this system attacks human dignity.[10] Presently, soccer stadiums are in a unique position in the global fight against racism.

The fight against racism in sports is evolving, primarily through the conduct of the International Federation of Association Football (FIFA) and the Union of European Football Associations (UEFA), with the support of awards from the Court of Arbitration for Sports (CAS). CAS jurisprudence has helped clarify the relevant elements of fan-based racism, which is the main subject of this article. Meanwhile, international law, particularly during the past two decades, has frequently addressed this phenomenon in sporting venues.[11]

This article will analyze the intersection between international law, culture, and fan-based racism in soccer stadiums. Part I describes the problem. Part II discusses the regulatory framework in international and organizational levels. Part III analyzes the jurisprudence of the CAS, which helps clarify the legal framework applicable to those who are involved in sports. Part IV uncovers the roots and origins of racism, and concludes that the current approach of rejecting any kind of cultural justification can be effective if it is coupled with education.

I. FANS, RACISM, AND SOCCER

Multiculturalism creates complicated challenges for modern communities.[12] People with various cultural and national backgrounds participate in sports.[13] This makes sports one of the most important avenues for introducing multiculturalism into societies through hiring players from different parts of the world solely based on their skills and abilities. Soccer's domination—its "economic primacy," particularly in Europe, and vast media

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[10] *See* FARE NETWORK, GLOBAL GUIDE TO DISCRIMINATORY PRACTICES IN FOOTBALL (June 2017), http://www.farenet.org/wp-content/uploads/2017/06/Global-guide-to-discriminatory-practices-in-football-low-res.pdf [hereinafter FARE Global Guide].

[11] *See* discussion *infra* Part II. Section A.

[12] SANDRA FREDMAN, DISCRIMINATION LAW 52 (2nd ed. 2011).

[13] Human Rights Council, *Rep. of the Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action on Its Ninth Session*, ¶ 56, U.N. Doc. A/HRC/19/77 (Feb. 20, 2012).

coverage around the world—put it on the frontline in the debate on racism and discrimination in sports.[14]

Statistics and research show that soccer in the European Union is most impacted by racism.[15] Researchers have traced racism in European soccer all the way back to the 1920s when Jack Lesley was playing for Plymouth FC. Racism in soccer grew during the 1970s and 1980s when Clyde Best and Viv Anderson—the first black player to be capped by England—gave detailed accounts of racial abuses they suffered as players.[16]

Incidents of fan violence are most commonly the result of racial biases.[17] In fact, spectator violence in soccer brought attention to this problem.[18] In both men's professional and amateur soccer, regulators have recognized fans as the primary source of racist incidents.[19] During the past years, soccer stadiums have also been convenient places for racist groups to cry out their hate. Yet, soccer is not the source of racism, but rather an easy platform for extremist groups to promote their racist views and behaviors.[20]

A report monitoring racist abuses, mainly by spectators,[21] at both the professional and amateur level,[22] and throughout almost all the European Union, determined most incidents were targeting "dark skin" athletes with other discriminatory cases

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[14] Mutuma Ruteere (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), *Report to GA: Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive Implementation of the Follow-up to the Durban Declaration and Programme of Action*, ¶ 63, U.N. Doc. A/69/340 (Aug. 22, 2014).

[15] European Union Agency for Fundamental Rights, *Racism, Ethnic Discrimination and Exclusion of Migrants and Minorities in Sport: A Comparative Overview of the Situation in the European Union,* at 33, http://www.furd.org/resources/Report-racism-sport_EN.pdf (last visited Apr. 28, 2018) [hereinafter: FRA Report].

[16] Morley, *supra* note 1.

[17] FRA Report, *supra* note 15, at 15; *see, e.g.* Adrien Vicente and Jean Decotte, *Homophobia Permeates Football World in Spain*, AFP (June 24, 2017) https://sports.yahoo.com/homophobia-permeates-football-world-spain-010918778--sow.html.

[18] FRA Report, *supra* note 15, at 15.

[19] *Id.* at 7.

[20] HOUSE OF COMMONS: CULTURE, MEDIA AND SPORT COMMITTEE, RACISM IN FOOTBALL, 2012–13, H.C. 89, at 8 (UK), http://www.furd.org/resources/Racism%20in%20football%20Committee%20report%20Volume%201%20sep%202012.pdf.

[21] FRA Report, *supra* note 15, at 15.

[22] *Id.* at 35.

against immigrants.[23] However, racist conduct is also directed against minority group athletes[24] from various racial, religious, or ethnic backgrounds. The racist conduct usually includes chanting and insults such as "Go back to Africa!" or "jungle shouts" directed at black athletes[25] or their families;[26] or anti-Semitism[27] and anti-Roma[28] slurs.[29] Groups often exhibit their racist messages through signs or banners with culturally sensitive symbols, like banners containing the Celtic cross, which is the symbol of the international "White Power" movement,[30] or neo-Nazi symbols in support of the former fascist regime.[31] Similarly, these signs or banners may generally target other persons, like club representatives, referees,[32] or the fans.[33]

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[23] *Id.* at 30.

[24] FRA Report, *supra* note 15, at 11. On 17 November in Madrid, several hundred Spanish supporters hurled racist remarks at black players on the English team which was playing a friendly match against Spain. *See* Diène, *supra* note 21, ¶ 31. In October, racist, anti-black songs were heard during a Champions League match being played in Athens between Panathinaikos and Arsenal. *Id.*

[25] Doudou Diène (Special Rapporteur of the Commission on Human Rights on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), *Rep. to General Assembly: The Fight Against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive Implementation of and Follow-up to the Durban Declaration and Programme of Action*, ¶ 32, A/59/329, (Sept. 7, 2004).

[26] *Id.* ¶ 31.

[27] *See* Matthew R. Watson, *The Dark Heart of Eastern Europe: Applying the British Model to Football-Related Violence and Racism*, 27 EMORY INT'L L. REV. 1055, 1058–59 (2013). In Lodz, Poland, a city where the Nazis killed almost its entire 230,000 Jewish residents during World War II, football supporters use the word "Jew" and Jewish imagery as an insult to attack opposing teams. *Id.* at 1058.

[28] *See* Phil Cain, *Hungary Nationalists Whip Up Anti-Roma Feelings*, BBC (Sept. 2, 2012), http://www.bbc.com/news/world-europe-19439679.

[29] Wojciech Zurawski, *Polish Far-right Groups Stir Up Anti-Roma Hatred in the Shadow of Auschwitz*, THE INDEPENDENT (July 9, 2014), http://www.independent.co.uk/news/world/europe/polish-far-right-groups-stir-up-anti-roma-hatred-in-the-shadow-of-auschwitz-9595882.html.

[30] *Celtic Cross, General Hate Symbols*, ADL, https://www.adl.org/education/references/hate-symbols/celtic-cross (last visited Apr. 4, 2018).

[31] FRA Report, *supra* note 15, at 31.

[32] *See* FRA Report, *supra* note 15, at 11.

[33] Doudou Diène (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance) *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, ¶ 53, U.N. Doc. A/HRC/4/19 (Jan. 12,

Despite efforts by Soccer Governing Bodies (SGBs) to fight racism in stadiums,[34] the problem is continuing. Before the Euro 2012 tournament, BBC aired a documentary in which soccer stars were discouraging fans from going to stadiums because of racial hatred and violence. [35] In another instance, Non-governmental organizations (NGOs) confirmed different forms of fan-based racism occurred in Russian soccer one year before hosting the FIFA World Cup.[36] Thus, the problem not only still exists but remains common.[37]

This implies that the current measures and policies are not working effectively. Mr. Doudou Diène, Special Rapporteur of the Commission on Human Rights on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, found that despite huge media coverage, the condemnations and measures taken have not reflected the seriousness and gravity of

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2007). He wishes to refer in particular to the racist and anti-Semitic incidents that took place in Paris at the end of a match between Paris Saint-Germain and Hapoel Tel Aviv on 23 November 2006, during which hooligans attacked a young French national of Jewish origin and a black plain-clothes policeman who had tried to protect him. Caroline Wyatt, *France Faces Up to Football Hooliganism*, BBC NEWS (Nov. 27, 2006), http://news.bbc.co.uk/2/hi/europe/6189888.stm. The policeman used his service weapon, which resulted in the death of one of the attackers and seriously injured another. *Id.* In 2015 in Paris, Chelsea fans in metro pushed back a black man and refused to let him board the Metro singing a racist chant. *See* Roisin O'Connor & John Lichfield, C*helsea Racism Video: French Police Hunt for Football Fans Filmed Pushing Black Man off Paris Metro*, THE INDEPENDENT (Feb. 18, 2015), http://www.independent.co.uk/news/uk/chelsea-fans-filmed-pushing-black-man-off-paris-metro-10052713.html.

[34] For example, football-related arrests and banning orders in season 2014 to 2015 of UK government show steady decrease. *See* UK Home Office, *Official Statistics Football-Related Arrests and Banning Orders Season 2014 to 2015*, GOV.UK (Nov. 26, 2015), https://www.gov.uk/government/publications/football-related-arrests-and-banning-orders-season-2014-to-2015/football-related-arrests-and-banning-orders-season-2014-to-2015.

[35] *Euro 2012: Stadiums of Hate*, BBC PANORAMA (June 3, 2012), http://www.bbc.co.uk/programmes/b01jk4vr.

[36] *See* Natalia Yudina, *Xenophobia in Figures: Hate Crime in Russia and Efforts to Counteract It in 2017*, SOVA CENTER FOR INFORMATION AND ANALYSIS (Feb. 12, 2018), http://www.sova-center.ru/en/xenophobia/reports-analyses/2018/02/d38830/.

[37] SOVA CTR. FOR INF. AND ANALYSIS & THE FARE NETWORK, A CHANGING PICTURE: INCIDENTS OF DISCRIMINATION IN RUSSIAN FOOTBALL 2015-2017 9 (2017), http://www.sova-center.ru/files/xeno/Russia_report.pdf.

the situation.[38] For example: organizing "inclusivity zones" as a safe area for fans inside and outside the stadiums is not only ineffective in eradicating racism from soccer stadiums, but also it sends a message that the only way to protect yourself from abuse is to stay away from the stadiums.[39]

Should soccer be a source of unity or hatred?[40] Despite recognizing sports as a tool to promote equality[41] and inclusion in societies, "to foster peace and development and to contribute to an atmosphere of tolerance and understanding," [42] soccer is the subject of widespread criticism based on the "seriousness of racism in sports."[43]

II. LEGAL EFFORTS TO FIGHT RACISM

Xenophobia usually brings forth acts of discrimination and violence that, in grave circumstances, can lead to genocide and ethnic cleansing.[44] In fact, it was the atrocities of World War II that caused the international community to take steps against

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[38] Doudou Dièn (Special Rapporteur of the Commission on Human Rights on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance), *The fight Against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive Implementation of and Follow-up to the Durban Declaration and Programme of Action*, ¶ 39, U.N. Doc. A/60/283 (Aug. 19, 2005).

[39] Watson, *supra* note 27, at 1062.

[40] GNK Dinamo v. Union des Associations Europeennes de Football, CAS 2013/A/3324, ¶ 1.1 (June 13, 2014), https://www.uefa.com/MultimediaFiles/Download/uefaorg/CASdecisions/02/47/25/32/2472532_DOWNLOAD.pdf [hereinafter Dinamo v. UEFA].

[41] Human Rights Council Res. 24/1, U.N. Doc. A/HRC/RES/24/1, at 3 (Oct. 8, 2013).

[42] Human Rights Council Res. 13/27, U.N. Doc. A/HRC/RES/13/27, at 2 (Apr. 15, 2010).

[43] G.A. Res. 71/179, Combating Glorification of Nazism, Neo-Nazism and Other Practices that Contribute to Fueling Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, at 2 (Dec. 19, 2016) (Despite these efforts, the UN General Assembly expressed "deep concern" about "manifestations of violence and terrorism incited by violent nationalism, racism, xenophobia and related intolerance, including during sports events"). *See also* Ruteere, *supra* note 14 , ¶ 42.

[44] LI-ANN THIO, MANAGING BABEL: THE INTERNATIONAL LEGAL PROTECTION OF MINORITIES IN THE TWENTIETH CENTURY 254 (2005) (considering the situation in Rwanda and Kosovo).

discrimination and racism.[45] Concerned with the deep connection between racism in sports and social-cultural structures, and how racism and discrimination is articulated through sports, United Nations (UN) bodies regularly and carefully observe the circumstances in sports, particularly in soccer.[46] Particular attention from international law has triggered serious efforts by SGBs to fight racism in stadiums.

International law and human rights norms are related to SGB's work because "FIFA is committed to respect all internationally recognized human rights and shall strive to promote the protection of these rights."[47] CAS reliance on international law shows the interaction between the court's jurisdiction and the importance of the court's international human rights law analysis.[48]

A. INTERNATIONAL LAW

Dating back to the 17th century and the Treaty of Westphalia, international law "has a long-established approach toward protecting minorities which created obligations for States to tackle diversity problems in their territories."[49] Under international law, discrimination is a negative concept that States should outlaw.[50]

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[45] NATAN LERNER, GROUPS RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 49 (2d ed. 2003).

[46] Doudou Diène (Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance) *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, ¶ 13, 29, U.N. Doc. E/CN.4/2005/18 (Dec. 13, 2004), http://undocs.org/E/CN.4/2005/18; *See* also Diène, *supra* note 33, ¶ 53.

[47] FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION, FIFA STATUTES: REGULATIONS GOVERNING THE APPLICATION OF THE STATUTES 7 (Apr. 2016), http://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutsweben_neutral.pdf [hereinafter FIFA Statutes].

[48] *See e.g.,* Dinamo v. UEFA, *supra* note 40, ¶ 9 (referring to a paper of European Commission and a decision of the European Court of Human Rights). *See also* Union Cycliste Internationale (UCI) v. Alberto Contador Velasco & Real Federación Española de Ciclismo (RFEC), CAS, 2011/A/2384 & 2386, ¶ 21–32 (Feb. 6, 2012) (the panel acknowledges that the court is bound by provisions of European Convention on Human Rights); Fenerbahçe SK v. Union des Associations Européennes de Football (UEFA), CAS, 2013/A/3139, ¶ 83–103 (Dec. 5, 2013).

[49] THIO, *supra* note 44, at XXIX.

[50] LERNER, *supra* note 45, at 30.

After the Second World War, racism was the primary cause that pushed the international community toward establishing an international regime to combat discrimination.[51] In 1965, the Convention on Elimination of Racial Discrimination was adopted as the most important anti-racist international document.[52] However, some other international documents have addressed discrimination based on race.[53] Regionally, Europe has the most coherent efforts to combat discrimination and racism.[54]

The international community paid particular consideration to the issues of racism in sports in two major documents. The International Convention against Apartheid in Sports[55] was the first international effort to tackle systematic racism in sports. The convention aimed to avoid "sport contact" with those countries that systematically apply racism in sports,[56]

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[51] *Id.* at 30.

[52] ANN-MARIE MOONEY COTTER, RACE MATTERS: AN INTERNATIONAL LEGAL ANALYSIS OF RACE DISCRIMINATION 55 (2006).

[53] *See e.g.,* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Economic Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. UNESCO also has adopted five declarations on racial issues: 1950 The Race Question, the 1951 Statement on the Nature of Race and Race Differences, the 1964 Propositions on the Biological Aspects of Race, the 1967 Statement on Race and Racial Prejudice and 1978 Declaration on Race and Racial Prejudice. *See generally UNESCO on Race*, HONESTTHINKING.ORG (May 5, 2018), http://www.honestthinking.org/en/unesco/index.html.

[54] The European Convention on Human Rights adopted in 1950 emphasizes enjoyment of rights and freedoms enshrined in the Convention without discrimination on any ground. *See What is the European Convention on Human Rights?*, EQUALITY AND HUMAN RIGHTS COMM., https://www.equalityhumanrights.com/en/what-european-convention-human-rights (last visited Apr. 28, 2018). Other documents include: the 1995 Council Resolution on the Fight Against Racism, Xenophobia and Anti-Semitism on the Fields of Employment and Social Affairs, the 1996 Council Resolution concerning European Year against Racism, and the 1997 Council Declaration on the Fight Against Racism, Xenophobia and Anti-Semitism in the Youth Field. Tamera K. Hervey*, Putting Europe's House in Order: Racism, Race, Discrimination, and Xenophobia after the Treaty of Amsterdam, in* LEGAL ISSUES OF THE AMSTERDAM TREATY 346–49 (David O'Keefe & Patrick Twomey eds., 1999).

[55] International Convention Against Apartheid in Sports, Dec. 10, 1985, 1500 U.N.T.S. 177, https://treaties.un.org/doc/Publication/UNTS/Volume%201500/volume-1500-I-25822-English.pdf [hereinafter ICAAS].

[56] LERNER, *supra* note 45, at 128.

and recognized that only "merit" should be the deciding factor to participate in sports.[57]

Sport was again on the agenda in the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance in Durban, South Africa, where the International Olympic Committee was one of the participants. Emphasizing the Olympic spirit, the Durban Declaration highlights the role of sports in promoting tolerance, solidarity, and peace.[58] The participants also recognized sports as a means to prevent and fight the rise of "neo-fascist, violent nationalist ideologies which promote racial hatred and racial discrimination."[59] In order to take a stronger stance against racism in sports, the Declaration recognizes the responsibility of States, intergovernmental organizations, IOC, and international and regional sports federations.[60] It urges stakeholders to take all possible measures to combat racism and, particularly calls attention to the role of youth education through sports.[61] Following the Durban conference, the Committee on the Elimination of Racial Discrimination encouraged all national and international sport entities to "promote a world of sports free from racism, racial discrimination, xenophobia and related intolerance."[62]

The work of the Special Rapporteurs on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance has created valuable literature regarding racism in sport. The General Assembly highlights the role of the Special Rapporteur among others in the fight for eliminating racism in sports.[63] A core component of this mechanism is cooperation between States and international sports entities with the help of relevant human rights procedures.[64]

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[57] ICAAS *supra* note 55, at 179.

[58] World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Report of the World Conference*, ¶ 218 U.N. Doc. A/CONF.189/12 (Sep. 8, 2001).

[59] *Id.* ¶ 86.

[60] *Id.* ¶ 218.

[61] *Id.* ¶ 86.

[62] U. N. Committee on the Elimination of Racial Discrimination, *General recommendation No. 33: Follow-up to the Durban Review Conference*, U.N. Doc. CERD/C/GC/33, ¶ 2(c) (Sep. 29, 2009) [hereinafter General Recommendation No. 33].

[63] G.A. Res. 58/160, ¶ 54 (Dec. 22 ,2003).

[64] Ruteere, *supra* note 14, ¶13; *See also* Doudou Diène (Special Rapporteur on the Fight Against Racism, Racial Discrimination, Xenophobia

The Special Rapporteur began its mission in 1993 under the mandate of the Commission on Human Rights, working to encourage societies and the international community to work against racial hatred and harassment.[65] In this context, sports:

> [h]ave the capacity to demystify racial superiority discourses, making them an important and practical instrument for combating racism and proving that athletes succeed in sports independent of their skin colour . . . . Furthermore, sports can be used as a positive symbol for social acceptance by conveying the image of multi-ethnic teams representing one nation and competing for a common goal.[66]

Additionally, the Special Rapporteur keeps a close and strong relationship with sport governing bodies by writing to FIFA and the IOC about growing racism on the soccer field and in other sports,[67] and by meeting with high profile sports officials.[68]

Generally speaking, international law under the mandate of the Special Rapporteur highlights the capacity of sports in promoting values such as equality, inclusion, diversity, and understanding, and calls States to use this potential to break the status quo of racial superiority.[69] It emphasizes the power of sport to bring people together based on their skills,[70] and describes the unification power of sport as a pattern for positive inclusion.[71]

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and Related Intolerance), *Report to General Assembly: The fight against racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action*, U.N. Doc. A/58/313, ¶ 42 (Aug. 22, 2003).

[65] Diène, *supra* note 64, ¶ 31. Human Rights Council extended the Special Rapporteur's mission until 2020. *See* Human Rights Council Res. 34/35, U. N. Doc. A/HRC/RES/34/35 (Mar. 24, 2017).

[66] Ruteere, *supra* note 14, ¶ 15.

[67] Diène, *supra* note 64, ¶ 29.

[68] Diène, *supra* note 38, ¶ 41.

[69] *UN General Assembly: Human Rights Expert Calls for Global Action to Eradicate Racism from Sports*, THE OFF. OF THE UNITED NATIONS HIGH COMM'R FOR HUM. RIGHTS (Nov. 4, 2013), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15247&LangID=E.

[70] *Id.*

[71] *Id.*

Nevertheless, the coordinative nature of international law and lack of an authoritative enforcement body,[72] leaves the police powers to national jurisdictions. To keep the governments out of this realm, sports organizations should play a more effective role.

B. SOCCER GOVERNING BODIES (SGBS)

Soccer governing bodies are on the front line of fighting racism. Reacting to international concerns about the existence of racist conduct in sports, especially in stadiums, FIFA and UEFA have lead the efforts to eradicate racism from soccer.[73] This commitment has been praised by international experts.[74] Almost all national soccer federations in the Member States have introduced provisions establishing the principle of anti-discrimination, or anti-racism, within their statutes or similar documents.[75] However, there should be stronger measures of action to effectively eliminate racism in stadiums.

1. UEFA

Sports in the European Union are heavily regulated by European Union law. In many cases, it was European Union law that specified the limits and set the borders for sport activities.[76] This strong legal framework has, in some cases, influenced sports governing bodies on a global level and forced them to comply with European Union law.[77] The coherent European Union approach to combat racism, compared to FIFA, has resulted in more

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[72] ROBERT KOLB, THEORY OF INTERNATIONAL LAW 157–158 (2016).

[73] Diène, *supra* note 38, ¶ 41.

[74] *Id.* ¶ 44–45.

[75] FRA Report, *supra* note 15, at 42.

[76] *See* Case C-415/93, Union Royale Belge des Societes de Football Association ASBL [Royal Belgian Football Association] [URBSFA] v. Bosman, 1995 E.C.R. I-4921.

[77] FIFA struggled to apply its 6+5 rule because the EU's legal framework has recognized the discriminatory nature of this rule and thus UEFA could not enforce this rule based on its conflict with EU labor law and the Bosman ruling. *See* R. C. R. SIEKMANN, INTRODUCTION TO INTERNATIONAL AND EUROPEAN SPORTS LAW 258–65 (2012).

disciplinary sanctions, [78] and, since 2008, even criminal legislation.[79]

Regulators considered racist conduct and discrimination in European sports as a threat to sports during the late 1990s.[80] The European Union's legal framework was successful in creating a well-established structure to fight racism with UEFA working as the pillar to bring together governmental and non-governmental organizations, and serves as a good model for other sports.[81] In fact, UEFA requires different European bodies to take action against racism, notwithstanding those bodies' own actions against racism.[82]

Under this framework, UEFA created a well-designed system to combat racism. [83] One of UEFA's objectives is

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[78] *See* FRA Report, *supra* note 15, at 26 ("Between the 2003-2004 and 2008-2009 seasons, negative sanctions for racist behaviour in European Cup Competitions or European Championship Games were imposed at least 41 times on clubs and football federations, including fines or stadium suspensions. In comparison, FIFA has imposed fines on member associations in relation to Article 58 of its Disciplinary Code twice in the past five years (among them one European federation)."). Criminal proceedings against football fans involved in racist conduct, have been recorded in some countries like Estonia, France and UK. *Id.* at 40.

[79] *Id.* at 11.

[80] *Id.* at 15.

[81] *Id.* at 25.

[82] *See, e.g.*, Council of Europe, European Convention on Spectator Violence and Misbehaviour at Sports Events and in Particular at Football Matches art. 3, Aug. 19, 1985, 1496 U.N.T.S. 125; Council of Europe, Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events, CETS No.218 https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680666d0b (July 3, 2016); EUR. PARL., DOC. 0069/2005, ¶ D(3), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+WDECL+P6-DCL-2005-0069+0+DOC+PDF+V0//EN&language=EN (Nov. 30, 2005); EUR. PARL., DOC. P6_TA(2006)0080, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2006-0080+0+DOC+PDF+V0//EN (2006); *Media Against Racism in Sport*, EUROPEAN UNION AND THE COUNCIL OF EUROPE, http://www.coe.int/t/dg4/cultureheritage/mars/default_en.asp (2014); European Commission against Racism and Intolerance (ECRI), *General Policy Recommendation N°12:Combating racism and racial discrimination in the field of sport*, COUNCIL OF EUROPE http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N12/Recommendation_12_en.asp (Dec. 19, 2008).

[83] FRA Report, *supra* note 15, at 7–8.

promoting peace and understanding through soccer regardless of race.[84] It calls on member associations to adopt effective policies and rigid legal actions to wipe out racism and discrimination in soccer. [85] Zero tolerance against racism and going beyond differences is one of UEFA's eleven values, which allows soccer to be an example for other sports.[86] UEFA recognizes speaking out against racism as a part of soccer players' and coaches' duties.[87] UEFA sustainability plans include recognizing sports' social responsibility in the EU, [88] and combating racism and discrimination. [89]

In 2008, UEFA took further action through guidelines and policies to apply anti-discrimination regulations on the club licensing process to oblige the clubs to adopt anti-discriminatory and anti-racist approaches. [90] Provisions against discrimination exist in all European soccer federations' statutes and two-thirds of them expressly penalize racial abuses.[91] UEFA organizes official days to tackle racism and discrimination each season, which is match day three of UEFA Champions League and UEFA Europa League.[92] UEFA's disciplinary regulations identify sanctions for racist behaviors ranging from suspension to heavy fines and stadium bans.[93]

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[84] Union of European Football Association (UEFA), UEFA Statute, art. 2(1)(b) (2014) [hereinafter UEFA Statute].

[85] UEFA Statute, *supra* note 84, at art. (7)(7).

[86] *Eleven Values*, UEFA.COM http://www.uefa.org/about-uefa/eleven-values/ (last visited Apr. 20, 2018).

[87] UEFA, IX. RESOLUTION EUROPEAN FOOTBALL UNITED AGAINST RACISM, ¶ 10 (2013), http://www.uefa.org/MultimediaFiles/Download/EuroExperience/uefaorg/Anti-racism/01/95/54/81/1955481_DOWNLOAD.pdf [hereinafter UEFA Resolution]; *see also* EUR. PARL. DOC. 0069/2005, *supra* note 82, ¶ D(3).

[88] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. 165, Dec 13, 2007, 2007 O.J. (C306).

[89] FRA Report, *supra* note 15, at 25.

[90] UEFA, UEFA CLUB LICENSING AND FINANCIAL FAIR PLAY REGULATIONS art. 23 (2015), https://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/02/26/77/91/2267791_DOWNLOAD.pdf.

[91] FRA Report, *supra* note 15, at 7.

[92] UEFA, TACKLING RACISM IN CLUB FOOTBALL: A GUIDE FOR CLUBS 17 (2006), http://www.uefa.com/MultimediaFiles/Download/uefa/KeyTopics/448328_DOWNLOAD.pdf.

[93] UEFA, DISCIPLINARY REGULATIONS art. 8 (2017) [hereinafter UEFA DR].

2. FIFA

FIFA assumes racism is an "immense harm to sports."[94] Traditionally, FIFA has been active in the fight against racism in areas ranging from regulating and sanctions to symbolic moves to promote tolerance and encourage fair play.[95] These efforts can be traced back to the 1960s, when FIFA was trying to ensure respect and peace in its territory.[96] "[D]iversity and antidiscrimination" programs are some essential elements of FIFA's agenda to implement its social responsibility.[97] FIFA has recognized this as a human rights issue of "high relevance" [98] as highlighted in FIFA's annual member associations conference.[99] Racism is one of the issues that FIFA continually take action against[100] to protect FIFA's values and stop procedures that might endanger the game's integrity.[101]

FIFA's first action was in 2001, when its congress ratified the resolution against racism in Buenos Aires, Argentina. This recognized soccer's responsibility of "power and influence" on society.[102] One year later, FIFA launched the first international anti-discrimination day to raise awareness about this phenomenon.[103] In March 2003, the FIFA Executive Committee adopted the handshake before the start of games as an indication

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[94] Josip Šimunič v. FIFA, CAS, 2014/A/3562, ¶114 (Jul. 29, 2014) [hereinafter Šimunič v. FIFA].

[95] Ruteere, *supra* note 14, ¶ 35.

[96] *See* FIFA, GOOD PRACTICE GUIDE ON DIVERSITY AND ANTI-DISCRIMINATION 14 (2015) [hereinafter FIFA Good Practices] http://resources.fifa.com/mm/Document/AFSocial/Anti-Racism/02/70/94/34/goodpracticeguide_Neutral.pdf.

[97] *Id.* at 9.

[98] FIFA Statutes, *supra* note 47, at 46.

[99] *Id.*

[100] *Id.* at 13.

[101] *Id.* at 6.

[102] *Extraordinary FIFA Congress ratifies resolution against racism*, FIFA.COM (July 7, 2001), http://www.fifa.com/about-fifa/news/y=2001/m=7/news=extraordinary-fifa-congress-ratifies-resolution-agains-racism-78421.html.

[103] *FIFA Anti-Discrimination Days*, FIFA.COM, http://www.fifa.com/sustainability/news/y=2007/m=5/news=fifa-anti-discrimination-days-518198.html. (last visited April 20, 2018).

that "respect for rivals and referees comes before the contest itself."[104]

In 2004, FIFA amended Article 3 of its statutes to further develop the scope of its anti-discrimination efforts.[105] To encourage its goal of promoting diversity, in March 2005, FIFA's Executive Committee created a team of ambassadors against racism using past and present soccer legends.[106]

The formation of the FIFA Task Force Against Racism and Discrimination in 2013 and the following resolution calling for education, prevention, and sanction is of great importance.[107] The task force dissolved in 2016,[108] after providing FIFA with recommendations that became the foundation of FIFA's ongoing plans in the fight against racism.

FIFA's discrimination handbook sets forth the framework for future actions and provides that the pledge to overcome racism requires the contribution of "all persons involved directly or indirectly with the sport of [soccer] at all levels and in all countries,"[109] from governmental officials, referees, and the media. It also explicitly addresses soccer fans, asking them to take related measures in the battle against racism.[110]

The fight against racism takes place in five different fronts: (1) regulations, (2) communication, (3) controls and sanctions, (4) networking and cooperation, and (5) education.[111] These factors can help design a national action plan to implement Article 4 of FIFA's statutes.

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[104] Diène, *supra* note 46, ¶ 33.

[105] Previously article 2 par 3.1 of the FIFA Statutes stating: "there shall be no discrimination against a country or an individual for reasons of race, religion or politics" is amended to: "Article 3 – Non-discrimination and stance against racism: Discrimination of any kind against a country, private person or groups of people on account of ethnic origin, gender, language, religion, politics or any other reason is strictly prohibited and punishable by suspension or expulsion." FIFA GOOD PRACTICES, *supra* note 96, at 22.

[106] Diène, *supra* note 46, ¶ 43.

[107] FIFA, *Resolution on the Fight Against Racism and Discrimination,* FIFA Cong. Res. 11.2, 63d Cong., at 2–3 (May 31, 2013), https://resources.fifa.com/mm/document/afsocial/anti-racism/02/08/56/92/fifa-paper-against-racism-en-def_neutral.pdf.

[108] *Fifa Says Anti-Racism Taskforce Had Completed Work*, BBC NEWS (Sept. 26, 2016), http://www.bbc.com/sport/football/37470473.

[109] FIFA GOOD PRACTICES, *supra* note 96, at 11.

[110] *Id.* at 11–12.

[111] *Id.* at 16.

FIFA's statutes state that any discriminatory conduct can be punished by suspension or expulsion.[112] Spectators are also subject to FIFA's disciplinary code.[113] FIFA adopted measures that include the removal of fans from stadiums and police intervention when fans engage in racist conduct.[114] Moreover, Law 5 of the Laws of the game clearly states: "The referee stops, suspends or abandons the match because of outside interference of any kind."[115] This also applies to misconduct by spectators.[116] Subsequently, Law 5 says that if this violation is by a supporter, then FIFA will impose a minimum stadium ban of two years on that person.[117] "A stadium ban can prohibit someone from entering the confines of one or several stadiums."[118]

FIFA also imposes sanctions against soccer associations for their fan's behaviors with the assistance of its Anti-Discrimination Monitoring System. Started during the 2018 FIFA World Cup Qualifying round, FIFA has used this system to open "disciplinary proceedings against the associations of Chile, Paraguay, Peru, Mexico, El Salvador, Honduras, and Croatia."[119]

III. ANALYSIS OF LEGAL FRAMEWORK AGAINST RACISM IN SOCCER

Despite these measures by sport governing bodies, soccer stadiums are still struggling with the plague of racism. One reason may be the reluctance of SGBs to apply harsh sanctions resulting from a lack of independence.[120] The lack of appeals on fines imposed by UEFA is an indication that parties regard the fines as insignificant.[121] Another reason is that sanctions are limited to the

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[112] FIFA Statutes, *supra* note 47, at 6.

[113] FIFA, FIFA DISCIPLINARY CODE 11 (2011 ed.) https://resources.fifa.com/mm/document/affederation/administration/50/02/75/discoinhalte.pdf [hereinafter FIFA DC].

[114] *See id.* at art. 58(3).

[115] FIFA GOOD PRACTICES, *supra* note 96, at 40.

[116] *Id.*

[117] FIFA DC, *supra* note 113, at art. 58.

[118] *Id.* at art. 21.

[119] *FIFA Sanctions Several Football Associations After Discriminatory Chants by Fans*, FIFA.COM (May 27, 2016), http://www.fifa.com/governance/news/y=2016/m=5/news=fifa-sanctions-several-football-associations-after-discriminatory-chan-2792733.html.

[120] *See* Wynn, *supra* note 2, at 314–16.

[121] *Id.* at 319–20.

matches played under UEFA's control, which allow misbehaving supporters to attend other matches.[122] This leads to the presumption that UEFA is only sending a mild warning[123] for violating discrimination regulations.[124]

In addition, these administrative bodies may lack adequate legal experience, which might result in real abusers remaining unsanctioned. CAS has sometimes criticized FGBs' approach on handling racism,[125] such as in the case of *Albania v. UEFA*, concerning the incidents of a 2016 UEFA Championship Qualifying match between the Serbian and the Albanian national soccer teams. The CAS panel in that case disagreed with both UEFA's understanding of the incidents of the match and their conclusion about why Albania refused to continue the game.[126] Unlike UEFA, the panel decided that the reason for abandoning the match was because of the situation created by Serbia's fans.[127]

CAS's independence, compared to UEFA, makes it more effective in combating racism in soccer. CAS panelists can promote dispute settlement or accurately enforce the provisions of UEFA's Disciplinary Regulations and Statutes without fear of becoming victims of politically motivated reprisal.[128] SGBs and CAS have developed a jurisprudence with regard to racist incidents. All soccer associations, clubs, national and international sports bodies, and fans should be aware of the crucial elements of this jurisprudence. These elements will be further analyzed.

A. RACISM DEFINITION AND CULTURAL EXCEPTIONS

The starting point and the cornerstone of any legal argument is how certain terms/concepts are defined. The definition of racism is one of the key topics in the legal fight against racism in soccer.

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[122] Watson, *supra* note 27, at 1068.

[123] *See* Wynn, *supra* note 2, at 322.

[124] *See id*. at 321.

[125] *See* Football Association of Albania v. UEFA & Football Association of Serbia, CAS, 2015/A/3874, ¶ 215 (Jul. 10, 2015) [hereinafter Albania v. UEFA].

[126] *Id*. ¶ 207–253.

[127] *Id*. ¶ 248.

[128] *See* Wynn, *supra* note 2, at 353.

In the case of *Feyenord v. UEFA,*[129] a fan threw an inflatable banana onto the field during a match which landed close to where play was stopped.[130] Following this incident, UEFA held that Feyenord Rotterdam, the team the fan was associated with, was responsible for the fan's behavior—the club appealed UEFA's decision to CAS.[131] In its submission to the court, the club attacked the definition of racism by challenging the ambiguity of the definition.[132] CAS affirmed that racism has a wide definition in UEFA regulations, and in recognizing this, it indicated that the definition is broad enough to include all forms of racial conduct and abuses.[133]

The International Convention on the Elimination of All Forms of Racial Discrimination (ICEAFRD) defines racial discrimination as:

> Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[134]

FIFA's statute extends the scope of this definition. It prohibits *any kind of discrimination* "against a country, private person or group of people" setting forth factors like "race, skin colour, ethnic, national or social origin, gender, disability, language, religion, political opinion or any other opinion, wealth, birth or any other status, sexual orientation or any other reason."[135] FIFA's Code of Ethics bans derogatory conduct with the same elements using

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[129] Feyenoord Rotterdam N.V. v. Union des Associations Européenes de Football (UEFA), CAS, 2015/A/4256 (June 24, 2016) [hereinafter Feyenoord v. UEFA].

[130] *Id.* ¶ 5.

[131] *Id.* ¶ 7–8.

[132] *Id.* ¶ 27(8).

[133] *See id.* ¶ 49.

[134] International Convention on the Elimination of All Forms of Racial Discrimination art. 1(1), Mar. 12, 1969, 212 U.N.T.S. 660.

[135] FIFA, FIFA CODE OF ETHICS art. 23 (2012) https://resources.fifa.com/mm/document/affederation/administration/50/02/82/codeofethics_v211015_e_neutral.pdf.

either *actions* or *words*.[136] UEFA's statute provides a general image also.[137] UEFA disciplinary regulations focus on insults to human dignity of a person or group of persons on any grounds.[138]

It is not incidental that neither the Convention on Elimination of Racial Discrimination nor SGBs in their definitions of racism provide examples of racist conduct. In this way, the definition has the flexibility to cover the emergence of new factors based on cultural evolutions. The FIFA handbook also underlines the broad scope of racist behaviors:

> When the FIFA task force talks about discrimination, this extends beyond the various ways it is expressed in public or extreme right-wing manifestations such as discriminatory profanities or physical attacks. There are also hidden forms … this can consist of racist, sexist or disablist jokes, for example, or displaying a preference for a particular group or gender.[139]

FIFA regulations also draw attention to various types of racist conduct "for example, unacceptable levels of verbal provocation or aggression towards players, match officials or opposing fans, racist behaviour and banners and flags that bear provocative or aggressive slogans."[140] Within the sports context, burning a NATO flag in a stadium can be discriminatory against Albanians.[141] CAS infers this incident as an offensive act against

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[136] *Id.*

[137] The article states: "promote football in Europe in a spirit of peace, understanding and fair play, without any discrimination on account of politics, gender, religion, race or any other reason" UEFA Statute, *supra* note 84, at art. 2(1)(b).

[138] UEFA DR, *supra* note 93, at art. 14.

[139] FIFA GOOD PRACTICES, *supra* note 96, at 19.

[140] FIFA, FIFA STADIUM SAFETY AND SECURITY REGULATIONS art. 60(2) http://www.fifa.com/mm/document/tournament/competition/51/53/98/safetyregulations_e.pdf.

[141] Marissa Payne, *Drone Toting Pro-Albanian Flag Causes Riots at End of Albania vs. Serbia 2016 Qualifier Early*, WASH. POST, (Oct. 14, 2014, 9:45 PM), https://www.washingtonpost.com/news/early-lead/wp/2014/10/14/drone-toting-albanian-national-flag-causes-riots-that-end-albania-vs-serbia-euro-2016-qualifying-match-early/?utm_term=.c0fd00013082.

Albanians since NATO bombings were needed to stop the ethnic cleansing of the Albanian people.[142]

While the definition of racism has been extended in SGBs' rules, there are some key concepts to determine racist conduct. The definition based on essential elements might include insults, whether by means of words, symbols, or gestures on whatever ground, against a person or group of persons.[143] If a behavior is racist, it does not matter if it is against the opponents, the club's own players, fans, or officials.[144] Sanctions would follow in any situation.[145]

This broad interpretation also rebuffs any cultural justification. In its risk assessing process, the FIFA monitoring system concentrates on factors such as fan cultures, traditional and current rivalries, number of fans, and their combination.[146] In the first case of fan-based racism in soccer before CAS, the use of the word Gypsy was at issue.[147] The appellant in this case was GNK Dinamo, a Croatian club which was trying to contest allegations of racism by providing cultural justifications for the behavior of its fans.[148] In this case, the fans had addressed the executive chairman of their own club in three different matches by chanting "Mamic, gypsy, get out of our temple."[149] The appellant, attempting to prove that the word Gypsy was no racially offensive, argued that:

> The term gypsy is not inherently pejorative but derives etymologically from the ancient spelling of Egyptian based on a belief that Egypt was the country of origin of that group. Gypsy in Roma language means "good man". Gypsy can be used as a term of cultural description as in the music group Gypsy King or even of affection as in the

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[142] Football Association of Albania v. UEFA, CAS 2015/A/3874, ¶102, (July 10, 2015).

[143] Dinamo v. UEFA, *supra* note 40, ¶ 9.12.

[144] *Id.* ¶ 9.16.

[145] *Id.* ¶ 9.12.

[146] FIFA GOOD PRACTICES, *supra* note 96, at 38.

[147] Dinamo v. UEFA, *supra* note 40, ¶ 2.2–2.7.

[148] *Id.* ¶ 8.2(4).

[149] *Id.* ¶ 2.5.

> UK television programme "My Big Fat Gypsy Wedding."[150]

CAS observed that even if a word in a particular culture is not used as a racial slur, it has to "be viewed against a background of admitted discrimination."[151] The court did take note of the fact that the club chairman was not a Gypsy.[152] Notwithstanding this fact, the court explained that the only reason to use that word was because of the chairman's support from ethnic minorities including people of Roma.[153] In the panel's own words: "even if the word gypsy could in some circumstances not be used as an insult, it does not follow that it can never be used as an insult."[154] CAS also emphasized that challenging the way the chairman was running the club could be done without using the word Gypsy.[155] The panel decided that the chants were offensive to a group of persons and concluded that the UEFA's penalties were proportionate and dismissed the appeal.[156]

The case of *Simonic v. FIFA* was related to the incidents at a qualifying match between Croatia and Iceland. Because of the match's result, Croatia qualified for the World Cup.[157] After the match, one of the Croatian players went to the pitch with a microphone and, while interacting with the crowd, started chanting racially charged phrases.[158] The player was suspended for 10 games and received a stadium ban, but later sought an appeal from CAS.[159] On appeal, the player pointed out the words he used came from a 1876 Croatian opera "Nikolce Subic Zrinski" which had patriotic connotation.[160] However, the panel concluded that the words had a different connotation; one that promoted fascist ideology.[161] The panel explained that the "Ustaše established a terrorist regime in Croatia, which, amongst others, was responsible for the planned mass murder on different groups

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[150] *Id.* ¶ 8(2)–(4).
[151] *Id.* ¶ 8.2(1) (reviewing this case against the background of being a Roma in Croatia).
[152] *Id.* ¶ 8.2(4).
[153] *Id.* ¶ 9.16(2).
[154] *Id.* ¶ 9.15.
[155] *Id.* ¶ 9.16(1).
[156] *Id.* ¶ 9.32.
[157] Šimunič v. FIFA, *supra* note 94, ¶ 4.
[158] *Id.* ¶ 5.
[159] *Id.* ¶ 9.
[160] *Id.* ¶ 31(1).
[161] *Id.* ¶ 32(4).

of the population based on a deeply repugnant ideology and that the wording used by the Player [could] be associated with this regime."[162] Based on this understanding, the court rejected the player's defense that his words were not discriminatory.[163]

Justifications based on culture are rejected even if the conduct is not perceived as insulting or racist in a particular culture. Regardless of how the slogans or words were used in the past, courts look to how they are perceived today.[164] With this analysis, even implied insults toward a person or a group disregarding the cultural factors can be considered racist conduct. In other words, "in the fight against racism, there is little room for actions that, while they might be acceptable by some, are offensive to others."[165] Therefore, CAS believes that the definition of racial discrimination in SGB's rules are inclusive and clear.[166]

B. REASONABLE OBSERVER TEST

The "reasonable observer" test is another aspect of the broad definition of racism. This is the main test, developed by SGBs and utilized by CAS, which provides that conduct may still be racist even if the target of that specific conduct does not have any negative understanding of it.[167]

Based on this concept, whether an observer is located in the stadium or thousands of miles away watching the game on a TV,[168] certain conduct is deemed racist if the reasonable observer recognizes it as an "insult to human dignity."[169] In other words, conduct may be deemed racist if, in the reasonable observer's perception, the conduct is derogatory and humiliating for a person or group of persons, even if the target itself does not feel offended.[170]

When applying this test, SGBs or CAS rely heavily on certain aspects to prove the racist nature of conduct. In establishing that a particular behavior is racially offensive,

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[162] *Id.* ¶ 67.
[163] *Id.* ¶ 68–69.
[164] *Id.* ¶ 71.
[165] Feyenoord v. UEFA, *supra* note 129, ¶ 66.
[166] Dinamo v. UEFA, *supra* note 40, ¶ 9.16(2).
[167] Feyenoord v. UEFA, *supra* note 129, ¶ 63.
[168] *Id.* ¶ 66.
[169] *Id.*
[170] Dinamo v. UEFA, *supra* note 40, ¶ 9.16(2).

regulators account for many surrounding circumstances to prove the reasonableness of observation, such as: "who is saying what to (or about) whom, when, what, how and against what background."[171] Some behavior may not be discriminatory in nature when performed alone, but when combined with other factors it can be seen as racial discrimination by a reasonable person. For example, while a single sign may not be racist, when combined with chants, one may find a racist meaning. This was the case in a dispute regarding the Arphad flag in *Hungary v. FIFA*, where CAS found the use of signs by fascist groups coupled with chants regarding the identity of the opposing team was discriminatory or racist conduct.[172] Another example is when CAS found the use of the word Gypsy in a Croatian soccer stadium to be derogatory, given the fact that Roma children were segregated in Croatian schools.[173]

CAS thoroughly discussed the reasonable observe test in *Simonic*, where a player interacting with the fans said "for the homeland we are ready."[174] The player claimed that his words were merely pointing to the nationalistic sentiments after qualifying for the World Cup.[175] However, one of FIFA's anti-racism officer identified the words as a short form of a "Croatian salute that was used during World War II by the fascist Ustaše movement."[176] FIFA noted that the use of a short form of the infamous slogan does not make a difference in its implied connotation and does not divorce it from the ideologies of that

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[171] *Id.* ¶ 9.14.

[172] Hungarian Football Fed'n v. Fédération Internationale de Football Ass'n (FIFA), CAS No. 2013/A/3094, at 100 (2014), http://www.tas-cas.org/fileadmin/user_upload/Bulletin_2014_2.pdf [hereinafter Hungary v. FIFA].

[173] Dinamo v. UEFA, *supra* note 40, ¶. 9.16 (8).

[174] On 19 November 2013, during the play-off of the preliminary competition European zone of the 2014 FIFA World Cup Brazil in Zagreb, Croatia won the match and qualified for the 2014 FIFA World Cup. Brazil. Šimunič v. FIFA, *supra* note 94, ¶ 4–5. After the game ends, a Croatian player, goes into the pitch and using a microphone starts interacting with the fans. *Id.* While making "rising arm movements" with his left hand, in his native language he first pronounced, *"u boj, u boj"* "to the battle", replied by the spectators in the stadium with the words *"za narod svoj"* "for your people" or "for your nation" and then repeatedly, *i.e.* four times, the words *"za dom"* "for the homeland", replied by the spectators at each occasion with the word *"spremni"* "we are ready." *Id.*

[175] *Id.* ¶ 6.

[176] *Id.*

regime.[177] Without a distinction between the full official form of the slogan and a shorter version used by the player, the panel concluded that the player had used words associated with the fascist regime.[178]

The panel specifically addressed the identical form of using the slogan by both the Utase regime and the player, which is an interaction from an individual on one side coupled with the response of the crowd on the other side.[179] This uniformity makes a reasonable observer believe that the player intended to communicate a fascist message.[180]

Essentially, it is the entire incident which defines the racist conduct. The panel considers the surrounding situations and the combination of conduct performed. Behaviors like raising the left hand and the response of the spectators to the player's words,[181] the reaction of other fans in the stadium who felt offended,[182] and other instances of Croatian fans using the Ustaše regime in other matches,[183] are deciding factors in the Court's analysis. Thus, the conduct is not observed in a vacuum but against the context in which a party performed it.[184]

How the act is reflected in society is also of great importance. Here, especially absent a proceeding,[185] media has a strong impact on the reasonableness test. CAS's use of media reports is documented in *Feyenoord v. UEFA* where, in proving the racist nature of the act, the panel also made reference to the way the media covered the news.[186]

CAS also takes into account the stadium environment and the fans' attitude towards the opponent, including any general hostility towards opposing teams or fan base.[187] CAS ignores national court's jurisprudence in rejecting racist conduct based on using a different form of a slogan and states that this does not affect the discriminatory nature of the conduct in the world of

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[177] *Id.* ¶ 32(3).
[178] *Id.* ¶ 49.
[179] *Id.* ¶ 58.
[180] *Id.* ¶ 59.
[181] *Id.* ¶¶ 48, 64, 69, 71, 83, 90, 91.
[182] *Id.* ¶ 70.
[183] *Id.* ¶ 71.
[184] Dinamo v. UEFA, *supra* note 40, ¶ 9.14.
[185] Šimunič v. FIFA, *supra* note 94, ¶ 83.
[186] Feyenoord v. UEFA, *supra* note 129, ¶ 29.
[187] *Id.*

sports.[188] They point out the evaluation should be on a case by case basis.[189]

C. UNINTENTIONAL RACISM

CAS case law indicates that its panel's main focus is to identify the intentional nature of a person's behavior at the time of the alleged racist conduct. For example, in *Simonic*, CAS referred to the player's own statements when he said that he "cautiously" avoided using parts of the slogan associated with a fascist regime.[190] Based on this statement, the panel reasoned that the player was aware of the negative implications of his conduct.[191] In addition, CAS interpreted the appellant's effort in detaching himself from the supporters' reaction as a sign of the appellant's knowledge about the discriminatory nature of his statements.[192] In this context, the panel found that the appellant's general knowledge of the probable meaning of his words was as an indication of knowingly using racist slurs.[193]

Whether the actor had enough time to ponder what he was going to do is another factor in determining intent. In *Simonic v. FIFA*, the panel noted that the forty-minute gap between qualifying for the World Cup and the player's conduct, in addition to the time waiting to find a microphone to address supporters,[194] was sufficient time for the player to think about his actions.[195] The Court interpreted it as "an indication of the intention of the player to plan the movement and then enforce it."[196]

CAS jurisprudence's greatest development is the recognition of unintentional racism, where the perpetrator is subject to penalties even though the perpetrator is unaware of his or her misbehavior. This doctrine complies with Article 7(1) of the FIFA Disciplinary Code, which provides that all violations are punishable regardless of deliberation or negligence.[197] Once racist remarks are proven, it does not matter whether the perpetrator

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[188] Šimunič v. FIFA, *supra* note 94, ¶ 77–78.
[189] *Id.* ¶ 83.
[190] *Id.* ¶ 106.
[191] *Id.*
[192] *Id.* ¶ 58.
[193] *Id.* ¶ 68.
[194] *Id.* ¶ 5.
[195] *Id.* ¶¶ 92, 120.
[196] *See id.* ¶ 59.
[197] FIFA DC, *supra* note 113, at art. 7(1).

intended to insult a particular person or group of people.[198] FIFA's handbook has considered unintentional racism when pointing out instances where the perpetrator is not aware of the effect of his conduct.[199] In *Feyenord v. UEFA*, involving the incident of someone throwing an inflatable banana onto the pitch, the panel accepted the *reasonable possibility* that there was no discriminatory purpose.[200] Yet, the panel also pointed out that this is an illustration of "*potentially unintentional racism*."[201] CAS acknowledges that this situation may rarely arise, but if it does, CAS can consider it as a mitigating factor if preventive measures for the future are adopted.[202]

D. STRICT LIABILITY FOR SUPPORTERS' CONDUCT

The lack of punishment for racial abuses in sports is a source of concern for the Special Rapporteur who has called for effective measures in national jurisdictions to combat discriminatory conduct.[203] The principle of strict liability, and the definition of supporter, work together to avoid situations where no liability can be assigned and thus misconduct remains unpunished.

The strict liability doctrine is the intersection between the reasonable observer test, the definition of racism, and the definition of supporter. According to CAS jurisprudence, the term "supporter" is an open concept that is intentionally and wisely undefined.[204] It must be assessed from the perspective of a reasonable and objective observer."[205] In fact, applying this test is

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[198] GNK Dinamo v. UEFA, *supra* note 40, ¶ 9.12.

[199] FIFA GOOD PRACTICES, *supra* note 96, 25.

[200] Feyenoord v. UEFA, *supra* note 129, ¶ 77.

[201] *Id.*

[202] *Id.*

[203] Ruteere, *supra* note 14, ¶ 62.

[204] Fenerbahçe SK v. Union des Associations Européennes de Football (UEFA), CAS, 2013/A/3139, ¶ 64 (Dec 5, 2013) [hereinafter Fenerbahçe v. UEFA]; *see also* Feyenoord v. UEFA, *supra* note 129, ¶ 17.

[205] Albania v. UEFA, *supra* note 125, ¶ 189; *see also* Feyenoord v. UEFA, *supra* note 129, ¶ 46 (The panel says: "The term 'supporter' is not defined. In particular, the Panel notes that it is not linked to race, nationality or the place of residence of the individual, nor is it linked to a contract which an individual has concluded with a national association or a club in purchasing a match ticket. The Panel has no doubt that it is UEFA's deliberate, and wise, policy not to attempt to provide a definition for 'supporter'. … There is no UEFA provision that makes a distinction between 'official' and 'unofficial' supporters of a team. Nor could such a provision easily be drafted. UEFA could

the only manner in which CAS can attribute responsibility in a case of supporter misconduct.[206]

Identifying the perpetrators of misconduct can be a real challenge for match officials. This is especially true when 200-300 perpetrators are scattered in a section that contains 2,000 to 3,000 fans,[207] or when a drone from outside the venue is the means of perpetrating the improper behavior.[208] In *Albania v. UEFA*, a drone carried nationalistic Albanian symbols into the stadium.[209] Efforts to remove the banners carried by the drones sparked reactions from the Albanian players who attempted to protect the banners.[210] The CAS panel assigned to review the incident concluded that defensive response of the Albanian players was grounds for attributing the drone to Albanian supporters.[211] The panel further held that it was not necessary for the supporters to be in the stadium, or to be in sight;[212] an association or a club becomes responsible for its supporters' misbehavior as long as the incident takes place at a match.[213]

Once identified, the supporter's club or association is responsible for the supporter's misconduct. The principle of strict liability is the core concept of FIFA disciplinary Code with regard to spectators, which attributes the liability of supporters conduct to either or both the home or guest association or club, regardless of culpability.[214]

Strict liability was challenged in the case of *Fenerbahce*,[215] and also *Hungary v. FIFA*.[216] In *Hungary v. FIFA*, the Hungarian Football Federation, appealing a disciplinary

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not be satisfied that its Disciplinary Regulations would ensure the responsibility of clubs for their supporters if such a distinction were made. The only way to ensure that responsibility is to leave the word 'supporters' undefined so that clubs know that the Disciplinary Regulations apply to, and they are responsible for, any individual whose behavior would lead a reasonable and objective observer to conclude that he or she was a supporter of that club. The behavior of individuals and their location in the stadium and its vicinity are important criteria for determining which team or club they support.").

[206] Feyenoord v. UEFA, *supra* note 129, ¶ 3.
[207] Hungary v. FIFA, *supra* note 172, ¶ 33.
[208] Albania v. UEFA, *supra* note 125, ¶ 13.
[209] *Id.*
[210] *Id.* ¶ 15.
[211] *Id.* ¶ 195.
[212] Fenerbahçe v. UEFA, *supra* note 204, ¶ 44.
[213] *Football Ass'n of Alb. (FAA)*, CAS 2015/A/3874, ¶ 191.
[214] FIFA DC, *supra* note 113, at art. 67(1)(2).
[215] Fenerbahçe v. UEFA, supra note 204, ¶ 83.
[216] Hungary v. FIFA, *supra* note 172, ¶¶ 38, 44.

decision by FIFA, relied on the fundamental principle of '*nulla poena sine culpa*,': denying responsibility in the absence of fault.[217] The Federation tried to blame (i) a "minority of trouble makers" unknown to the host,[218] and (ii) the police who, under Hungarian law, were responsible for the security of the match.[219] The Federation also argued that while it is possible to detect physical objects such as weapons or banners, political ideas cannot be detected by security checks.[220] It further argued that this principle would unfairly influence the real fans and not the violators as it "is unlikely to deter a group of fascists who are not even [soccer] fans and no security system can prevent spontaneous outbursts of racism."[221] The court used the same argument to support the principle of strict liability. It explained that accepting the appellant's arguments would allow there to be no accountability, which undermines FIFA's rules and regulations.[222]

FIFA, as the respondent, defended the deterrent effects of the "indirect sanction" and argued that blocking these punitive measures would deny FIFA the ability to appropriately address racist conduct on the stands, thus allowing the circle of violence by spectators to continue.[223] The panel agreed with FIFA that the sanctions were necessary to address the seriousness of the offenses.[224]

"Impunity of racially motivated crimes in sport" is a substantial challenge, [225] but such measures can help to appropriately address racist incidents while sending a message to violators about potential disciplinary actions. The main purpose of SGB's disciplinary procedures is to prevent the violation of its rules and ensure respect for them by imposing sanctions on clubs or associations, thereby influencing fans' behavior. [226] It is important to interpret the rules according to the purpose of the rule

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[217] *Id.* ¶ 44.
[218] *Id.*
[219] *Id.* ¶¶ 44, 48.
[220] *Id.* ¶ 44.
[221] *Id.* ¶ 54.
[222] *Id.* ¶ 63.
[223] *Id.* ¶ 62.
[224] *Id.* ¶ 100.
[225] H.R.C. Res. 13/27, *supra* note 42, at 3.
[226] Hungary v. FIFA, *supra* note 172, at ¶ 90.

maker.[227] CAS strongly affirms this approach[228] as "one of the few legal tools" to stop improper spectator conduct.[229]

E. AGGRAVATING CIRCUMSTANCES

Whether a particular incident turns into a serious case, one requiring harsher sanctions, is an issue considered by CAS. SGB's regulations do not provide an explanation for "serious" cases. The FIFA Disciplinary Code only points out the involvement of several persons in breaching a rule is an aggravating circumstance.[230] Regardless of recidivism,[231] both FIFA[232] and UEFA DR[233] determine whether a racist incident is "serious" on case-by-case basis, focusing on unique circumstances (i.e. aggravating circumstances) that might require harsher sanctions.[234]

CAS case law has determined a number of aggravating circumstances which helps clarify how "serious" cases should be distinguished from others. In *Simonic*, described above, CAS found an aggravating circumstance existed when the player involved fans in his racist conduct by inviting supporter to respond to his words.[235] The panel also justified the imposition of harsher sanctions by noting the "time gap" between the end of the game, when the incident occurred, and the player's other conduct—noting that it gave the player more time to think about what he was doing.[236] The panel also noted that the player never publicly regretted what he did on the field in regard to his use of words associated with the Ustaše regime, which the court viewed as a sign of disrespect for the regime's victims.[237]

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[227] GNK Dinamo v. UEFA, *supra* note 40, ¶ 9.11 (iii); *see also* Liao Hui v. International Weightlifting Federation (IWF), CAS 2011/A/2612, ¶ 107 (July 23, 2012).

[228] Sport Lisboa e Benfica Futebol SAD v. UEFA & FC Porto Futebol SAD, CAS 2008/A/1583 & Vitória Sport Clube de Guimarães v. UEFA & FC Porto Futebol SAD, CAS 2008/A/1584, ¶ 42–44 (July 15, 2008).

[229] Albania v. UEFA, *supra* note 125, ¶ 187.

[230] FIFA DC, *supra* note 113, art. 58(1)(b).

[231] *Id.* art 40; UEFA DR, supra note 93, art. 19.

[232] FIFA DC, *supra* note 113, art. 58(2)(b).

[233] UEFA DR, *supra* note 93, art. 14(4).

[234] *See* FIFA DC, *supra* note 113, art. 58(2)(b); UEFA DR, *supra* note 93, art. 14(4).

[235] Šimunič v. FIFA, *supra* note 94, ¶ 59.

[236] *Id.* ¶ 92.

[237] *Id.* ¶¶ 116, 120.

In *Albania v. UEFA*, a CAS panel affirmed that the use of intimidating chants calling for Albanians to be killed and slaughtered [238] was an aggravating factor that contributed to the abandonment of the match.[239] In addition, Physical violence by players and fans, described as act of "severe nature,"[240] and using a drone to bring an illicit banner to the stadium were also considered aggravating factors.[241] The panel noted that while banners and misbehaving fans can be removed, the drone, a "sophisticated method of delivery", might be used to carry explosive or other hazardous materials.[242]

Finally, a particularly aggravating factor was the reaction by security forces in the stadium, where one steward was seen attacking an Albanian player.[243] Despite the presence of around 4000 police officers in the stadium no one was arrested, not even those fans who were on the pitch.[244]

IV. THE BIGGER PICTURE

Social phenomena cannot be observed in a vacuum. No societal aspect, including sports, is "isolated from the social, economic, political, and cultural context in which it is situated."[245] Sport is a fundamental cultural piece stretching beyond borders. For many people who have considered soccer an essential part of their life since childhood, soccer is not just about a goal, a victory or defeat, it is a part of their "social life," mixed with all the things they have learned outside of soccer.[246] In other words soccer goes hand in hand with social developments, as a "mirror of society."[247]

SGBs have also recognized that racism and discrimination are social problems regularly demonstrated

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[238] Albania v. UEFA, supra note 125, ¶ 9.
[239] *Id.* ¶ 243.
[240] *Id.* ¶ 244.
[241] *Id.* ¶ 69.
[242] *Id.* ¶¶ 69, 206
[243] *Id.* ¶ 18.
[244] *Id.* ¶ 41.
[245] GEORGE H. SAGE, INTRODUCTION TO DIVERSITY AND SOCIAL JUSTICE IN COLLEGE SPORTS 2 (Dana D. Brooks & Ronald C. Althouse eds., 2007).
[246] FIFA GOOD PRACTICES, *supra* note 96, at 52.
[247] H.R.C. Rep., *supra* note 13, ¶ 56.

through their sport.[248] Indeed, hooliganism, racism, and violence in soccer,[249] are only a few pieces of a bigger societal picture[250] that encourages hatred and conflict.[251] The only way to rectify it is to build tolerance by addressing its roots, i.e. the "historical legacies and imbalances of racism."[252]

As a part of the cultural climate, racism in soccer targets "vulnerable groups" and thus is just an illustration of the general trends in society. In fact, soccer is a survival channel for discriminatory patterns existing in the social structure,[253] which exploit soccer's ability to reach millions of people, in order to promote an alternative agenda.[254] "Racism is not about objective characteristics, but is about relationships of domination and subordination, about hatred of the 'Other' in defense of 'self', perpetrated and apparently legitimized through images of the 'Other' as inferior, abhorrent, even sub-human."[255]

Extremist groups, including neo-Nazis and skinhead groups, intervening in sports events remains a source of deep concern for the United Nations General Assembly.[256] Some of these groups, like English Defense League, advocate against immigration, and are deeply rooted in soccer hooliganism.[257] In Germany, such groups have tried to infiltrate sport clubs or establish their own sports clubs.[258] Meanwhile, anti-Semites displaying neo-fascist symbols are challenging Eastern European stadiums.[259] These actions only lead to more violence and conflict in society.[260] Because of this, experts suggest greater transparency for fans in regions with discriminatory records.[261] The proceedings against UEFA and the Serbian Football Federation by Albania, where the historical Balkan conflict played a role in a

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[248] UEFA EXEC. COMM., DECLARATION AGAINST RACISM (Dec. 15, 2005) http://www.uefa.org/newsfiles/379953.pdf.

[249] Watson, *supra* note 27, at 1105.

[250] Ruteere, *supra* note 14, ¶ 14.

[251] Watson, *supra* note 27, at 1105.

[252] Ruteere, *supra* note 14, ¶ 14.

[253] FARE GLOBAL GUIDE, *supra* note 10, at 5.

[254] Diène, *supra* note 64, ¶ 25.

[255] SANDRA FREDMAN, DISCRIMINATION LAW 51 (2d ed. 2011).

[256] G.A. Res. 71/179, *supra* note 43, ¶ 24.

[257] AMOS N. GUIORA, TOLERATING INTOLERANCE: THE PRICE OF PROTECTING EXTREMISM, 118 (2014).

[258] FRA Report, *supra* note 15, at 31.

[259] *Id.* at 32.

[260] Watson, *supra* note 27, at 1058.

[261] FIFA GOOD PRACTICES, *supra* note 96, at 38.

stadium incident and the submissions of the parties,[262] is one example of how such conduct can have its roots in the political and social history of a community.

Therefore, racist behavior differs from one region to another, each creating unique sets of ever-changing symbols or chants or a combination of them.[263] Thus, the first important step in the fight against racism is identifying the racist conduct, which requires experts familiar with the cultural context and language.[264] Anti-racist organizations play a crucial role in the fight against racism by providing support to officials and working to educate and raise awareness in society.[265]

SGBs have properly identified and addressed the need to use cultural experts and have incorporated the cultural factor into their fight against racism by creating outside partnerships. The current FIFA Anti-Discrimination Monitoring System is a mechanism modeled after UEFA's cooperation with the Football Against Racism in Europe (FARE); an NGO active in the fight against racism, and particularly identifying cultural racist patterns.[266] Greater awareness and reporting of racist incidents in soccer is the outcome of deeper cultural knowledge—a result of the partnerships between SGBs and relevant NGOs, like FARE.[267]

In this framework, FIFA and FARE identify soccer events where there is a high probability of racist behavior and monitor these events with "FIFA Anti-Discrimination Match Observers," that FIFA and FARE jointly train.[268] The observers create reports about any discriminatory conduct in the matches.[269] The CAS panels give great weight to these official reports[270] because the observer's comprehension of the incidents are more accurate compared to those who are not in the stadium.[271]

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[262] Albania v. UEFA, *supra* note 125, ¶ 141.

[263] FIFA GOOD PRACTICES, *supra* note 96, at 41.

[264] *Id.* at 42.

[265] UEFA Resolution, *supra* note 87, ¶ 9.

[266] FIFA GOOD PRACTICES, *supra* note 96, at 39.

[267] FRA REPORT, *supra* note 15, at 33.

[268] FIFA GOOD PRACTICES, *supra* note 96, at 39.

[269] *Id.* For example the proceedings against Serbia and UEFA by Albania in CAS is a case that was first initiated based on a report by FARE in identifying racist conducts in a specific cultural context. Albania v. UEFA, *supra* note 125, ¶ 1.

[270] Club Atlético Madrid SAD v. Union Européenne de Football Association, CAS, 2008/A/1688, ¶ 93 (Feb. 9, 2009).

[271] Albania v. UEFA, *supra* note 125, ¶ 216.

Another way SGBs can effectively reduce racial violence within their stadiums is by providing enhanced educational opportunities and opening dialogue between fans.[272] This view is not only shared by SGBs but also by the International Convention on the Elimination of All Forms of Racial Discrimination (ICEAFRD) and the Committee on the Elimination of Racial Discrimination[273] ICEAFRD underlines the role of education and teaching in promoting tolerance, which has been further considered by the Committee on the Elimination of Racial Discrimination.[274]

The FIFA handbook on *Good Practice Guide on Diversity and Anti-Discrimination*, states: "[s]imply accepting the institutional view of [soccer] is not enough: players and other people in and around [soccer] must also be involved individually in the discussion so that solutions can be found."[275] Dialogue assists in a better understanding on both sides. For example, while some conduct might be offensive for a victim, the performer might not even be aware of the negative connotation of his behavior. If both sides could sit together to discuss how the victim suffered as the result of a specific behavior, a deeper understanding could emerge at the end.[276]

In some institutional aspects soccer is ahead of other sports in its attempts to tackle racism.[277] However, sport governing bodies lack adequate means to educate fans,[278] and that is why the FIFA Task Force Against Racism and Discrimination believes fighting discrimination and promoting diversity is a long-term process.[279]

However, there are several situations where SGBs can influence relevant cultural conditions. Soccer supporters in

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[272] *See generally* Mesut Bulut & Mehmet Emin Bars, *The Role of Education as a Tool in Transmitting Cultural Stereotypes Words (Formal's):The Case of "Kerem and Asli" Story*, 3 INTL. J. OF HUMANITIES AND SOCIAL SCIENCE 57, 57–65 (2013). Education is one of the tools in the FIFA fight against racism. *See* FIFA GOOD PRACTICES, *supra* note 96, at 16.

[273] INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, *SUPRA* NOTE 134, ART. 7.

[274] U. N. Committee on the Elimination of Racial Discrimination, *General Recommendation No. 35: Combating Racist Hate Speech*, U.N. Doc. CERD/C/GC/35, ¶ 8 (Sept. 26, 2013).

[275] FIFA GOOD PRACTICES, *supra* note 96, at 19.

[276] *Id.* at 27.

[277] Morley, *supra* note 1.

[278] FIFA GOOD PRACTICES, *supra* note 96, at 15.

[279] *Id.* at 12.

Europe highlight the importance of "proactive involvement of supporters and encourage self-policing" in stadiums [280] as a mechanism that allows spectators to voluntarily report racist incidents. [281] Programs that foster the inclusion of minority groups, like invitations to visit stadiums or free tickets to matches are also potentially helpful.[282]

Education and dialogue can turn the fans into a positive contribution.[283] The FIFA handbook recommends interacting with fans to hear their voices and to understand their expectations through surveys, meetings, organizing a fan congress, or have their representatives involved in some decision-making process, especially those who are related to antidiscrimination.[284]

CONCLUSION

Fair play and good sportsmanship are pillars of sport spirit, and racism threatens these foundations; "sport has no place in it for racist conduct and acts."[285] Thus, eradicating racism from sports is an "urgent concern" underlined by international law and requires a joint endeavor by governments and international and national entities.[286] However, sport governing bodies cannot be successful on their own. Therefore, "[i]t is the duty of States, regardless of their political, economic and cultural system, to promote and protect human rights and fundamental freedoms of all people."[287]

Education and dialogue are key factors in realizing change. Success will only follow if there is collaboration between all levels, [288] from education [289] to administrative measures. [290] Spectators along with players must be informed of the legal framework that applies to racist incidents,[291] and they should be

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[280] FRA Report, *supra* note 15, at 26.
[281] FIFA GOOD PRACTICES, *supra* note 96, at 34.
[282] *Id.* at 71.
[283] *Id.* at 67–68.
[284] *Id.* at 68.
[285] Feyenord v. UEFA, *supra* note 129, at ¶ 80.
[286] Ruteere, *supra* note 14, ¶ 22.
[287] COTTER, *supra* note 52, at 12.
[288] *Id.* at 13.
[289] G.A. Res. 64/148, ¶ 51 (Dec. 18, 2009).
[290] Watson, *supra* note 27, at 1071, 1104.
[291] FIFA GOOD PRACTICES, *supra* note 96, at 38.

well aware of relevant regulations in a clear and unambiguous way.[292] Fans should understand the far-reaching definition of "racist conduct" and the possibility of disciplinary proceedings before FGBs and CAS.[293] Promoting the message of tolerance and non-discrimination through sport constitutes one of the important approaches in the prevention of racism, racial discrimination, xenophobia, and intolerance.[294]

In the end, skin color should be invisible under a jersey. Eradicating racism from soccer stadiums is an important task, one that can trigger change in societies by inspiring individuals to become interlocutors for positive change within their communities.

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[292] *Id.* at 32.
[293] *See supra* part III (A) and (B).
[294] Ruteere, *supra* note 14, ¶ 40.

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THE HOME TEAM ADVANTAGE: WHY LAWMAKERS AND THE JUDICIARY SHOULD BENCH THE JOCK TAX

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THE STARTING LINE UP: AN INTRODUCTION TO THE JOCK TAX

Sports commentators across the nation consider Tom Brady to be one of the greatest football players of all time.[1] As a five-time Super Bowl champion, Tom Brady certainly is a top-rated quarterback, yet he still gets sacked every single year by what is known as the jock tax.[2] The jock tax allows states to tax the income of nonresident professional athletes whenever they engage in athletic contests when visiting a state's jurisdiction.[3] Additionally, numerous cities levy jock taxes on nonresident professional athletes, resulting in the taxation of professional athletes on both the state and local level.[4] While it may be hard to

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[1] *See generally,* Lance Cartelli, *11Reasons Why Tom Brady Might be the Greatest Quarterback Ever*, CBS SPORTS (Feb. 2, 2015), https://www.cbssports.com/nfl/photos/11-reasons-why-brady-might-be-the-greatest/.

[2] The term "sack" is a commonly used term in American football where a defender tackles the quarterback behind the line of scrimmage before the quarterback throws the ball. *See* Andrew Gould, *Tom Brady Poses with All 5 Super Bowls Rings at Patriots' Ceremony*, BLEACHER REPORT (June 10, 2017), http://bleacherreport.com/articles/2714922-tom-brady-poses-with-all-5-super-bowls-rings-at-patriots-ceremony.

[3] *See* Nick Overbay, Comment, *A Uniform Application of the Jock Tax: The Need for Congressional Action*, 27 MARQ. SPORTS L. REV. 217, 220 (2016) (Nick Overbay cites to the U.S. Supreme Court case *U.S. v. Shaffer*, where the Court ruled that a state could impose a tax on the income of nonresidents).

[4] *See* Kirk Berger, Note, *Foul Play: Tennessee's Unequal Application of its Jock Tax Against Professional Athletes*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 333, 338 (2015) (discusses the background of jock taxes, explaining that states did not begin imposing the jock tax until 1968, and thereafter, local governments began implementing the tax).

sympathize with professional athletes such as NBA star Steph Curry of the Golden State Warriors, who recently signed a $201 million contract,[5] the jock tax also applies to coaches, trainers, and others who travel with professional sporting teams, and make "fairly modest salaries."[6]

In this article, I will examine the constitutionality of the jock tax and argue that it violates both the Equal Protection Clause[7] and the Commerce Clause[8] of the Constitution because the jock tax: (1) allows states to practice intentional and systematic discrimination, and (2) taxes income extraterritorially. The jock tax encourages states to target professional athletes with surgical precision, and disregards other business professionals that are similarly situated to professional athletes.

In the first section of this article, I will explore the history of the jock tax and demonstrate the implications that the tax has on professional athletes, sports businesses, and society at large. Then, I will explain the origins of the jock tax and how it affects athletes and other professionals who work in the sports industry. Thereafter, I will demonstrate how the jock tax is calculated and present why it is inefficient and administratively burdensome. I will then analyze the constitutional arguments in support of invalidating the jock tax. Thereafter, I will present the only policy proposal that is consistent with what the law dictates and justice demands, the repealing of the jock tax entirely, which is followed by a brief conclusion.

As a threshold matter, the jock tax is an unchartered and unchallenged territory within the United States judicial system. The highest court that has analyzed the constitutionality of the

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[5] *Stephen Curry, Warriors Finalize $201 Million, 5-year Deal*, USA TODAY (July 25, 2017), https://www.usatoday.com/story/sports/nba/2017/07/25/stephen-curry-warriors-finalize-201-million-5-year-deal/103989466/.

[6] *See* Thomas Heath & Albert B. Crenshaw, *In Professional Sports, States Often Claim Players*, WASHINGTON POST (Feb. 24, 2003), https://www.washingtonpost.com/archive/sports/2003/02/24/in-professional-sports-states-often-claim-players/200ba244-d18e-49c8-b90f-b40d1aabb2c0/?utm_term=.33f1e4211eef (Heath analyzes the jock tax, which he dubs "the ultimate commuter tax," and explains that the salary applies to athletes and working professionals of a sports organization who "make fairly modest salaries.").

[7] *See* U.S. CONST. amend. XIV, § 1.

[8] *See* U.S. CONST. art. I, § 8, cl. 3.

jock tax is the Ohio Supreme Court in 2015,[9] where the tax scheme at issue was almost entirely irrelevant to the arguments I will present in this article. By examining cases considering the constitutionality of various state taxation measures, I have concluded that no matter the subject of the tax, the same general principles and rules apply, and courts often find that tax measures such as the jock tax, which discriminate against a specific class, are wholly unconstitutional.

I. THE HALL OF SHAME: A BACKGROUND OF THE JOCK TAX

For years, the jock tax has been justified by the power of taxation bestowed upon the states.[10] It is undisputed that states and cities have the authority to tax the personal income of their residents.[11] Additionally, states can impose a tax on the income of nonresidents' derived from sources within the state, if done so constitutionally.[12] Indeed, if a nonresident benefits from the advantages provided by a state's government, it follows that the nonresident should pay taxes in that jurisdiction.[13] However, the jock tax runs afoul of constitutional taxation measures as states apply it arbitrarily, selectively, and upon income not derived specifically from state resources.

California was the first state to impose the jock tax.[14] The State of California conveniently imposed its new tax on

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[9] Hillenmeyer v. Cleveland Bd. of Review, 17 N.E.3d 1164, 1167 (Ohio 2015).

[10] *See* Mary Pilon, *The Jock-Tax Man*, THE NEW YORKER (Apr. 10, 2015), https://www.newyorker.com/business/currency/the-jock-tax-man.

[11] *See State and Local Taxes*, U.S. DEP'T. OF TREASURY, https://www.treasury.gov/resource-center/faqs/Taxes/Pages/state-local.aspx (last visited Apr. 15, 2018).

[12] *See* Shaffer v. Carter, 252 U.S. 37, 53 (1920) (holding that Oklahoma could impose a tax on a nonresident who owned oil-producing land in Oklahoma, "so long as the tax was no more onerous than that assessed against residents.").

[13] *See id.* at 51 (recognizing that because a nonresident of Oklahoma owned oil-producing land in Oklahoma, he thus "realize[d] . . . a pecuniary benefit[] under the protection of the government," and accordingly, was subject to a tax of Oklahoma).

[14] *See* CAL. REV. & TAX. CODE § 17951 (West 2018); *see also* John DiMascio, *The "Jock Tax": Fair Play or Unsportsmanlike Conduct*, 68 U. PITT. L. REV. 953, 956–57 (2007) (explaining that California began the first state to levy a jock tax against professional athletes in 1991, although "state taxation of nonresident income [was] not a new concept," it was not until

nonresident professional athletes from Illinois after the Chicago Bulls beat the Los Angeles Lakers four games to one in the 1991 NBA Finals, with the Bulls winning the last three games in California.[15] Thereafter, Illinois responded to California's jock tax scheme and enacted legislation known colloquially as "Michael Jordan's Revenge."[16] Sports commentators have argued that the Illinois jock tax was a form of retribution against California because it does not apply to nonresident professional athletes from non-jock-tax states, and therefore the tax is retaliatory in nature.[17] For example: Dak Prescott of the Dallas Cowboys plays for an NFL franchise that resides in Texas.[18] Texas is a non-jock-tax state, and therefore would not be subject to the Illinois retaliatory jock tax.[19] Illinois created its reciprocal taxing measure in an attempt to motivate other states to forego adopting the jock tax.[20]

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athlete salaries began getting larger that states found targeting athletes with the tax to be worthwhile).

[15] DiMascio, *supra* note 14, at 957–58. The Chicago Bulls beat the Lakers in the NBA finals, playing the last three games in California. *Id.* at 958. Thereafter, California retroactively imposed a tax on Chicago Bulls legend Michael Jordan and his teammates on the income the nonresident athletes earned while playing in the NBA finals in California. *Id.* Sports commentators have argued that California was a "sore loser," and imposed the tax because of the finals upset. *Id.*

[16] *See* Steven D. Hamilton, *Michael Jordan, The Grizzlies, and The Jock Tax*, CORE COMPASS (July 30, 2015), https://www.corecompass.com/articles/michael-jordan-grizzlies-and-jock-tax (discussing the tax consequences of the 1991 NBA finals and deeming Illinois' retaliatory tax as "Michael Jordan's Revenge").

[17] *See* 35 ILL. COM. STAT. 5/302 (2018). This Illinois statute allows the state tax director to "enter into an agreement with the taxing authorities of any state which imposes a tax on or measured by income to provide that compensation paid in such state to residents of this State shall be exempt from such tax." *Id.*

[18] *Dallas Cowboys: Dak Prescott*, NFL, http://www.nfl.com/player/dakprescott/2555260/profile (last visited Apr. 5, 2018).

[19] Stefanie Loh, *Fun Facts About the Jock Tax*, THE SAN DIEGO UNION-TRIBUNE (Apr. 20, 2015), http://www.sandiegouniontribune.com/sports/nfl/sdut-jock-tax-fun-facts-origins-super-bowl-money-2015apr20-story.html.

[20] *See* Elizabeth C. Ekmekjian, *The Jock Tax: State and Local Income Taxation of Professional Athletes*, 4 SETON HALL J. SPORT L. 229, 235 (1994) (in citing to the Daily Reporter for representatives, author finds that the reciprocal tax measure enacted by Illinois that taxed the income of nonresident professional athletes from states with jock tax regulations was designed to "put pressure on the states those currently tax nonresident professional athletes to eliminate the tax.").

Unfortunately, Illinois' efforts to eliminate the jock tax were ineffective.[21]

There are only seven states that do not have an income tax:[22] Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming.[23] Of the seven non-income tax states, only four have major professional athletic teams: Texas, Florida, Nevada, and Washington.[24] Nevada only recently became home to a professional NHL team and soon will be home to an NFL team when the Oakland Raiders move to Las Vegas in the near future.[25] The acquisition of two professional sporting teams could result in Nevada considering the imposition of a jock tax on nonresident professional athletes. Currently, however, Florida, Nevada, Tennessee, Texas, and Washington[26] continue to be the only states

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[21] *See* Phil Rosenthal, *Tax day can be Especially Taxing for Pro Athletes*, CHICAGO TRIBUNE (Apr. 7, 2012, 5:57 PM), http://www.chicagotribune.com/sports/columnists/ct-taxing-professional-athletes-spt-0418-20170417-story.html. Of the 26 states (plus the District of Columbia) operating a "major four" professional sports teams, 22 impose the jock tax on nonresident athletes. *See* Robert Raiola, *Newton to Feel Effects of California's Taxes*, SPORTS ILLUSTRATED (Feb. 6, 2016), https://www.si.com/nfl/2016/02/06/super-bowl-50-california-jock-tax-cam-newton.

[22] *See* Chris Kahn, *States with No Income Tax: Better or Worse*?, BANKRATE (Jan. 13, 2015) http://www.bankrate.com/finance/taxes/state-with-no-income-tax-better-or-worse-1.aspx (discussing the advantages and disadvantages of states with no income taxes). Many of you are probably thinking about, New Hampshire, the "live free or die state." New Hampshire however, is not considered a true non-income tax state because it taxes income from dividends and interest at a 5% rate. *Id.*

[23] *Id.*

[24] Texas, Florida and Washington are home to numerous major professional teams, including the Dallas Cowboys, dubbed "America's Team," the Miami Heat, the Washington Wizards, and just recently, Nevada acquired an NHL team, the Vegas Golden Knights. *Major professional Sports Teams in the United States and Canada*, WIKIPEDIA (Apr. 13, 2018), https://en.wikipedia.org/wiki/Major_professional_sports_teams_of_the_United_States_and_Canada.

[25] Ken Belson & Victor Mather, *Raiders Leaving Oakland Again, This Time for Las Vegas*, N.Y. TIMES (Mar. 27, 2017), https://www.nytimes.com/2017/03/27/sports/football/nfl-oakland-raiders-las-vegas.html.

[26] *See* Andrew M. Ballard, *Game Over for Tennessee's 'Jock Tax' on NBA Players*, BLOOMBERG NEWS (June 3, 2016), https://www.bna.com/game-tennessees-jock-n57982073582 (Tennessee had a jock taxation scheme which taxed nonresident professional athletes on a "professional privilege" tax basis, charging each nonresident athlete $2500/game with a $7500 annual cap. The

with professional sporting teams that do not impose a tax on nonresident professional athletes.[27] Accordingly, it is easy to see why Florida, with nice weather, sandy beaches, and zero income tax is home to more professional athletes than any other state.[28]

The far reaching implications of the jock tax do not stop at the state level, and currently eight cities tax nonresident professional athletes: Detroit, Kansas City, Philadelphia, Pittsburgh, St. Louis, Cincinnati, Columbus, and Cleveland.[29] Accordingly, a nonresident professional athlete who plays against the NFL team, the Philadelphia Eagles, in Philadelphia will be subject to taxation on both the state and local level—once by the state of Pennsylvania and once more by the city of Philadelphia.[30]

II. PLAY BALL: THE JOCK TAX IN ACTION

The implications of the jock tax are best demonstrated by Super Bowl LI, where the New England Patriots defeated the Atlanta Falcons in Houston, Texas, a jurisdiction that does not impose an income tax. Reports claim each athlete on the winning Patriots team earned $107,000, while athletes on the losing Falcons team earned $53,000 for playing in the 2017 Super Bowl.[31] After most Super Bowls, there is a clear distinction

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NBA players settled with the state of Tennessee, and received refunds on the tax they paid).

[27] *See* Kathryn Kisska-Schulze & Adam Epstein, *"Show Me the Money!" - Analyzing the Potential State Tax Implications of Paying Student-Athletes*, 14 VA. SPORTS & ENT. L.J. 13, 33–34 (2014) (explaining that because Florida, Texas and Washington do not impose income tax on residents or nonresidents, they are ideal states to host championship games).

[28] *See* U. S. DEP'T OF LABOR. BUREAU OF LABOR STATISTICS, 27-202, ATHLETES AND SPORTS COMPETITORS (2017), https://www.bls.gov/oes/current/oes272021.htm#(9).

[29] *See* David D. Savage, *Hillenmeyer v. Cleveland Board of Review*, 42 OHIO N.U. L. REV. 989, 1000 (2016) (according to New Jersey public accountant, Robert Raiola, only these eight cities impose the jock tax on nonresident professional athletes).

[30] *See* Anthony R. Wood, *Phila., Pa., N.J. Tax Visiting Athletes' Salaries*, PHILLY.COM (Dec. 1, 2009), https://www.geierfinancial.com/wp-content/uploads/2014/06/Philly-Inquirer-Phil.-PA.-N.J.-tax-visiting-athletes-salaries-20092.pdf (where a Philadelphia Inquirer writer states, "the New York Yankees, just by spending an autumn weekend in Philadelphia, probably chipped in well over $300k to the state and city treasuries in the form of income taxes).

[31] *See* Kay Bell, *No 'Jock Tax' for Patriots, Falcons at Super Bowl LI*, USA TODAY (Feb 2, 2017, 1:19 PM) https://www.usatoday.com/story/money/2017/02/02/no-jock-tax-patriots-

between the winning and losing team; however, Super Bowl LI presented a situation where both teams won—in terms of taxes—because none of the players were subject to the jock tax. In contrast, Super Bowl LII took place in Minneapolis, Minnesota on February 4, 2018. Although only one team won the game this year,[32] both teams lost—9.85% of the income earned while in Minnesota, [33] the nation's second largest income tax state, only second to California's income tax rate of 13.3%.[34] Undoubtedly, this presents fairness concerns. The teams that make it to a Super Bowl in a non-income tax state will win the "Super Bowl of taxes," while others who make it to a Super Bowl scheduled in a jock tax state will be subject to high tax rates and take home only a portion of their income. Eventually, this may cause the NFL selection committee to forego allowing states with high income tax rates from hosting the Super Bowl in an attempt to appease its top performers.

States imposing the jock tax do so likely on the basis of an "ability to pay" theory, contending that because most professional athletes have large salaries, they can afford to shoulder the jock tax.[35] This is known as the fairness principle of vertical equity, which taxes individuals based on the level of their

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falcons-super-bowl-li/97399106/ (analyzing the tax implications of the players in the 2017 Super Bowl between the Atlanta Falcons and the New England Patriots hosted in Houston, Texas).

[32] The Philadelphia Eagles defeated the New England Patriots 41-33 in Super Bowl LII. Mark Maske, *Eagles Defeat Patriots, 41-33 to Capture First Super Bowl*, WASHINGTON POST: NFL (Feb. 4, 2018), https://www.washingtonpost.com/sports/eagles-defeat-patriots-41-33-to-capture-first-super-bowl-title/2018/02/04/240ae37e-0774-11e8-94e8-e8b8600ade23_story.html?utm_term=.6e986d40bddc.

[33] *See* Nick Halter, *Adrian Peterson is Among the Highest-Taxed NFL Players*, MINNEAPOLIS/ST. PAUL BUS. J. (Nov. 5, 2015), https://www.bizjournals.com/twincities/blog/sports-business/2015/11/adrian-peterson-taxes-bill-rate-vikings.html. Minnesota Vikings NFL star, Adrian Peterson is one of the highest-taxed players in the league. *Id.* About half of Peterson's almost $16 million salary goes to taxes. *Id.* One of the reasons he has large tax liabilities is because he plays for a Minnesota team, and Minnesota subjects its citizens to a 9.95% income tax rate. *Id.*

[34] *Tax Year 2017 California Income Tax Brackets*, TAX-BRACKETS.ORG, https://www.tax-brackets.org/californiataxtable (last visited Apr. 17, 2018).

[35] *See* JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES 94 (5th ed. 2017) (defining the ability-to-pay principle of vertical equity).

income.[36] This type of taxation system ultimately reduces the incentive to become a top income-earner athlete, as the tax implications that a highly-paid athlete faces are colossal compared to those of a taxpayer in a lower income tax bracket.[37] Even if the majority of Americans feel as though the top income earners of this country should pay more income taxes to increase fairness, the jock tax does not alleviate such a concern, as it taxes even the medical staff and equipment managers who travel to games with professional sporting teams, irrespective of their seemingly average salaries.[38] This is known as tax shifting, where the taxation of one group results in the taxation of others.[39] It follows that subjecting nonresident professional athletes and professionals that travel with professional sporting teams to a jock tax is disproportionately unfair, especially in the context of Super Bowl earnings. Not only will this phenomenon discourage individuals from earning top dollar for their profession, but also, the jock tax burdens a group aside from nonresident professional athletes who arguably cannot stomach the tax.

State income tax implications force athletes to make personal and professional based on the corresponding tax consequences.[40] Athletes all over the country have chosen to live in states and sign with certain teams to avoid burdensome tax laws.[41] The AFC South Division of the National Football League is home to the Tennessee Titans, the Jacksonville Jaguars, the Houston Texans, and the Indianapolis Colts—three out of the four

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[36] *See id.* at 88.

[37] *See id.* at 97 (commenting on the idea that progressive tax structures "reduce the incentive or award of earning income.").

[38] *See id.* at 108 (reviewing the results of an April 2015 Gallup poll which found that 62% of the American population felt as though "upper-income people" pay "too little" in taxes).

[39] *See id.* at 113 (where tax shifting is explained as the "phenomenon that taxes ostensibly levied on one group of people may end up being borne by others."); *see also Glossary of Tax Terms – Tax Dictionary*, EFILE.COM, https://www.efile.com/glossary/ (last visited Apr. 19, 2018) (where tax shifting is defined as, "when a tax is levied on one group of people but is in practice paid by another group.").

[40] *See* Joshua Rhett Miller, *Millionaire Athletes Flee States with High Income Taxes*, FOX NEWS (Jan. 30, 2013), http://www.foxnews.com/sports/2013/01/30/federal-state-tax-hikes-could-send-athletes-migrating-to-tax-friendlier-states.html (Tiger Woods officially became a professional golf player in 1996, and thereafter he moved from California to Florida. Tiger Woods was public in asserting that the motivation behind the move was to avoid state income tax).

[41] *See generally id.*

teams in the division hailing from non-jock-tax states. For players on the Titans, Jaguars, and Texans, income taxes will only be imposed on division games played in Indianapolis. Accordingly, the tax consequences for players in the AFC South are "the lowest in the league."[42] While the AFC South is not the best division of the previous NFL season, it is home to notable athletes such as Heisman Trophy winner Marcus Mariota, four-time Pro Bowl selectee, J.J. Watt, and the 2014 first-overall draft pick, Jadeveon Clowney—and why would these stars ever sign a deal with another team? The tax benefits athletes may reap from playing in the AFC South however, present fairness concerns for other NFL divisions, ultimately weakening the "equal treatment of equals" platform the Fourteenth Amendment of the Constitution stands on.[43] For example, a free agent could find an opportunity to play in the AFC South more attractive than an identical offer in the AFC West, which hosts two California teams, and the Kansas City Chiefs, a team in a jurisdiction that taxes athletes on both the state and local level.[44]

This principle of unfairness falls heaviest on the equipment managers, medical personnel, and other non-athletes that travel with professional sporting teams. The roles of top-rated athletes are lucrative and relatively elastic; therefore, top-performing athletes can be selective with their employment contracts and team designations. Thus, the non-athlete employees, with somewhat inelastic roles and average salaries, bear the burden of the jock tax. In most instances, such employees have no choice but to accept the job in front of them, with little negotiating

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[42] *See* Nick Wallace, *What do NFL Players Pay in Taxes?,* SMARTASSET (Jan. 23, 2017), https://smartasset.com/taxes/NFL-jock-taxes (where Nick Wallace compares and contrasts the tax consequences and implications of various NFL players, ultimately finding that the AFC South is the "most tax friendly NFL division").

[43] *See* SLEMROD & BAKIJA, *supra* note 35, at 137 (horizontal equity requires "equal treatment of equals"); *see also*, Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612, 624 (1985) (finding a tax scheme that created a divide in a class of similarly situated individuals to be unconstitutional, which will be explained in depth below).

[44] *See* Liz Mathews, *'Jock Tax': Pay Where you Play is Consideration for NFL Free Agents*, SEAHAWKS WIRE (Mar. 9, 2017), http://seahawkswire.usatoday.com/2017/03/09/jock-tax-pay-where-you-play-is-consideration-for-nfl-free-agents/ (athletes who work outside Washington should consider the jock tax when making an employment decision, which is implemented by 23 out of the 28 states with professional sports teams).

power to pick and choose the division they work in. "A good rule of thumb is that the better the alternatives to what is taxed, the less likely one is to bear a burden."[45] It follows that because there are not many "better alternatives" to the top-performing athletes in major league sports organizations, the non-athlete employees of professional sports leagues will bear the burden of the jock tax.[46]

Additionally, the jock tax hurts NFL franchises located in non-jock-tax-states, as athletes may ask for raises and additional compensation to recoup the costs of playing season games in jock tax states with no reciprocity. It is possible NFL franchises will start frontloading the income of professional athletes in the form of a "bonus," because the IRS and state courts do not consider bonuses to be compensation for jock tax purposes.[47]

To further exemplify the efficiency costs and behavioral responses to the jock tax, look no further than LeBron James' infamous "Decision," which shocked the nation, basketball enthusiasts, and tax professionals alike.[48] In 2010, LeBron James announced that he would be signing with the Miami Heat instead of remaining in his home state to play for the Cleveland Cavaliers. While the Cleveland Cavaliers offered James a higher salary, which totaled $10,000 more per game than the offer presented by the Miami Heat, James chose to play for the Miami Heat, and arguably made the right decision in light of tax implications.[49] In 2010, Ohio had a top tax rate of 5.295% and the city of Cleveland also imposed a 2% income tax, which would negate almost 8% of James' overall salary.[50] By signing with the Miami Heat, James could be certain that his salary would remain untouched by state

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[45] *See* SLEMROD & BAKIJA, *supra* note 35, at 114 (discussing tax incidence and who is to bear the burden in tax-shifting scenarios).

[46] *Id.*

[47] *See* Elizabeth C. Ekmekjian, James C. Wilkerson & Robert W. Bing, *The Jock Tax Contest: Professional Athletes v. The States – Background and Current Development*, 20 J. OF APPLIED BUS. RES. 19 (2011), https://www.cluteinstitute.com/ojs/index.php/JABR/article/download/2202/2179/ (references 58-145 INTERNAL REVENUE SERV. REVENUE RULING 1958-1 C.B. 360 and *Appeal of Testaverde*, No. 9A-0197 (Cal. Bd. Of Appeals Feb. 1, 2000) (Supp. App.6) where courts and administrators found that a signing bonus is not allocable compensation for purposes of the jock tax.)

[48] *See* Aaron Merchak, *State Jock Taxes: Is LeBron Better Off in Miami?*, TAX FOUNDATION (July 8, 2010) https://taxfoundation.org/state-jock-taxes-lebron-better-miami/.

[49] *Id.* (The Cleveland Cavaliers offered LeBron James $100 million while the Miami Heat offered $96 million, which, based on the author's calculation, would equate to roughly an extra $10k/game over 5 years).

[50] *Id.*

taxation schemes when playing at home for the Miami Heat.[51] The taxation of income earned in away games presented its own complexities, yet James was subject to less tax liability with the Miami Heat.[52] In addition to the five locations that do not impose a jock tax on nonresident athletes, James could also avoid the Illinois retaliatory jock tax, as a professional athlete from a non-jock tax state.[53]

While playing for the Miami Heat is certainly a more economically sound decision when considering the tax regulations enforced by Florida and Ohio, LeBron James ultimately opted out of his contract with the Miami Heat in 2014 and signed with the Cleveland Cavaliers.[54] In 2010, Cleveland offered James a larger salary than Miami, potentially to compensate for tax implications, and in 2014, it was no different.[55] As the saying goes, only two things in life are certain: death and taxes—and for LeBron James, even more taxes.

III. A HEAVY HITTER: ENFORCEMENT OF THE JOCK TAX

There are two methods states utilize to calculate a professional athlete's tax liability: the duty days method and the games played method.[56] The duty days method is the most common and tax-friendly approach.[57] It considers all of an athlete's practice days, game days and travel days to be "duty days."[58] The duty days approach uses the following formula to calculate a nonresident professional athlete's tax liability owed to a state:

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[51] *Id.*

[52] *Id.*

[53] Aaron Merchak analyzes the jock tax implications of LeBron James signing with the Miami Heat instead of the Cleveland Cavaliers, finding that because he was from Florida, he would not be subject to Illinois' jock tax scheme. *Id.*

[54] *See LeBron Signs Reported 2-year, $42Million Contract with Cavs*, NBA.COM (July 12, 2014, 9:59 PM), http://www.nba.com/2014/news/07/12/lebron-contract.ap/.

[55] *See id.* (discussing LeBron James' salary increase).

[56] *See* Ekmekjian, *supra* note 20, at 238.

[57] *See id.* at 240.

[58] *Id.*

Tax Liability Rate: (Total number of duty days spent in specific state) / (Total number of duty days in season)[59]

To demonstrate the duty days formula, I will refer to Major League Baseball (MLB) Hall of Famer and legend, Cal Ripken, Jr., who played twenty-one seasons for the Baltimore Orioles and holds the record for playing 2,632 consecutive games, which my father, a devoted Orioles fan, always reminded me of when I wanted to miss a day of school while growing up. Now suppose it is 1983 and Cal Ripken of the Baltimore Orioles is playing the Philadelphia Phillies in the World Series and played three games in Philadelphia. During the course of the series, Ripken spent three (3) days practicing and playing in Philadelphia—traveling to and from Philadelphia on the first and last game days of the series. After the 1983 Orioles/Phillies World Series, Ripken will have spent a total of three (3) duty days in Pennsylvania, out of the possible 220 duty days in an MLB season.[60] Of course, the more duty days considered, the less tax consequences there will be, as the tax liability rate becomes lower as the duty days total become greater. The differing approach by states in applying the duty days formula presents its own concerns which will be further examined below. Based on the traditional duty days approach, considering both preseason and regular season duty days, Ripken would owe taxes to Pennsylvania on 1.4% of his income, as demonstrated below:

Tax Liability Rate: (Total number of duty days spent in Pennsylvania (3)) / (Total number of duty days in MLB season (220)) = 1.4%

In the less common, "games played" method, states consider solely the regular season and exhibition games to calculate a professional athlete's tax liability.[61] See below:

Tax Liability Rate: (Total number of games played in a specific state) / (Total number of games played)

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[59] *Id.* at 238.

[60] *See* Eric Seidman, *Checking the Numbers: The Jock Tax*, BASEBALL PROSPECTUS (Jan. 6, 2011), https://www.baseballprospectus.com/news/article/12682/checking-the-numbers-the-jock-tax/ (demonstrating the jock tax by calculating a professional baseball player's salary accounting for the 220 duty days in a regular baseball season).

[61] *See* Ekmekjian, *supra* note 20, at 240.

Using the earlier example, suppose again that Cal Ripken played three (3) games versus the Philadelphia Phillies in Pennsylvania during the 1983 World Series in a season of 162 games.

Tax Liability Rate: (Total number of games played in Pennsylvania (3)) / (Total number of games played in regular season (162)) = 1.85%

Thus, under the games played method, Ripken would owe taxes to Pennsylvania on 1.85% of his total income, more than that of the tax liability owed when using the duty days formula. Hypothetically, if in 1983, Ripken had a salary of $10 million, he would owe $4,186.36 to Pennsylvania under the duty days method and $5,685.19 under the games played method, irrespective of the Philadelphia city wage tax or the likely increase in income gained from playing in a World Series. See below:

Duty Days Method: Ripken's Tax Liability to PA
$10 million * [(3 duty days in Pennsylvania) / (220 total duty days)] = $136,636.63 * PA tax rate 3.07%[62] = **$4,186.36**

Games Played Method: Ripken's Tax Liability to PA
$10 million * [(3 games played in Pennsylvania) / (162 total games played)] = $185,185.19 * PA tax rate 3.07% = **$5,685.19**

A. OUT OF BOUNDS: THE GAMES PLAYED METHOD FOUND UNCONSTITUTIONAL

The games played method was found to be unconstitutional by the Supreme Court of Ohio because it violated the Due Process Clause.[63] Under the Due Process Clause, "no state shall… deprive any person of life, liberty, or *property*, without due process of law…"[64] While the games played method is a simpler formula, only considering one factor—the number of

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[62] *Current Tax Rates*, PA. DEP'T OF REV., http://www.revenue.pa.gov/GeneralTaxInformation/Current%20Tax%20Rates/Pages/default.aspx (last visited Apr. 6, 2018).

[63] Hillenmeyer v. Cleveland Bd. of Review, 41 N.E.3d 1164, 1176 (Ohio 2015).

[64] U.S. CONST. amend. XIV, § 1 (emphasis added).

games played by an athlete—it fails to account for the numerous other days that a professional athlete works, such as practice days, appearances, and preseason obligations.[65] The result of considering only the games played, a small fraction of an athlete's work, "dramatically overstates" the income earned by an athlete in that state, and disregards the "compensation an NFL player earns for training, practices, strategy sessions and promotional activities he is engaged in" ultimately taxing more income than a state may constitutionally tax.[66] Accordingly, the Ohio Supreme Court found that by using the games played method, Cleveland taxed "extraterritorially, beyond its power to tax."[67] While the games played method has been denounced by the Ohio Supreme Court, certiorari was denied by the United States Supreme Court, and therefore, this approach could still arguably be utilized by any jurisdiction other than Ohio.[68]

B. IN OVERTIME: THE ADMINISTRATIVE BURDEN PRESENTED BY THE JOCK TAX

While the method a state may use to calculate an athlete's tax liability is not 100% certain, what is certain is the number of tax returns each professional athlete must file as a result of the jock tax. In any given year, a professional athlete plays games and makes appearances in over a dozen states, and must file a tax return in each state. Josh Martin, a line-backer for the New York

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[65] *See* John DiMascio, *The "Jock Tax": Fair Play or Unsportsmanlike Conduct*, 8 U. PITT. L. REV. 953, 962 (2007) (explaining that the games played method "fails to reflect that athletes are paid for services in addition to game performances such as practice days, team meetings and public relations activities"). At present, no states utilize the games played method, although it was previously the approach used in New York, Pennsylvania and Oregon).

[66] In *Hillenmeyer*, the former linebacker of the Chicago Bears, Hunter Hillenmeyer's income was taxed at 5% when using the unconstitutional games played method for two days of work in Cleveland, but only 1.25% for the same two days when employing the widely accepted, duty days approach. Accordingly, the tax that Cleveland imposed on Hillenmeyer was extraterritorial, and reached income that was earned in other jurisdictions. *Hillenmeyer*, 41 N.E.3d at 1176.

[67] *See id*. (finding that Cleveland's use of the games played method to tax a nonresident's income reached beyond Cleveland's taxing power because the games played method ultimately reached an athlete's income for work completed outside of Cleveland, it was an extraterritorial tax).

[68] *See* City of Cleveland Bd. of Review v. Hillenmeyer, 41 N.E.3d 1164 (Ohio 2015), *cert. denied* 136 S. Ct. 491 (2015).

Jets described his tax return documents to be "as thick as a bible."[69] To ensure compliance with the jock tax, professional athletes are forced to hire tax experts to file their tax returns with each individual state an athlete plays in, which is extremely costly.[70] On the flip side, the administratively burdensome nature of the jock tax has resulted in some states hiring employees to oversee athlete schedules and salaries, further adding to the administrative costs of the jock tax.

To make matters more complicated, every state has its own version of the jock tax, and therefore, there is little uniformity in the tax treatment of nonresident professional athletes across the country.[71] As alluded to previously, Arizona does not include the preseason in its duty days calculation, but rather defines duty days as, "all days during a taxable year from the *beginning* of a professional athletic team's first regular game of the season through the last game in which the team competes."[72] Arizona likely loosened its jock tax scheme because the State is one of the two locations where the MLB holds Spring Training—the other being the beloved, non-income tax state of Florida—and Arizona feared that if it taxed athletes participating in Spring Training, Florida would monopolize hosting the event. Arizona's departure from the traditional duty days approach exemplifies yet another behavioral response to the jock tax. If Arizona included Spring Training in its duty days calculation, the state would have made $14 million in tax revenue in 2013.[73] While this is certainly a win for players participating in Spring Training in Arizona, it also lessens the total possible duty days for tax liability calculation

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[69] *See* Steven Kutz, *This is What a Pro Athlete's Tax Return Looks Like*, MARKET WATCH (Aug. 29, 2016) https://www.marketwatch.com/story/the-jock-tax-and-why-a-professional-athletes-tax-form-can-be-as-big-as-a-bible-2016-07-27 (discussing the administratively burdensome nature of the jock tax, which requires professional athletes to file a tax return in every state in which he competes).

[70] *See* SLEMROD & BAKIJA, *supra* note 35, at 231 (explaining that the average taxpayer spends 12.5 hours complying with the federal individual income tax, which amounts to 1.8 billion total hours in the aggregate for the United States. Further, the average taxpayer pays $198 in expenses preparing for filing an income tax return).

[71] *See* Ekmekjian, Wilkerson & Bing, *supra* note 47, at 21.

[72] Jonathan Nehring, *How Arizona Saves MLB Players Millions in Taxes*, TAXABALL BLOG (Feb. 17, 2015), http://www.taxaball.com/blog/how-arizona-saves-mlb-players-millions-in-taxes-2015.

[73] *Id.*

purposes, which could result in larger tax consequences at the tail end of the season.

Additionally, in some states, the mere presence of an athlete in a state for *part* of a day is considered an *entire* "duty day" for tax liability purposes. For example, if a Chicago Cubs player leaves New York City on a Friday morning after a Thursday night game in the Bronx and practices in Philadelphia, Pennsylvania on that same Friday in the afternoon, in preparation of taking on the Phillies, both states could arguably claim a duty day for tax revenue.[74] This results in two states taxing the same day of income, which is also known as double taxation, and is disfavored by courts across the country.[75]

There is no dispute that the jock tax increases the complexity of the United States tax system, as well as the costs of efficiency, compliance, and enforcement. From the perspective of the states and cities that impose the jock tax however, the tax revenue gained from the jock tax may be worth the high costs of administration and enforcement. In fact, in 2013 alone, California profited $229 million from the imposition of the jock tax against nonresident professional athletes.[76]

IV. UNSPORTSMANLIKE CONDUCT: THE JOCK TAX VIOLATES THE EQUAL PROTECTION CLAUSE

As a threshold matter, the jock tax is a form of income tax that should apply to all visitors of a city or state who make income in that jurisdiction—professional athletes and businessmen alike.

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[74] *See* K. Sean Packard, *Income Taxes for Pro Athletes Are Reminder of How Complicated U.S. Tax Code Is*, FORBES, (Apr. 18, 2017, 9:20 AM), https://www.google.com/amp/s/www.forbes.com/sites/kurtbadenhausen/2017/04/18/income-taxes-for-pro-athletes-are-reminder-of-how-complicated-u-s-tax-code/amp/ (discussing the complications of the duty days approach, the author explains that "In New York, if a person's plane leaves from JFK at 12:01am, that entire day counts as a New York day.").

[75] *See* Richard Wolf, *Supreme Court: Two States Can't Tax the Same Income*, USA TODAY, (May 18, 2015, 1:54 PM), https://www.usatoday.com/story/news/nation/2015/05/18/supreme-court-double-taxation/22066863/ (stating that this "scheme creates an incentive for taxpayers to opt for intrastate rather than interstate economic activity" and that "[t]he issue of double taxation seemed to worry the [sic] most justices.").

[76] *See* Stefanie Loh, *Fun Facts About the Jock Tax*, THE SAN DIEGO UNION-TRIBUNE (Apr. 20, 2015, 6:30 AM), http://www.sandiegouniontribune.com/sports/nfl/sdut-jock-tax-fun-facts-origins-super-bowl-money-2015apr20-story.html.

This is referred to as "income apportionment," a term used to describe the way in
which a state treats income earned within the state by nonresidents.[77] Traditionally, this nonresident income tax regulation has only been applied to professional athletes and entertainers. This is because of the public nature of their affairs, and the large salaries these professionals have, making the cost of administering the jock tax worthwhile for states.[78] By picking and choosing who to apply the jock tax to, the tax is applied in a manner that runs afoul to this nation's taxation jurisprudence.

A. SWING AND A MISS: THE JOCK TAX FAILS THE RATIONAL BASIS TEST

To determine whether a taxpayer's right to equal protection is being violated, the court must apply the rational basis test.[79] Under this test, courts ask whether the taxation constitutes selective taxation, and if so, whether the selection is rationally related to a legitimate state interest.[80] Although this standard is a relatively low threshold of scrutiny, countless tax regulations have been deemed unconstitutional for failing to promote a legitimate state interest.

In *Allegheny Pittsburgh Coal Company v. County Commission* for example, the Supreme Court invalidated a West Virginia County's selective taxation scheme which resulted in a coal company's recently purchased property to be taxed at a rate approximately 8 to 35 times greater than the tax rates applied to neighboring and comparable properties that had not been recently

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[77] *See* INCOME APPORTIONMENT ELEMENTS, 0130 REGSURVEYS 38 (Westlaw 2017) (Westlaw organizes all of the state specific statutes concerning income apportionment, i.e., the "jock tax").

[78] *See* Hillenmeyer v. Cleveland Bd. of Review, 41 N.E.3d 1164, 1173 (Ohio 2015) (where the Supreme Court of Ohio explains that, "professional athletes are typically high paid, and their work is relatively easy to find.").

[79] *See* Nordlinger v. Hahn, 505 U.S. 1, 30 (1992) (before analyzing the constitutionality of a selective tax regulation, the Supreme Court explained that "equal protection challenges to state tax regimes" must be rationally related to a legitimate state interest).

[80] *See* N. New Eng. Tel. Operations, LLC v. Cty. of Concord, 102 A.3d 1190, 1194 (N.H. 2014) (The Supreme Court of New Hampshire analyzed a taxpayer's claim of selective enforcement).

sold.[81] The county asserted that the tax assessment scheme "was rationally related to its purpose of assessing properties at true current value."[82] The Supreme Court felt otherwise, and found that, "[the] approach systematically produced dramatic differences in valuation between petitioners' recently transferred property and otherwise comparable surrounding land" and therefore, constituted "intentional and systematic discrimination" in violation of the equal protection clause.[83]

In *Hooper v. Bernalillo County Assessor*, the Supreme Court found a New Mexico statute that exempted a selective class of Vietnam veterans from a state property tax to be unconstitutional.[84] Specifically, Vietnam veterans that established residency in New Mexico prior to 1976 were eligible to take advantage of the tax exemption, while Vietnam veterans who moved to New Mexico after 1976 could not.[85] New Mexico asserted two legitimate state interests: (1) to encourage Vietnam veterans to move to New Mexico; and (2) to serve as New Mexico's expression of appreciation to its citizens for honorable military service.[86] The Court ultimately found that New Mexico's statute "create[d] two tiers of Vietnam veterans, identifying resident veterans who settled in the state after 1976, second-class citizens" and that New Mexico's "distinction between resident veterans [was not] rationally related to the State's asserted legislative goal."[87]

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[81] *See* Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster, 488 U.S. 336, 336–37 (1989). The West Virginia Constitution required that "taxation shall be uniform throughout the state, and that all real and personal property shall be taxed in proportion to its value." *Id.* In light of this, the Supreme Court found a tax assessment which imposed taxes on the basis of recent purchases price unconstitutional because it imposed disproportionately higher taxes on recently sold property than property that had not recently been sold. *Id.* This exemplified in a disparity in similar property, and therefore, an equal protection violation. *Id.*

[82] *Id.* at 343.

[83] *Id.* at 341–42.

[84] Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612, 624 (1985).

[85] *Id.* at 614.

[86] *Id.* at 618–19.

[87] *Id.* at 622–23 (holding that barring Vietnam veterans who moved to New Mexico after 1976 from being property tax exemption eligible did not further the interest of encouraging veterans to move to New Mexico or express New Mexico's appreciation for its veterans.) This is in large part because "an infant who resided in New Mexico long ago would immediately qualify for the exemption upon settling in the state at any time in the future regardless of where he resided before, during, or after military service," and, a Vietnam

Similar to *Allegheny Pittsburgh Coal Company*, the application of nonresident professional taxation schemes to athletes alone is intentional and systematic discrimination. Similar to *Hooper*, the jock tax creates a divide in a class of similarly situated citizens, and while the law behind the equal protection clause in the context of state taxation is complex and lacks clarity, the underlying purpose is easy: a state cannot define its interest as legitimate if it selectively enforces a tax measure that discriminates amongst members of the same class.

In the context of nonresident athletic professionals, the Ohio Supreme Court analyzed the constitutionality of Cleveland's jock tax scheme in *Hillenmeyer v. Cleveland Board of Review*.[88] There, Hunter T. Hillenmeyer, a former linebacker for the Chicago Bears, challenged Cleveland's jock tax regulation.[89] While the court ultimately found Cleveland's specific taxation scheme unconstitutional as it utilized the unpopular "games played" method, the court set forth what it considered to be a legitimate state interest rationally related to justify the jock tax.[90] In doing so, the court stated: "[i]mposing a limit on local taxation while protecting the cities' interest in collecting existing taxes constituted an adequate rational basis for the General Assembly's actions."[91] The court further reasoned: "the Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their tax laws and how much help those laws ought to provide."[92] Accordingly, the Supreme Court of Ohio found it justifiable to treat similarly situated members of a class differently than others of the same class to ensure that the city could continue to collect taxes—conveniently from those with the highest salaries and the most public schedules—and because overseeing tax regulation was provincially within the discretion of the legislature.

Pursuant to this nation's long lineage of equal protection case law, however, the singling out of professional athletes by way of the jock tax is not rationally related to the legitimate state

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veteran who settles in New Mexico after 1976 does not deserve less of an expression of appreciation than that of a Vietnam veteran who settles in New Mexico prior to 1976. *Id.*

[88] Hillenmeyer v. Cleveland Bd. of Review, 41 N.E.3d 1164 (Ohio 2015).

[89] *Id.* at 1167–68.

[90] *Id.* at 1174.

[91] *Id.*

[92] *Id.*

interest the Ohio Supreme Court asserted. Additionally, legislators are not benefitting any particular class by imposing the jock tax, and thus, the Ohio Supreme Court could have ruled on the selective application of the taxation of nonresident professionals without hijacking the role of the legislative branch. Further, the legitimate state interests the *Hillenmeyer* Court analyzed were found to be rationally related in the specific instance of excluding a nonresident professional athlete from obtaining a 12-day grace period, which differs significantly from the jock tax at large, which excludes athletes from being treated similarly to its equivalents on a daily basis.[93]

In *Arkansas Writers' Project, Inc. v. Ragland*, the United States Supreme Court invalidated an Arkansas regulation that imposed a tax on receipts from sales of tangible personal property but exempted newspapers, as well as religious, professional, trade, and sports journals printed and published within Arkansas.[94] The central issue before the court was, "not whether the tax singled out the press as a whole, but whether it targets a small group within the press."[95] The court found that the tax was unconstitutional because it was not "evenly applied to all magazines."[96] In a dissenting opinion, Justice Scalia expressed that Arkansas's selective taxation of magazine publications served the legitimate interest of "avoiding the collection of taxes where administrative cost exceeds tax proceeds."[97] While this arguably is a persuasive argument in support of the jock tax, it is not rationally related to any legitimate state interest a jock tax state could advance. It is a well-known fact that the goal of the jock tax is to increase revenue within the states by targeting those who have large salaries and public schedules; however, states have not yet tried to tax other nonresident professionals.[98] Similar to *Hooper*, the jock tax creates a hierarchy system within a class, presupposing that one occupation of a class will increase state revenue but other

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[93] The *Hillenmeyer* Court found that, "the classification of professional entertainers or athletes as distinct from occasional entrants, which neither involves fundamental rights nor proceeds along suspect lines, cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some governmental purpose." *Id.* at 1173. The *Hillenmeyer* Court however, was dealing with a jock tax scheme that differs from the general jock tax at large. *Id.*

[94] Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 225 (1987).

[95] *Id.* at 229.

[96] *Id.*

[97] *Id.* at 235–36.

[98] Overbay, *supra* note 3, at 220–23.

occupations will not. Additionally, the jock tax deters local and state governments from even attempting to tax other nonresident professionals which ultimately cuts overall state revenue.[99]

Further, it is likely the jock tax will eventually encourage athletes and franchises of non-jock tax jurisdictions to avoid playing in jock tax states. Thus, Justice Scalia's proposed legitimate interest that a state could assert in enforcing selective taxation of athletes while "avoiding the collection of taxes [from other nonresident business professionals] where administrative costs exceed tax proceeds," fails.[100] Such an argument cuts against the stated goal of earning revenue in light of the circumstantial and behavioral affects that will follow.

It cannot be understated that the equal protection clause "protects an entity from state action which selects it out for discriminatory treatment by subjecting it to taxes not imposed on others of the same class."[101] The long lineage of equal protection jurisprudence makes clear that selective discrimination of similarly situated citizens without a legitimate state interest is unconstitutional.[102] Accordingly, the jock tax does not pass the constitutional muster of the rational basis test.

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[99] For example, if a plaintiff's attorney were licensed to practice in California and Texas, lived in Texas, and received a third of a $9 million verdict while on trial in California, that attorney would most likely not be taxed on this income because of his residency in the non-income tax state of Texas. This is because the taxation of nonresidents is exclusively applied to athletes rather than all nonresident professionals alike. By targeting only one specific group, states and localities are limiting themselves from collecting tax revenue from other nonresident traveling professionals.

[100] *Ragland*, 481 U.S. at 235–36 (Scalia, J., dissenting).

[101] *See* Allegheny v. Pittsburgh Coal Co. v. County Comm'n of Webster Cty., 488 U.S. 336, 345 (1989).

[102] *See Allegheny*, 488 U.S. at 336; *Ragland*, 481 U.S. at 221; Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612, 612 (1985); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Rev., 460 U.S. 575, 585 (1983) (finding that a Minnesota tax regulation that treated publications differently from other enterprises was facially discriminatory, and therefore unconstitutional); N. New Eng. Tel. Operations, LLC v. City of Concord, 102 A.3d 1190, 1190 (N.H. 2014); Verizon New Eng., Inc. v. City of Rochester, 940 A.2d 237, 244 (N.H. 2007).

V. FOUL BALL: THE JOCK TAX VIOLATES THE COMMERCE CLAUSE

A state tax regulation satisfies the Commerce Clause, if "(1) the tax is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State."[103] In this section, I will examine how the jock tax fails the second, third, and fourth prongs of this test.

A. STRIKE ONE: THE JOCK TAX DISCRIMINATES AGAINST INTERSTATE COMMERCE

Before the Supreme Court decided the landmark case of *Comptroller of the Treasury v. Wynne* in 2015[104], involving the dormant commerce clause, there was a complete lack of governing authority in tax discrimination jurisprudence. [105] Now, to determine whether a state tax regulation discriminates against interstate commerce, courts can apply one simple test by hypothetically applying the tax regulation at issue of one state to every state. Thereafter, the court will resolve whether the identical application of the tax regulation at issue to every state would put interstate commerce at a disadvantage in comparison to intrastate commerce.[106] This is known as the internal consistency test.[107] As the Supreme Court stated: "by assuming that every State has the same tax structure, the internal consistency test allows courts to isolate the effect of a State's tax scheme."[108]

In *Comptroller of the Treasury v. Wynne*, the Supreme Court applied the internal consistency test and found a Maryland income tax regulation unconstitutional because it resulted in the double taxation of Maryland residents by failing to provide a tax credit on the taxes paid to other states.[109] This caused Maryland residents to pay more tax on their income from other states than they would have paid on the same income, had they earned it in

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[103] *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

[104] Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015).

[105] *See* Michael S. Knoll, *The Economic Foundation of the Dormant Commerce Clause,* 103 VA. L. REV. 309, 311 (2017).

[106] *See Wynne*, 135 S. Ct. at 1803 (2015).

[107] *See id.*

[108] *See id.* at 1787.

[109] *See id.*

Maryland.[110] To exemplify the illegality of Maryland's taxation scheme, the Supreme Court presented the following example:

> Assume that every State imposed the following taxes, which are similar to Maryland's "county" and "special nonresident" taxes: (1) a 1.25% tax on income that residents earn in State, (2) a 1.25% tax on income that residents earn in other jurisdictions, and (3) a 1.25% tax on income that nonresidents earn in State. Assume further that two taxpayers, April and Bob, both live in State A, but that April earns her income in State A whereas Bob earns his income in State B. In this circumstance, Bob will pay more income tax than April solely because he earns income interstate.[111]

When applying the test set forth in *Wynne* and considering the above illustration, the jock tax also fails the internal consistency test. If every state applied the jock tax, nonresident professional athletes would be victims of double taxation as they would be taxed multiple times on the same income solely for earning income outside of their resident state. This would be heightened for athletes from jock tax states other than California. While those athletes would likely receive a tax credit from their own state for taxes paid to other states, athletes would never receive a full credit up to the high-income tax rate that California imposes against its residents and visiting nonresidents. This would essentially favor the local California economy over interstate commerce. Additionally, most states do not give credits to its residents for taxes paid to cities.[112]

Because the jock tax upsets interstate commerce for both nonresident professional athletes and the states, it is

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[110] *See id.*

[111] *See id.* at 1803–1804.

[112] *See* K. Sean Packard, *Income Taxes for Pro Athletes Are Reminder Of How Complicated U.S. Tax Code Is*, FORBES (Apr. 18, 2017), https://www.google.com/amp/s/www.forbes.com/sites/kurtbadenhausen/2017/04/18/income-taxes-for-pro-athletes-are-reminder-of-how-complicated-u-s-tax-code/amp/ (discussing the tax credit availability for athletes among the states and how most states do not give credits for taxes paid to cities. This is concerning as eight cities impose a jock tax).

unconstitutional and does not satisfy the requirements mandated by the Commerce Clause.[113]

B. STRIKE TWO: THE JOCK TAX IS NOT FAIRLY RELATED TO THE SERVICES PROVIDED BY THE STATES

The fourth prong of the Commerce Clause test requires that a taxing measure is fairly related to the services provided by the State.[114] However, the jock tax is not enforced to recover expenditures related to any services or benefits that were provided to nonresident professional athletes by the state. Rather, it is to target tax revenue from high salaried figures who have relatively public schedules. Unlike situations where a nonresident taxpayer has a corporation or business in a foreign state, and is benefited by having a permanent presence there, an athlete has relatively little control over which state he or she will play in and is not directly benefited by the services a state provides. Additionally, not all stadiums or professional sporting venues are owned by the state. Rather, some cities own stadiums and lease them to NFL franchises. Other stadiums, such as the old home of the New York Jets, was provided completely by the NFL.[115] Further, the jock tax fails to account for the benefits that a professional athlete brings to the state. When a popular team visits a certain jurisdiction, it creates an enormous amount of revenue for the state, its businesses, bars, restaurants, retail providers and more.[116]

Even if my argument were to concede that a state provides *some* services for a nonresident athlete, such as providing the athlete with a police force to address safety concerns or crowd control at a sporting event, such services are not fairly related to the jock tax as required by the Commerce Clause. Additionally, such services would be provided by the state for any large event

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[113] Both athletes and states can be harmed by the jock tax in the context of the commerce clause—athletes in the form of double taxation—and states, when issuing credits to its residents. To illustrate this, suppose NY and NJ, which both have professional sporting teams, grant tax credits to its residents for the taxes paid to the other state. If NY has a higher income tax rate than NJ, and NJ issues a tax credit in the amount of NY's income tax rate to its resident, then NY would benefit at the detrimental expense of NJ.

[114] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

[115] *See* Bob Collins, *Public Financing of Football Stadiums: This is How They Do It*, MINN. PUB. RADIO (May 3, 2010, 1:08 PM), https://blogs.mprnews.org/newscut/2010/05/cleveland_browns_1999_stadium/.

[116] *See* Sharianne Walker & Michael Enz, *The Impact of Professional Sports on the Local Economy*, 29 W. NEW ENG. L. REV. 149, 152–53 (2006).

or convention, whether or not it was a sporting event. Thus, nonresident professional athletes are currently being forced to bear the burden for state services that benefit society as a whole by way of the jock tax.

In *Complete Auto Transit, Inc. v. Brady*, a nonresident corporation had a large operation of transporting vehicles within the state of Mississippi, and thus, was "dependent on the State for police protection and other State services, the same as other citizens."[117] There, the nonresident corporation actively chose to engage in business in Mississippi, and had a continuing presence there.[118] In the context of the jock tax, however, professional athletes are not in control of their schedule, and therefore do not seek out particular states to engage in business. Rather, professional athletes travel as a team on behalf of a franchise and at the mercy of the league's scheduling coordinators. If anything, the *franchise* should be taxed for doing business in a state, and not the athletes on an individual level. It follows that the large tax bills states impose upon athletes are not fairly related to the services provided by the state because (1) professional athletes have little control over their place of work for away games, and (2) the services provided by the state to nonresident athletes are minimal.

C. THREE STRIKES, YOU'RE OUT!: THE JOCK TAX IS NOT FAIRLY APPORTIONED

The fair apportionment standard represents the proposition that a nonresident will only be taxed on the activities over which a state has jurisdiction, thereby "preventing extraterritorial taxation."[119] In plain language, this means that a state can only tax its "fair share" of interstate business.[120]

For a tax measure to be fairly apportioned, it requires both internal and external consistency.[121] As previously explained, the

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[117] *Complete Auto*, 430 U.S. at 277.

[118] *Id.* at 276–77.

[119] *See* Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, 71 FORDHAM L. REV. 149, 150 (2002) (explaining the meaning of fair apportionment in the context of constitutional taxation).

[120] *See* Goldberg v. Sweet, 488 U.S. 252, 260–61 (1989), (discussing that "the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction.").

[121] Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 185 (1995).

jock tax fails the internal consistency test because it upsets interstate commerce. Along those lines, courts can resolve whether a taxation measure is fairly apportioned by reviewing the regulation as though it were applied in every state to examine the regulation's effect on interstate commerce.[122] The sum of the apportioned shares of a professional athlete taxed in every state, or at least by the states at issue, should equate to 100% of the taxed value.[123] While "the Constitution imposes no single [apportionment] formula on the States," the duty days calculation runs afoul of what the commerce clause stands for.[124] When calculating a professional athlete's tax liability by utilizing the duty days formula, the jock tax allows states to reach beyond their "fair share," resulting in the taxation of more than 100% of a professional athlete's income when reviewed in the aggregate. This is because some states account for more duty days than others, and professional athletes often make appearances and visits to many states while in the scope of their employment beyond the duty day cap. Consider for example, professional athletes that play in the NFL Pro Bowl or the MLB All-Star Game, participate in franchise-required charity events and make television appearances. Further, often times states will claim the same duty day of a professional athlete for tax revenue purposes when that athlete is present in multiple states on the same day, which results in double taxation. Thus, in the context of fair apportionment, the jock tax is not internally consistent.

To determine whether a tax regulation is externally consistent, the state's economic justification for taxing the value at issue is reviewed to resolve "whether a State's tax reaches beyond the value that is fairly attributable to economic activity within the taxing state."[125] This requires that the portion of a professional athlete's salary that is taxed to reflect either (1) the value of the state activity required to host the professional athlete, or (2) the benefits provided to the athlete by the state. But the taxation of a professional athlete's large salary is not fairly apportioned to the services a state may provide to a professional athlete. This is especially true in light of the varying salaries that exist in professional sporting organizations, in relation to the levels of security various celebrity figures require as opposed to

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[122] *See* Joondeph, *supra* note 116, at 157.

[123] *Id.*

[124] *See id.* at 261 (quoting Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 171 (1983)).

[125] *See* Okla. Tax. Comm'n v. Jefferson Lines, Inc. 514 U.S. 175, 185 (1995).

those non-athlete employees that work behind the scenes. Additionally, the differing approaches to the duty days calculation employed by states makes it challenging, if not impossible, to determine how the state services rendered would be fairly apportioned to the amount taxed. For the foregoing reasons, the jock tax is not fairly apportioned under Commerce Clause standards, because it lacks both internal and external consistency.

The Supreme Court made clear that "[a taxpayer] should pay its fair share of taxes so long, but only so long, as the tax does not discriminate against interstate commerce, and there is no danger of interstate commerce being smothered by cumulative taxes of several states."[126] This however, is in common parlance with what the jock tax does.

VI. LEVELING THE PLAYING FIELD: REPEALING THE JOCK TAX

The jock tax, as enforced, presents numerous constitutional concerns and is administratively burdensome. The tax is imposed by twenty-three states, and targets professional athletes with surgical precision, subjecting them and non-athlete employees to arbitrary tax. To date, there has only been one occasion where a court could have invalidated the jock tax, yet the Ohio Supreme Court shied away from fully analyzing the constitutional concerns in an effort to appease the legislative body of Ohio.[127] Such governance is unacceptable in light of the discriminatory nature of the jock tax. What is acceptable however, and the most suitable policy proposal in response to the jock tax, is to repeal the tax entirely.

A. THROWING A HAIL MARY: THE JOCK TAX SHOULD BE REPEALED

To ensure the fair and efficient taxation of professional athletes, lawmakers and the judiciary of this country should repeal the jock tax entirely, and subject professional athletes and related employees to the same income tax as every other U.S. taxpayer—

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[126] *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 277 (1977) (quoting Complete Auto Transit, Inc. v. Brady 330 So. 2d 268, 272 (1976)).

[127] *See* Hillenmeyer v. Cleveland Bd. of Review, 41 N.E.3d 1164, 1174 (2015) (choosing not to usurp the broad authority of the legislature to implement taxes).

the standard state income tax. In this scenario, each professional athlete would be subject to the state income tax where the athlete is domiciled, and would file a tax return in that state. This would put nonresident professional athletes on an equal footing to other, similarly situated, nonresident, traveling professionals.

Subjecting professional athletes to the state income tax of where they reside is consistent with the Equal Protection[128] and Commerce Clauses of the Constitution.[129] Not only would nonresident professional athletes and related nonresident employees be treated equally in comparison to those similarly situated in their class, such as businessmen and other traveling professionals, but also, states would be prevented from "picking and choosing" who to tax based on the sole fact that a salary is high or occupation details are public. Further, when nonresident professional athletes and related employees are subject to only one state's income tax, the potential for double or extraterritorial taxation is eliminated. Fairness concerns would also be ratified, as the non-athlete employees of professional sporting organizations would not be subject to the tax shifting consequences that results from the jock tax. Additionally, the NFL and franchises alone would not be forced to overcompensate its players to appease its top performers for jock tax purposes.

By invalidating the jock tax, compliance and administration costs would be decreased dramatically. Professional athletes and related employees would expend significantly less time and money on filing a tax return, and could avoid the in-state credit redeeming process entirely. On the other hand, previous jock tax states could focus on their own residents, which would cut back on administrative costs exerted on employing individuals to track athletes, their salaries, and nonresident tax evasion.[130] Additionally, states such as California and Minnesota that charge the top income tax rates in the country, could still tax *resident* professional athletes for both home and away games, which would lessen the blow of repealing the jock tax. While states, athletes, and sports commentators may differ on the fairness of the jock tax, one thing that everyone can agree on

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[128] *See* U.S. CONST. amend. XIV § 1.

[129] *See* U.S. CONST. amend. XIV § 5.

[130] *See* SLEMROD & BAKIJA, *supra* note 35, at 230 (revealing that in 2014, the IRS spent $11.6 billion enforcing federal taxation. While this is obviously lessened on the state level, the costs of compliance and enforcement are high, especially when overseeing the tax liabilities of individuals from foreign states.).

is that repealing the jock tax would increase simplicity in one of the most complex and comprehensive tax systems in the world.[131]

For the jock tax to be repealed, an individual that has been impacted by the regulation will have to take a stand. Additionally, because there are so many people that have been wronged by this tax, there is definite potential for a class-action suit. As discussed, the jock tax falls most heavily on non-athlete employees that travel with professional sporting organizations. Such individuals make modest salaries in comparison to professional athletes and therefore endure heightened consequences imposed by the jock tax. An individual bringing a cause of action opposing the jock tax on constitutionality grounds should do so in a state that has the most standard and traditional form of the jock tax, inclusive of the formula employed in determining a nonresident's tax liability. If the jock tax scheme is an outlier, the reign of *Hillenmeyer* will continue in that a court will invalidate the jock tax design at issue, but not the jock tax at large.

THE HOME STRETCH—A CONCLUSION TO THE *HOME TEAM ADVANTAGE*

The jock tax presents numerous constitutional concerns but has seldom been challenged. Perhaps it is the precedent that was set by the Ohio Supreme Court in refusing to take a stand against the jock tax in *Hillenmeyer* that keeps those effected by the jock tax silent. Perhaps it is an athlete's fear of tarnishing his "America's Golden Boy" reputation by complaining about tax consequences on a multi-million-dollar salary, that pushes the jock tax further and further under the rug. Regardless of the reason, the unconstitutionality of the jock tax cannot continue to be overlooked, and the lawmakers and judiciary of this nation should bench the jock tax by repealing it entirely.

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[131] *Id.* at 237 (explaining that complexities in a tax system arise for a variety of reasons, sometimes to increase fairness, other times to encourage certain social activities, and in unfortunate circumstances, as a by-product of political maneuvering. The jock tax certainly does not increase fairness, or social activities, and thus, is complex simply for profit).

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#COPYRIGHT INFRINGEMENT VIA SOCIAL MEDIA LIVE STREAMING: SHORTCOMINGS OF THE DIGITAL MILLENNIUM COPYRIGHT ACT

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ABSTRACT

This Note looks at the effectiveness of the Digital Millennium Copyright Act (DMCA) in an age of rampant online copyright infringement resulting from Social Media Live Streaming (SMLS) technology. The Note highlights the problems faced by entertainment artists who attempt to use the DMCA to keep their creative works from appearing on Social Media sites. It also explains the requirements of the DMCA's "safe harbor" exceptions for Internet Service Providers as interpreted by the courts. Finally, the Note presents four alternative solutions to address the problem presented: (1) expanding of the interpretation of the safe harbor "knowledge" requirement to place more responsibility on Social Media sites; (2) establishing measures that prohibit cell phone use at shows; (3) dedicating greater resources to issuing takedown notices and filing lawsuits; and (4) embracing SMLS and develop a way to control and monetize live streams of their shows.

INTRODUCTION

As the lights go down and crowd starts to roar, a subtle glow lights up the stadium. Twenty years ago, this light would be coming from the stage as the artist made their grand entrance. But today, the light emanates from the thousands of smartphones filling the arena as spectators prepare to watch this live show through the tiny window of their smartphones. Obsessed with capturing every moment of the performance to show friends and followers, concertgoers are more and more commonly seeing

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shows through their iPhone camera lens instead of enjoying it in the moment.

Social Media's[1] rise to societal dominance over the last ten years has forced entertainment artists to grapple with the question of how to maintain control of their live performances in the era of Social Media Live Streaming (SMLS). SMLS allows attendees to share every moment of the action with their followers by broadcasting a live feed of the performance from their phone to their Social Media account for others to watch in real-time. Some artists have taken the "if you can't beat them, then join them" approach and have welcomed SMLS. These artists embrace the increased exposure SMLS brings to their shows as fans broadcast their performances. Other artists have decided not to take this rampant copyright infringement lying down. For example, Dave Chappelle has taken matters into his own hands by introducing a new way to take phones out of his audiences' hands. Chappelle has teamed up with Yondr, a company that manufacturers phone restricting cases, which allows him to create a "phone-free zone" at his shows.[2] Both approaches have their pros and cons, but should the responsibility fall solely on the artists to stop copyright infringement of their live shows via Social Media and SMLS?

When you arrive at a Dave Chappelle show, you are given a Yondr case.[3] Once you slip your phone inside, the case is locked and remains locked while you are in the venue.[4] Of course, if you need to use your phone before the show is over, you are welcome to do so, but you must leave the stage area to access your phone.[5] This way, audience members maintain possession of their phones, but are limited to watching the show with their own two eyes. Chappelle says that he does not want people sharing the content of his performances with the world because it increases the likelihood that someone in an upcoming tour city will see the show

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[1] Social Media broadly speaking refers to any online content, platform, network, or combination of those modalities. The term social media is explained further in Section II (A).

[2] Janet Morrissey, *Your Phone's on Lockdown. Enjoy the Show*, N.Y. TIMES (Oct. 15, 2016), https://www.nytimes.com/2016/10/16/technology/your-phones-on-lockdown-enjoy-the-show.html.

[3] *Id.*

[4] *Id.*

[5] *Id.*

before they actually *see* the show.[6] Chappelle is not the only artist using Yondr cases or other methods to prevent their shows from being broadcast via Social Media.[7] Artists like Taylor Swift have employed a team of attorneys tasked with issuing takedown requests in an effort to scrub the Internet of any infringing content.[8] Under Title II, the Online Copyright Infringement Liability Limitation Act (OCILLA), of the Digital Millennium Copyright Act (DMCA), a copyright holder can submit a takedown request to an Internet Service Provider (ISP) if they believe another individual has illegally posted copyrighted content on the ISP's website.[9] Unfortunately, mega-stars and smaller artists alike are finding little relief through submitting these takedown requests.[10] The DMCA takedown process can be both slow and cumbersome, and online infringement can be so widespread and reoccurring that relief seems impossible for copyright holders.[11] This begs the question: if artists like Chappelle are spending thousands of dollars to purchase special phone cases to protect their copyrighted content from infringers, how effective is the existing legislation that was passed to accomplish this exact purpose?[12]

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[6] Allison Sylte, *Why Dave Chappelle Won't Let You Have Your Cellphone at His Colorado Shows*, 9 NEWS (July 12, 2017), http://www.9news.com/article/entertainment/why-dave-chappelle-wont-let-you-have-your-cellphone-at-his-colorado-shows/455865355.

[7] Morrissey, *supra* note 2.

[8] James Geddes, *Taylor Swift Employs Dedicated Team to Remove All Periscope Videos from Net*, TECH TIMES (Sept. 28, 2015), http://www.techtimes.com/articles/88791/20150928/taylor-swift-employs-dedicated-team-to-remove-all-periscope-videos-from-net.htm.

[9] Copyright Act of 1976, 17 U.S.C. § 512 (2010).

[10] Mark Schultz, *Digital age changes all the rules on intellectual property*, THE HILL (Nov. 6, 2017, 1:50 PM EST), http://thehill.com/opinion/finance/358963-digital-age-changes-all-the-rules-on-intellectual-property.

[11] Jonathan Bailey, *How Long Should a DMCA Notice Take*, PLAGIARISM TODAY (Dec. 5, 2008), https://www.plagiarismtoday.com/2008/12/05/how-long-should-a-dmca-notice-take/.

[12] In 2016, in response to the changing status of the Internet, the Copyright Office announced that it would be accepting comments and suggestions regarding the DMCA and its effectiveness. Doug Isenberg, *Is the DMCA an Effective Way to Take Down Infringing*

I. SOCIAL MEDIA

A. DEFINED TERMS

The terms Social Network, Social Media, Social Media Network and Social Media Live Streaming are often used interchangeably; but there are important distinctions. Social Network refers to online platforms—and complimentary apps—that allow users to create accounts and connect with other users.[13] Social Networks facilitate creating relationships through engagement.[14] Social Media is the media, *i.e.*, content—blog, video, photo, slideshow, podcast, newsletter, or ebook—that a user uploads to a Social Network site.[15] A Social Media Network, like Facebook, is the whole package.[16] They offer media editing tools and networking capabilities.[17] Colloquially, Social Network, Social Media, and Social Media Network are used interchangeably when referring to whole package that is a Social Media Network. Currently, the most well-known of these platforms include Facebook, Instagram, YouTube, Twitter, and Snapchat.[18] This Note will refer to these types of sites collectively as "Social Media."

Social Media Live Streaming (SMLS) is a feature included on many popular Social Media sites which parties can use to broadcast their life or experiences in real time[19] using a

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Content?, GIGALAW (Feb. 3, 2016), https://giga.law/blog/2016/02/03/copyright-office-opens-comment-submissions-on-dmca-take-down-notices.

[13] Fauzia Burke, *Social Media vs. Social Networking*, HUFFPOST (Dec. 2, 2013), http://www.huffingtonpost.com/fauzia-burke/social-media-vs-social-ne_b_4017305.html.

[14] *Id*.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Jeff Dunn, *Facebook Totally Dominates the List of Most Popular Social Media Apps*, BUS. INSIDER (July 27, 2017, 3:10 PM), http://www.businessinsider.com/facebook-dominates-most-popular-social-media-apps-chart-2017-7.

[19] Jennifer McDonnow, *What Parents Need to Understand About Live Streaming Apps*, FAM. ONLINE SAFETY INST. (June 20, 2016), https://www.fosi.org/good-digital-parenting/what-parents-need-understand-about-live-streaming/.

phone, tablet, or computer.[20] SMLS is transmitted in real-time to a user's followers. These followers, or perhaps more appropriately viewers, can watch whatever event the user has chosen to broadcast. After the live stream has concluded, a user's followers are able to view a recorded copy of the video for the next twenty-four hours.[21] A user can also choose to archive their video, thus preventing it from expiring after the twenty-four hour window.[22] SMLS presents a unique legal issue because users of this functionality feel entitled to share their experiences with all of their followers; yet, live streaming a concert or other performance is likely copyright infringement of the artist's rights.[23]

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[20] Mitchell Labiak, *19 FAQs About Live Streaming Your Business on Social Media*, EXPOSURE NINJA (Feb. 4, 2017), https://exposureninja.com/blog/social-media-and-marketing-live-streaming/.

[21] *About*, FACEBOOK LIVE, https://live.fb.com/about/ (last visited Apr. 10, 2018).

[22] *How Long Are Broadcasts Available?*, PERISCOPE (Apr. 26, 2017, 6:04 PM), https://help.pscp.tv/customer/en/portal/articles/2017799-how-long-are-broadcasts-available-; Rich McCormick, *Periscope Users Can Now Save Their Live-Streamed Broadcasts Forever*, THE VERGE (May 5, 2016, 2:04 AM), https://www.theverge.com/2016/5/5/11595244/how-to-save-periscopes-live-streams; *Archive Live Streams*, YOUTUBE HELP, https://support.google.com/youtube/answer/6247592?hl=en (last visited Jan. 7, 2018).

[23] Kerry O'Shea Gorgone, *Live Streaming Video: Is It Legal?*, THE HUFFINGTON POST (Aug. 30, 2017, 11:36 AM), https://www.huffingtonpost.com/entry/live-streaming-video-is-it-legal_us_59a6d4e9e4b08299d89d0b3e; *Legal Ins and Outs of Live Streaming in Public*, SARA F. HAWKINS ATTORNEY AT LAW, https://sarafhawkins.com/legal-live-streaming-in-public/ (last visited Jan. 7, 2018); Charles Bowen, *The Legal Risks of Live Streaming*, THE BOWEN LAW GROUP (June 29, 2016), http://www.thebowenlawgroup.com/blog/the-legal-risks-of-live-streaming; Valeriya Metla, *Periscope & Meerkat: Live Streaming is the Latest Social Media Development*, LAW STREET (Apr. 14, 2015), https://lawstreetmedia.com/issues/technology/periscope-meerkat-live-streaming-latest-social-media-development/.

B. THE EVOLUTION OF SOCIAL MEDIA

Before delving into the legal problem at hand, it is important to look back at the history and evolution of Social Media to understand the breadth of the developments since the passage of the Digital Millennium Copyright Act some 20 years ago.

Six Degrees is considered to be the first Social Networking site.[24] This site was launched in 1997 and included features such as personal profiles, friends lists, and school affiliations.[25] Six Degrees had more than one million registered users, but access to the Internet was scarce at the time which means that the Internet infrastructure had not yet advanced to accommodate a widely used Social Network.[26] In 2002, Friendster launched as a Social Network that allowed people to connect with their current friends and to discover new friends.[27] The site was instantly popular, with three million users registered in the first three months.[28] As the user base on Friendster grew, the technical infrastructure of the site could not accommodate the growth, and the technical difficulties drove users to a rival site: MySpace.[29] MySpace launched in January of 2004 and users exceeded one million in the first month.[30] It was the number one website in 2006 and was valued at $12 billion at its peak in 2007.[31] These three sites served as the foundation upon which today's Social Media platforms were built.

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[24] *Then and Now: A History of Social Networking Sites*, CBS NEWS, https://www.cbsnews.com/pictures/then-and-now-a-history-of-social-networking-sites/2/ (last visited Apr. 10, 2018).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] Jolie O'Dell, *The History of Social Media*, MASHABLE (Jan. 24, 2011), http://mashable.com/2011/01/24/the-history-of-social-media-infographic/#7dlaIjTjnuqD.

[29] *Then and Now: A History of Social Networking Sites*, CBS NEWS, https://www.cbsnews.com/pictures/then-and-now-a-history-of-social-networking-sites/2/. MySpace rebranded in 2013 and is now referred to as "Myspace." Monica Riese, *The Definitive History of Social Media*, THE DAILY DOT (Feb. 24, 2017, 5:39 AM), https://www.dailydot.com/debug/history-of-social-media/.

[30] Riese, *supra* note 29.

[31] *Then and Now: A History of Social Networking Sites*, *supra* note 29.

Modern day Social Media giant Facebook[32] launched in 2004 as a Social Network for college students at affiliated universities.[33] Beginning in 2006, Facebook allowed any user with an email to create an account on the site.[34] By July of 2010, Facebook had half a billion users.[35] Instagram, originally just a platform for photo editing and sharing, was launched in 2010.[36] Facebook purchased Instagram in 2012 for nearly one billion dollars.[37] One of the most notable improvements in Facebook's history, "Facebook Live," launched on a limited basis in 2015 and became available to all users in 2016.[38] Facebook Live is a SMLS feature that allows users to share live-streamed content with their Facebook friends.[39] After a user concludes their Facebook Live video, the video is saved to the user's profile.[40] In 2016, Instagram launched "Stories," a feature that allows users to post photos and videos to a twenty-four-hour slideshow that a user's followers can view.[41] The launch of these two features, particularly Facebook Live, has significantly increased the popularity of SMLS with all Social Media users.[42] As of 2017, Facebook had two billion

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[32] Originally, Facebook was known as "thefacebook.com." Riese, *supra* note 29.

[33] O'Dell, *supra* note 28.

[34] Riese, *supra* note 28.

[35] *Number of Active Users at Facebook over the Years*, THE ASSOCIATED PRESS (May 1, 2013), https://www.yahoo.com/news/number-active-users-facebook-over-230449748.html.

[36] Riese, *supra* note 30.

[37] *Id.*

[38] Joe Lazauskas, *The Untold Story of Facebook Live*, THE CONTENT STRATEGIST (Sept. 27, 2016), https://contently.com/strategist/2016/09/27/facebook-live-resurgence/.

[39] *Id.*

[40] *About*, FACEBOOK LIVE, https://live.fb.com/about/ (last visited Apr. 8, 2018).

[41] Josh Constine, *Instagram Launches "Stories," A Snapchatty Feature For Imperfect Sharing*, TECH CRUNCH (Aug. 2, 2016), https://techcrunch.com/2016/08/02/instagram-stories/.

[42] Nikki Gilliland, *Why Live Video was the Biggest Social Trend of 2016*, ECONSULTANCY (Dec. 20, 2016), https://econsultancy.com/blog/68640-why-live-video-was-the-biggest-social-trend-of-2016.

monthly active users[43] and Instagram had in excesses of seven hundred million monthly active users.[44]

II. EXPLAINING THE DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA)

A. THE PURPOSE OF THE DMCA

There are more than one billion websites online,[45] and more than fifty percent of the world's population uses the Internet.[46] When the World Wide Web Project was launched in August of 1991, there was just one website on the Internet.[47] By 1998, barely seven years later, the number of websites on the Internet had exceeded two-million and more than 188 million people were reported to be Internet users.[48] Popular websites like LinkedIn, YouTube, Reddit, Facebook, and Tumblr had not yet been conceived.[49] Yet since the Internet's birth, content industries—Hollywood, music producers, and publishers—have been wary of the massive copyright infringement that could be possible with the Internet.[50] At the time, Title 17 of the United

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[43] Josh Constine, *Facebook Now Has 2 Billion Monthly Users ... and Responsibility*, TECH CRUNCH (June 27, 2017), https://techcrunch.com/2017/06/27/facebook-2-billion-users/.

[44] Josh Constine, *Instagram's Growth Speeds Up As It Hits 700 Million Users*, TECH CRUNCH (Apr. 26, 2017), https://techcrunch.com/2017/04/26/instagram-700-million-users/.

[45] *Total Number of Websites*, INTERNET LIVE STATS, http://www.internetlivestats.com/total-number-of-websites/ (last visited Jan. 6, 2018).

[46] *Internet World Stats Usage and Population Statistics*, MINIWATTS MARKETING GROUP, http://www.internetworldstats.com/stats.htm (last visited Jan. 6, 2018).

[47] Alyson Shontell, *Flashback: This Is What the First-Ever Website Looked Life*, BUS. INSIDER (June 29, 2011, 4:57 PM), http://www.businessinsider.com/flashback-this-is-what-the-first-website-ever-looked-like-2011-6.

[48] *Total Number of Websites*, INTERNET LIVE STATS, http://www.internetlivestats.com/total-number-of-websites/ (last visited Jan. 6, 2018).

[49] *Id.*

[50] *President Bill Clinton Signs the Digital Millennium Copyright Act into Law*, HISTSORY.COM (2009), http://www.history.com/this-day-in-history/president-bill-clinton-signs-

States Code, as amended by the Copyright Act of 1976, outlined the protections afforded to copyright holders by law.[51] In 1993, Congress acknowledged its own prior deficiency in maintaining copyright laws with emerging technology, and formed a task force to draft updated copyright laws.[52] The Digital Millennium Copyright Act (DMCA), signed into law in October of 1998 by President Bill Clinton, was written to improve upon the existing federal copyright protections in response to the growth of the Internet and the new threats it posed to copyright holders.[53] This Note focuses solely on Title II of the DMCA—Online Copyright Infringement Liability Limitation Act (OCILLA).[54]

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the-digital-millennium-copyright-act-into-law; *See also* S. REP. No. 105-190 at 9 (1998) [hereinafter *Bill Clinton Signs the DMCA*].

[51] Copyright Act of 1976, 17 U.S.C. § 101 et. seq. (2010).

[52] S. REP. NO. 105-190 at 2 (1998). After five years of collecting testimony from industry experts and other influential personnel, and several revisions to proposed versions of a bill, the Judiciary Committee unanimously ordered the Digital Millennium Copyright Act of 1998 reported favorably. *Id.* at 8 (1998).

[53] *Bill Clinton Signs the DMCA*, *supra* note 50. Congress passed the DMCA to achieve dueling compelling interests of the copyright holder and the Internet Service Provider (ISP). On the one hand, the DMCA assures copyright holders that their content is protected by law and they should continue to feel comfortable making that content readily available to the public. On the other hand, the DMCA assures ISPs that they will receive liability protection for the actions of others on their sites and they should therefore continue to invest in improving the Internet experience. S. REP. NO. 105-190 at 8 (1998).

[54] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998). The DMCA has five primary sections: (1) Title I: WIPO Copyright and Performance and Phonograms Treaties Implementation Act of 1998; (2) Title II: Online Copyright Infringement Liability Limitation Act (OCILLA); (3) Title III: Computer Maintenance Competition Assurance Act; (4) Title IV: Miscellaneous Provisions; and (5) Title V: Vessel Hull Design Protection Act. Title I implements two World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty. Title II limits the liability faced by ISPs whose sites may be used by individuals to commit acts of copyright infringement. Title III expands the existing exception relating to copies of computer programs used in conjunction with a computer. Title IV contains six provisions relating to the authority and

B. SECTION 512 [TITLE II] EXPLAINED

Codified by the addition of Section 512 to the Copyright Act,[55] Title II attempts to provide equal protective measures to both copyright owners and Internet Service Providers (ISPs).[56] Congress worried that copyright owners would be deterred from producing and sharing their work if they believed they had no means of protecting their original content.[57] Simultaneously, Congress feared that if ISPs faced a high risk of liability for the content individual users placed on their sites it would stifle the growth of the Internet.[58] Section 512 limits the liability faced by an ISP whose website is used for transmission, storage, or discovery of infringing content.[59] This protection is subject to three mandatory criteria:[60] (1) qualifying as an ISP;[61] (2) implementing a reasonable repeat infringer termination policy;[62] and (3) accommodating standard technical measures.[63] In striking

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functionality of the Copyright Office. Title V sets out a new system for protecting the designs of vessel hulls. *Id.*

[55] 17 U.S.C. § 512. Title II preserves strong incentives for ISPs and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment. At the same time, it provided greater certainty to ISPs concerning their legal exposure for infringements that may occur in the course of their activities. S. REP. NO. 105-90 at 20 (1998).

[56] S. REP. NO. 105-190 at 20 (1998).

[57] *Id.* at 8–9.

[58] *Id.* at 8.

[59] *Id.* at 20.

[60] Compliance with all three criteria is necessary for Title II limitation on liability. 17 U.S.C. § 512.

[61] As addressed in subsection (a) of Section 512, the term "service provider" means "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, or material of the user's choosing, without modification to the content of the material as sent or received." 17 U.S.C. § 512(a). The Social Media sites that will be discussed in this Note are considered to be ISPs.

[62] The second criteria, implementing a termination policy, mandates that an ISP make known to its users that it has a policy of terminating the user accounts of repeat infringers. 17 U.S.C. § 512(i)(1)(A).

[63] The third criterion, "standard technical measures," refers to technical measures employed by the ISP to identify and protect copyrighted works. 17 U.S.C. § 512(i). These technical measures,

a balance between the copyright holder and the ISP, the resulting legislation places the burden of monitoring for copyright infringement on the copyright holder and the responsibility of removing that infringing content expeditiously on the ISP.[64] In other words, an ISP does not have an affirmative duty to monitor its site to claim limited liability;[65] however, if an ISP becomes aware of "red flag" knowledge or receives notice from the copyright holder, then the service provider has an affirmative duty to expeditiously disable access to the content.[66]

Section 512 creates "safe harbors" for four activities commonly conducted by ISPs that allow an ISP to receive the benefit of limited liability.[67] These safe harbors blanket a qualifying ISP in limited liability protection for occurrences on their site that would typically raise a claim of contributory or vicarious liability under existing copyright laws and jurisprudence.[68] An ISP is not liable for monetary damages or other equitable relief if the infringement occurred in the course of one of the following activities: (1) transitory digital network communications;[69] (2) system caching;[70] (3) information residing

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although required, do not have to be so extensive as to impose substantial costs on the ISP or a great burden on the ISP's network. 17 U.S.C. § 512(i)(2).

[64] S. REP. NO. 105-190 at 44–45 (1998).

[65] "Protecting service providers from the expense of monitoring was an important part of the compromise embodied in the safe harbor." Capitol Records, LLC v. Vimeo, LLC, 826 F.3d 78, 98 (2d Cir. 2016).

[66] S. REP. NO. 105-190 at 44 (1998).

[67] *Id.* at 19.

[68] *Id.*

[69] *Id.* at 41. Subsection (a), "digital network communications," applies to ISPs that act as a conduit for sending the digital communications of others across digital networks. In the course of the ISP transmitting, routing, or providing the connection to complete the sending of digital communications, there is some form of intermediate or transient storage of copies of the content. An ISP is protected from liability for copyright infringement that may occur through the automatic storage of materials transmitted at the direction of another. *Id.*

[70] *Id.* at 42. Subsection (b), "system caching," addresses instances where an ISP serves as an intermediary between the originating site and the intended end user. With system caching, the content in question is stored on the ISP's network for a period of time

on systems or networks at the direction of users;[71] and (4) information location tools.[72] For an ISP to receive limited liability protection under one of the four Section 512 safe harbors, the ISP must comply with the requirements outlined in each subsection.[73] Based on the focus of this Note, the most relevant portion of the DMCA is Section 512(c)—Information Residing on Systems or Networks at Direction of Users.[74]

C. "SAFE HARBOR" REQUIREMENTS

An ISP wishing to benefit from the limitation on liability afforded under Section 512(c) must satisfy four requirements.[75] These four requirements are: (1) an ISP may not have knowledge of the infringing content's presence on their site; (2) an ISP may not receive a financial benefit as a result of the infringing content; (3) an ISP must act expeditiously to remove the infringing content once they have knowledge of its presence; and (4) an ISP must have a designated agent responsible for handling takedown notices.[76] All four of the above standards must be satisfied at all times for an ISP to receive copyright infringement liability protection under the DMCA Section 512(c) safe harbor.[77] An

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as a means of providing access to the ultimate user. If the stored content is the copyrighted property of another, the ISP has limited liability if the storage was at the direction of a third-party user of the ISP's site. *Id.*

[71] *Id.* at 43. Subsection (c), "information stored on service providers," limits infringement liability for ISPs who store infringing content on their system or network at the direction of a user. This subsection specifically applies to ISPs that provide a forum for users to post content of their choosing, forums such as Facebook, Twitter, or Instagram. Subsection (c) also outlines the procedural requirements for copyright owners to request infringing content be removed from an ISP's network. *Id.*

[72] *Id.* at 47; *see also* 17 U.S.C. § 512(a)-(d), (f) (1998). Subsection (d), "information location tools," applies to ISPs that refer or link users to a secondary online location that hosts infringing material or activity. This reference or linkage to a secondary location is facilitated using information location tools, such as, search engines that recommend sites to users. S. REP. NO. 105-190 at 47 (1998).

[73] 17 U.S.C. § 512 (1998).

[74] *Id.*

[75] *Id.* § 512(c).

[76] *Id.*

[77] *Id.*

understanding of each of the four criteria requires a review of the relevant case law and legislative history.

1. Knowledge

First, the ISP cannot have knowledge of the presence of infringing material on its network.[78] Actual knowledge is not required; if the ISP is aware of facts or circumstances that support even "apparent" knowledge[79] of the infringing material's presence, then that is enough to require the ISP to act expeditiously to remove the infringing content from its site.[80] "Apparent" knowledge is based on facts or circumstances referred to as "red flag" knowledge.[81]

A test for whether an ISP has sufficient knowledge to constitute actual notice came in 2013 from *UMG Recordings v. Shelter Capital Partner*.[82] The court addressed UMG's claim that Veoh, a video-sharing site, had sufficient knowledge or awareness of infringing videos on its site, but did not remove the content.[83] UMG further claimed that Veoh "*must have known* this [UMG's copyrighted music] content was unauthorized, given its general knowledge that its services could be used to post infringing

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[78] 17 U.S.C. § 512(c)(1)(A)(i).

[79] Also referred to in case law as 'red flags.'

[80] 17 U.S.C. § 512(c)(1)(A)(ii).

[81] S. REP. NO. 105-190, at 44 (1998).

[82] In the case of *UMG Recordings v. Shelter Capital Partner*, Universal Music Group (UMG) filed suit against Veoh Network (Veoh) in 2013 on the grounds that Veoh was liable for direct, vicarious and contributory copyright infringement, and for inducement of infringement based on the infringing content they allowed to be published on their site. Veoh is a publicly accessible website that allows users to share and view video content on the Internet. UMG is one of the largest music producers and publishers. In their complaint, UMG alleges that Veoh's infringement prevention measures, i.e. Veoh's Publisher Terms and Conditions, Terms of Use, and flash filtering software, were not instituted until after infringing content already existed on the Veoh site. Veoh asserted that it was protected by the safe harbor provision in the DMCA. The Ninth Circuit Court of Appeals delivered the ruling on the case. UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006, 1011 (9th Cir. 2013).

[83] *Id.* at 1020–21.

material."[84] In its opinion, the court pointed out that Congress required ISPs to have actual knowledge of infringement because "[c]opyright holders know precisely what materials they own, and are thus better able to efficiently identify infringing copies than service providers."[85] The court held that "general knowledge that one's service could be used to share infringing material, is insufficient to meet the actual knowledge requirement under § 512(c)(1)(A)(i)."[86] The burden of identifying infringing material rests on the copyright holder.[87] Ultimately, the court held the safe harbor provision of the DMCA shielded Veoh.[88]

In *Viacom International, Inc. v. YouTube, Inc.*,[89] the court addressed the question of whether the DMCA safe harbor protections required "'actual knowledge' or 'aware[ness]' of facts or circumstances indicating 'specified and identifiable infringements.'"[90] In its opinion, the court stated that:

> The difference between actual knowledge and red flag knowledge is thus not between specific and generalized knowledge, but instead between a subjective and objective standard. In other words, the actual knowledge provision turns on whether the provider actually or 'subjectively' knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made

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[84] *Id.* at 1021 (emphasis added).

[85] *Id.* at 1022.

[86] *Id.*

[87] *Id.* at 1023.

[88] *Id.* at 1006.

[89] Viacom brought a $1 billion lawsuit against Google alleging that YouTube illegally hosted content that infringed on Viacom's copyrighted intellectual property. Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012). In its complaint, Viacom alleged that YouTube was liable for direct and secondary copyright infringement resulting from approximately 79,000 videos that appeared on the YouTube website between 2005 and 2008. *Id.* at 26. The court evaluated whether YouTube, as an ISP, was entitled to DMCA safe harbor liability protections. *Id.* at 29.

[90] Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 31 (2d Cir. 2012) (quoting *Viacom Int'l, Inc. v. YouTube, Inc.,* 718 F.Supp. 2d 514, 523 (S.D.N.Y. 2010)).

> the specific infringement 'objectively' obvious to a reasonable person.[91]

The court held that, based on the text of § 512(c)(1)(A) and the precedent case law, an ISP will be disqualified from safe harbor protection if they have "actual knowledge or awareness of facts or circumstance that indicate specific and identifiable instances of infringement."[92] The ruling by the court established the red flag knowledge test that has since been used by courts to determine whether an ISP had apparent knowledge.

2. Financial Benefit

Second, the ISP may not receive a direct financial benefit as a result of infringing content that the ISP has the right and the ability to control.[93] In the case of *A&M Records v. Napster, Inc.*,[94] the court sought to interpret the "no direct financial benefit" restriction of the DMCA to determine what would cause an ISP to forfeit their safe harbor liability protections.[95] In addressing the financial benefit an ISP receives from infringing content, the court established that an ISP may not be afforded safe harbor protections if the ISP receives a direct financial benefit from the presence of infringing content on its site.[96] The court stated that "[f]inancial benefit exists where the availability of infringing

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[91] *Id.*

[92] *Id.* at 32.

[93] 17 U.S.C. § 512(c)(1)(B) (2012).

[94] The case of *A&M Records, Inc. v. Napster, Inc.*, is the first in a line of DMCA cases that interpreted the appropriate application of the DMCA, Section 512. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). Record companies and music producers brought copyright infringement actions against the music sharing website, Napster, on the grounds that Napster, as an ISP, facilitated the transmission and retention of digital audio files by its users. *Id.* at 1011. By accessing the Napster website, users were able to copy MP3 files and upload them to the "library" to be shared with other site users. *Id.* at 1011–12. In response to these claims of contributory and vicarious infringement liability, Napster attempted to establish a defense under the safe harbor protections of the DMCA, Section 512. *Id.* at 1024.

[95] *A&M Records, Inc.*, 239 F.3d 1004.

[96] *Id.* at 1022–25.

material "acts as a 'draw' for customers.'"[97] The court found sufficient evidence showing that Napster's future revenue was linked to the increase in user-base resulting from the infringing content on their site.[98] The court held that the copyrighted material on Napster (music) directly increased the number of site users.[99] As such, Napster was in fact receiving a direct financial benefit from the infringing material because the infringing content drew users to the site.[100] To apply this to Social Media sites, if the presence of infringing content was shown to be a significant draw for users, then this would constitute financial benefit and could render them ineligible for safe harbor protections.

3. Expeditious Removal

Third, once the ISP is notified of the infringing content, pursuant to Section 512(c)(1)(A)(iii), the ISP must either expeditiously remove the infringing materials or disable access to the material.[101] Given that the factual circumstances and technical parameters of each infringement instance will undoubtedly vary, Congress did not establish a uniform time limit for expeditious action.[102] Expeditious removal is not triggered until the ISP has knowledge or awareness of the specific infringing material, as

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[97] *Id.* at 1023. The *Napster* court cited *Fonovisa, Inc. v. Cherry Auction, Inc.*, in which the court stated that a financial benefit may exist "where infringing performances enhance the attractiveness of the venue." Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263–64 (9th Cir. 1996). Put another way, if the presence of infringing content on a website serves as a draw to users, thereby increasing the user base and thus increasing the financial value of the website, then this is considered to be a direct financial benefit and the ISP is ineligible for Section 512(c) liability protection.

[98] *A&M Records, Inc.*, 239 F.3d at 1023.

[99] *Id.*

[100] *Id.*

[101] 17 U.S.C. § 512(c)(1)(C).

[102] S. REP. NO. 105-190 at 44–45 (1998). Subsection (c)(1)(A)(iii) provides that a service provider must act expeditiously to remove infringing material from their site once they become aware of the material's presence on their site. In contemplating the definition of "expeditiously," the Senate comments, "[b]ecause the factual circumstances and technical parameters may vary from case to case, it is not possible to identify a uniform time limit for expeditious action." *Id.*

defined above, because requiring expeditious removal without specific knowledge or awareness would place too great of a burden on ISPs.[103]

4. Designated Agent

Fourth, the ISP must have a designated agent, whose name and contact information is publicly available through its service in a location that is accessible to the public, including on the ISP's website.[104] The Copyright Office must also have the designated agent's information on file so the Copyright Office can keep an accurate directory of all agents.[105] The designated agent receives all claims of alleged infringement from copyright owners.[106]

D. DMCA TAKEDOWN NOTICE

1. Process for Filing

When Congress passed the DMCA in 1998, some believed that copyright holders
would be best suited to identify infringing content online.[107] By offering protection to ISPs, the Internet could grow and flourish without the constant fear of copyright infringement liability.[108] To strike a balance between the protection of ISPs and the rights of copyright holders, the DMCA includes a takedown notice provision.[109] A copyright owner must file a takedown notice with the ISP's registered agent and must identify the infringing content on the ISP's site.[110] When a copyright owner, or person authorized

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[103] Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 30–31 (2d Cir. 2012). The language of the statute requires expeditious removal of the material at issue. 17 USC § 512(c)(1)(A)(iii). Therefore, to require expeditious removal without specific knowledge of a particular infringement "would be to mandate an amorphous obligation" inconsistent with the statutory intent. *Id.*

[104] 17 U.S.C. § 512(c)(2).

[105] *Id.*

[106] 17 U.S.C. § 512(c)(3)(A)

[107] S. REP. NO. 105-190 at 20 (1998).

[108] *Id.* at 8.

[109] *Id.* at 20.

[110] 17 U.S.C. § 512(c)(3)(A) (2010).

to act on the copyright owner's behalf, submits a takedown notice, the ISP must act expeditiously to remove the infringing content from its site.[111] Upon the filing of a proper takedown notice, the ISP has knowledge of infringing content and is therefore required to take steps to remove the content if the ISP wishes to maintain its safe harbor protections.[112]

A proper takedown notice must include the following information: (1) the complaining party's contact information; (2) identification of the allegedly infringed copyrighted work or works; (3) information detailed enough so the ISP can locate the content; (4) the physical or electronic signature of a person authorized to act on the copyright owner's behalf; (5) a statement affirming that the complaining party has a good faith belief that the infringing content is not authorized by the copyright owner, agent, or law; and (6) a statement that the information in the notice is accurate and that the complaining party is authorized to act on behalf of the copyright owner.[113] A takedown notice that does not substantially comply with these requirements does not trigger an obligation for the ISP to remove the infringing content and is not evidence of the ISP's actual or red flag knowledge of the infringement.[114]

Entertainment artists can submit takedown notices to have infringing content removed from online sites. The notices do not have to be completed by a lawyer, but many artists have lawyers submit the requests on their behalf.[115] Once an individual submits a takedown notice, the party that posted the content may submit a "counter-notice" explaining why they believe they have a good-faith right to use the copyrighted content.[116] The ISP then forwards the counter-notice to the individual that originally submitted the takedown notice.[117] The relevant content remains offline for ten days.[118] During that ten day period, the copyright

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[111] *Id.*

[112] 17 U.S.C. § 512(c)(1)(Q) (2010).

[113] 17 U.S.C. § 512(c)(3)(A), (d)(3) (2010).

[114] 17 U.S.C. § 512(c)(3)(B)(i) (2010).

[115] Jonathan Bailey, *7 Common Questions about DMCA Counter-Notices Pardon Our Interruption*, PLAGIARISM TODAY (June 3, 2010), https://www.plagiarismtoday.com/2010/06/03/7-common-questions-about-dmca-counter-notices/.

[116] 17 U.S.C. § 512(g) (1998).

[117] Bailey, *supra* note 115.

[118] *Id.*

holder may petition the court for an injunction to prevent the restoration of the content.[119] However, if the original party does not obtain an injunction within ten days, the content is restored to the site.[120] Counter-notices are rare, but when they are filed, a valid copyright holder must then invest a great deal of time and money to protect their content.[121]

2. Effectiveness of Takedown Notices

Artists and ISPs disagree on the effectiveness of DMCA takedown notices.[122] Sites like Google claim that the takedown notices are dealt with in in approximately six hours.[123] Yet most web hosts will likely handle a takedown notice only after 24 to 72 hours.[124] The DMCA requires that an ISP work "expeditiously" to remove infringing content once they have knowledge of its presence on the site, *i.e.* a takedown notice.[125] The lack of clarity surrounding the definition of "expeditiously" has created great discrepancy in what constitutes an adequate ISP takedown notice response time.[126] In its drafting of the DMCA, Congress acknowledged that defining expeditiously would be unwise given the varied nature of the takedown requests.[127] Based on this

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[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] Bailey, *supra* note 11.

[123] *Transparency Report Help Center*, GOOGLE, https://support.google.com/transparencyreport/answer/7347743?hl=en (Google reports that it receives more than six million requests a week and, in total, has received more than one hundred million takedown requests); Stephen Carlisle, *DMCA "Takedown" Notices: Why "Takedown" Should Become "Take Down and Stay Down" and Why It's Good for Everyone*, NOVA SE. U. (July 23, 2014), http://copyright.nova.edu/dmca-takedown-notices/.

[124] Bailey, *supra* note 11. After 72 hours, the probability that the content will be removed decreases and after 96–120 hours the likelihood decreases to almost zero. *Id.*

[125] 17 U.S.C. § 512(c).

[126] Bailey, *supra* note 115.

[127] S. REP. NO. 105–190 at 44 (1998).

legislative history, courts have also avoided defining a uniform time limit that they consider to be expeditiously.[128]

Artists have grown frustrated with the ineffectiveness of the DMCA. In an effort to take action, over 500 artists have signed an open letter to Congress asking that Congress amend the DMCA.[129] The letter called for "sensible reform" of the DMCA.[130] More specifically, the letter called attention to YouTube's safe harbor protection from copyright infringement liability despite the excessive amount of infringing content on the site.[131] Artists claim that YouTube has managed to grow their users and profits on the backs of artists without fairly compensating or protecting those artists.[132] Further, another problem for artists is that after ISPs remove infringing content, there are no sufficient safeguards in place to prevent the same content from being reposted almost immediately.[133] The constant cycle of artists issuing takedown notices, ISPs removing the infringing content, and users reposting the same infringing content can feel like a game of "whack-a-mole."[134] This persistent game of whack-a-mole is cumbersome to smaller artists that lack the resources to constantly monitor and submit takedown notices,[135] and is almost impractical for mega-stars because the amount of

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[128] *See id.* (explaining that "[b]ecause the factual circumstances and technical parameters may vary from case to case, it is not possible to identify a uniform time limit for expeditious action" under subsection (c)(1)(A)(iii)); *see also* Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514, 521 (S.D.N.Y. 2010).

[129] Emily Blake, *Bruno Mars & Bruce Springsteen Are Latest Artists to Sign DMCA Reform Letter*, MASHABLE (June 22, 2016), http://mashable.com/2016/06/22/dmca-letter-taylor-swift-bruno-mars/#HsalkqiqnOqa.

[130] *Id.*

[131] *Id.*

[132] Jamieson Cox, *The Music Industry Is Begging the US Government to Change Its Copyright Laws*, THE VERGE (Apr. 1, 2016, 9:45 AM), https://www.theverge.com/2016/4/1/11344832/music-industry-copyright-law-change-christina-aguilera-katy-perry.

[133] Devlin Hartline, *Endless Whack-A-Mole: Why Notice-and-Staydown Just Makes Sense*, CPIP (Jan. 14, 2016), https://cpip.gmu.edu/2016/01/14/endless-whack-a-mole-why-notice-and-staydown-just-makes-sense/.

[134] *Id.*

[135] *Id.*

infringing content online is overwhelming.[136] Beyond the DMCA takedown notice, copyright holders have a limited number of remedies to prevent online infringement. The DMCA safe harbor protections afforded to ISPs limit the parties an artist can seek judgment against in a court of law.[137] An artist may choose to file suit directly against the copyright infringer, but this is not likely to stop the incessant infringement that artists are desperate to stop.

One of the more prominent examples of an artist attempting to use the takedown notices to protect their content from online infringers surrounds Taylor Swift's album "1989."[138] In 2014, Universal Music Group (UMG) and Big Machine Records launched a joint effort to remove all online content infringing Swift's "1989."[139] UMG created a group of employees dedicated solely to searching for and issuing takedown notices for any infringing content from the album.[140] Between October of 2014 and March of 2016 the group submitted over 66,000 DMCA takedown notices.[141] Despite this massive effort to remove all infringing content for this one album, there were more than 500,000 links to the album found online and the album was

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[136] Kevin Madigan, *Despite What You Hear Notice and Takedown is Failing Creators and Copyright Owners*, CPIP (Aug. 24, 2016), https://cpip.gmu.edu/2016/08/24/despite-what-you-hear-notice-and-takedown-is-failing-creators-and-copyright-owners/. "For instance, in 2014, Grammy Award winning composer Maria Schneider testified before Congress that she spends more time sending notices than creating music, and she is hopelessly outmatched by online thieves thanks to the DMCA's feeble protections." Mark Schultz, *Digital Age Changes all the Rules on Intellectual Property*, THE HILL (Nov. 6, 2017, 1:50 PM), http://thehill.com/opinion/finance/358963-digital-age-changes-all-the-rules-on-intellectual-property.

[137] Susan Hong, *Digital Millennium Copyright Act and Protecting Individual Creative Rights: A Proposal for On-Line Copyright Arbitration*, 2 CARDOZO ONLINE J. CONF. RES. 110, 111 (2000).

[138] Kevin Madigan, *Despite What You Hear Notice and Takedown Is Failing Creators and Copyright Owners*, CPIP (Aug. 24, 2016), https://cpip.gmu.edu/2016/08/24/despite-what-you-hear-notice-and-takedown-is-failing-creators-and-copyright-owners/.

[139] *Id.*

[140] *Id.*

[141] *Id.*

illegally downloaded nearly 1.4 million times.[142] Taylor Swift has not stopped trying to remove infringing versions of her album; her team has worked to remove any social media live streams of her concerts as well.[143] Swift's team, appropriately named TAS Rights Management,[144] initially focused primarily on the SMLS app Periscope.[145] The team actively submitted takedown notices for any live-streamed videos from Swift's concerts.[146] This type of infringement is not unique to Taylor Swift, but it is rare that an artist would have the ability to dedicate an entire team to submitting takedown notices.[147] Such a heavy burden seems impractical to place on artists when sites like YouTube and Periscope greatly benefit from the user traffic that infringing content brings to their sites.[148]

III. ALTERNATIVE REMEDIES TO PROTECT ARTISTS FROM SMLS INFRINGEMENT

Operating under the assumption that the DMCA will not be revised in the near future, there are four alternative solutions that would protect artists from SMLS copyright infringement. The first solution presented calls for lawyers to advocate for a change in the interpretation of the DMCA as it is currently written. The last three solutions are directed at the artists. The four suggested solutions to SMLS infringement are as follows: (1) expanding of the interpretation of the safe harbor "knowledge" requirement to place more responsibility on Social Media sites; (2) establishing measures that prohibit cell phone use at shows; (3) dedicating greater resources to issuing takedown notices and filing lawsuits; and (4) embracing SMLS and develop a way to control and monetize live streams of their shows.

A. WORK WITHIN THE EXISTING DMCA TO SHIFT RESPONSIBILITY TO SOCIAL MEDIA SITES

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[142] *Id.*

[143] *Taylor Swift Cracks Down on Pirating "Periscope" Fans*, TORRENT FREAK (Sep. 25, 2015), https://torrentfreak.com/taylor-swift-cracks-down-on-pirating-periscope-fans-150925/.

[144] TAS stands for Taylor Allison Swift. *Id.*

[145] *Id.*

[146] *Id.*

[147] Madigan, *supra* note 138.

[148] *Id.*

Working within the existing DMCA framework, there may be an alternative view of the knowledge requirement that requires more action on the part of Social Media platforms. To receive safe harbor protections, the DMCA requires that an ISP does not have actual or red flag knowledge of the existence of infringing content on their site.[149] Social Media sites do not actively patrol their sites for infringing content; therefore, they are only required to act once a copyright holder submits a takedown notice.[150] The question artists should be asking is, given how commonly Social Media sites with SMLS capabilities are used for copyright infringement, can Social Media sites continue to hide behind the notion that they have "no actual knowledge" of the infringing content shared on their sites? The court in *UMG* stated that general knowledge of the potential for one's site to be used to share infringing content is not sufficient to satisfy the DMCA knowledge requirement.[151] Yet, given the amount of information that is constantly transmitted from Social Media users back to the host site,[152] if a sudden spike in live streaming occurred in one place at one time, would that trigger the requisite level of knowledge? Taking that one step further, if ISPs could cross reference this type of spike in user activity with concerts and or other major live performance dates, would that establish red flag or possibly even actual knowledge? This type of data analysis to identify patterns that correlate to certain user activity can be compared to the pattern recognition the SEC analytics software uses to identify insider trading.

Since 2014, the SEC has been using two analytics programs to analyze data and identify patterns.[153] The software

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[149] 17 U.S.C § 512(c).

[150] *Id.*

[151] UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006, 1022 (9th Cir. 2013).

[152] David Nield, *You Probably Don't Know All the Ways Facebook Tracks You*, FIELD GUIDE (June 8, 2017, 10:45 AM), https://fieldguide.gizmodo.com/all-the-ways-facebook-tracks-you-that-you-might-not-kno-1795604150.

[153] *SEC—Data Analytics Key to Unlocking Fraud Schemes*, MANATT (Mar. 24, 2017), https://www.manatt.com/Insights/Articles/2017/SEC%E2%80%94Data-Analytics-Key-to-Unlocking-Fraud-Schemes.

"identifies links between individuals and entities by connecting pieces of information from multiple data sources."[154] The SEC has opened nine investigations based on its software's pattern recognition since 2014.[155] This pattern recognition could be instituted in other contexts to achieve a similar goal; for example, within the Facebook framework to detect spikes in user activity. If it is assumed that Facebook and other Social Media sites can no longer claim that they lack knowledge and they cannot claim safe harbor protection, it would be imperative for them to establish a new means of stopping infringers. Instituting a variation of the SEC pattern recognition software would give Social Media sites the ability to identify mass infringement activity and to remove those live streams. This shift of responsibility to Social Media sites is likely only possible if it is determined that they do in fact have actual or red flag knowledge of the infringement on their site, thus stripping them of their DMCA liability protection.

Social Media sites like Facebook are constantly collecting information on their users, so it is hardly practical to allow them to say they have no knowledge of infringing content. The case law is very clear that an ISP cannot exhibit willful blindness and receive safe harbor protection under the DMCA, especially when the ISP increases its own financial gains.[156] Features like Facebook Live attract users to Facebook's site, and the greater the number of users, the higher the ad prices charged by Facebook.[157] If the user infringes on Taylor Swift's copyright protected material by live streaming her concert, then a connection can be shown between Facebook's financial position and the infringement. Combining the financial gain from advertisements garnished from higher user activity with the red flag knowledge based on spikes in user activity, Social Media sites should not be able to claim DMCA safe harbor protections because they do not meet the necessary requirements.

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[154] *Id.*

[155] *Id.*

[156] *UMG Recordings*, 718 F.3d at 1023.

[157] *See generally How Ad Billing Works on Facebook*, FACEBOOK BUS., https://www.facebook.com/business/help/716180208457684?helpref=page_content (last visited Apr. 10, 2018) (explaining that advertisers are "charged for the number of clicks or the number of impressions your ad received).

B. CREATE PHONE-FREE ZONES AT SHOWS

Artists may choose to take matters into their own hands by prohibiting cellphone use at their shows. In 2014, the California based startup Yondr began offering a way for entertainment artists to create cellphone-free zones.[158] Before attendees enter the venue, they are instructed to put their phone into a Yondr pouch.[159] Attendees keep possession of their phone, but the phone remains locked inside the pouch while they are inside the venue's phone-free zone.[160] If an attendee needs access to their phone, they can step outside the phone-free zone and the pouch can be unlocked.[161] Many singers and comedians, including Alicia Keys, Guns N' Roses, Maxwell, Dave Chappelle, and Donald Glover, have instituted phone-free zones at their shows.[162] These phone-free shows offer artists a greater sense of "creative security."[163] This increased sense of security stems from the alleviation of any fear that a video of the show will be leaked online.[164] Without access to their phones, attendees have no way of live streaming the show. This upfront investment in Yondr pouches would alleviate the need to expend funds to monitor for infringing content shared via Social Media.

C. DEDICATE MORE RESOURCES TO PREVENT INFRINGEMENT

Following Taylor Swift's lead, another option for entertainment artists is to be more aggressive in their monitoring for Internet infringement.[165] For SMLS issues, artists may look to

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[158] Morrissey, *supra* note 2.

[159] *See How It Works*, YONDR, https://www.overyondr.com/howitworks/ (last visited Apr. 10, 2018).

[160] *Id.*

[161] *Id.*

[162] Morrissey, *supra* note 2.

[163] *Lock Screen: At These Music Shows, Phones Go in a Pouch and Don't Come Out*, NPR (July 5, 2016), http://www.npr.org/sections/alltechconsidered/2016/07/05/483110284/lock-screen-at-these-music-shows-phones-go-in-a-pouch-and-dont-come-out.

[164] *Id.*

[165] Ernesto, *Taylor Swift Cracks Down on Pirating "Periscope" Fans*, TORRENT FREAK (Sept. 25, 2015), https://torrentfreak.com/taylor-swift-cracks-down-on-pirating-periscope-fans-150925/.

allocate financial resources to patrolling Social Media sites during concerts. The DMCA was written to protect artists from online copyright infringement, but with this legislative protection comes the responsibility to monitor the Internet for infringement. Because Facebook, Instagram, and other Social Media sites are complying with the DMCA, it shifts the burden of discovery to artists. If ISPs are fully in compliance with their responsibilities as laid out by the law, then it may be impractical to expect Social Media platforms to patrol their sites more aggressively. Therefore, artists wanting to prevent online infringement of their content should consider allocating a much more significant amount of both time and resources to a continuous monitoring effort. However, this solution assumes that an artist has the financial means to support such a course of action.

D. ADOPT A BUSINESS MODEL THAT CONTROLS SMLS MONETIZATION

As the saying goes, "if you can't beat them, join them." Maybe it is time artists develop a business model that allows them to harness SMLS for their own financial gain instead of trying to fight off infringing streamers. If it is assumed that the DMCA offers the full extent of legal remedies available to artists with online copyright infringements, artists that find this to be an insufficient or ineffective solution must change how they evaluate the problem. An artist could invest excessive amounts of money attempting to stop Social Media users from live streaming a poor-quality version of the concert or they could produce their own live stream and take the power away from infringers. A survey by New York Magazine found that "nearly half of live video audiences would pay for live, exclusive, on-demand video from a favorite team, speaker, or performer."[166] Additionally, the survey revealed that sixty-seven percent of live video viewers reported that they were "more likely to buy a ticket to a concert or event after watching a live video of that event or a similar one."[167] Facebook Live, like other Social Media sites, makes it possible for users

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[166] Caroline Golum, *Live Video ROI: 4 Strategies for Live Video Monetization*, LIVESTREAM, https://livestream.com/blog/live-video-monetization.

[167] Caroline Golum, *62 Must-Know Live Video Streaming Statistics*, LIVESTREAM, https://livestream.com/blog/62-must-know-stats-live-video-streaming.

hosting a live stream to profit from mid-stream advertisements once a SMLS surpasses a set viewer threshold.[168] Just as artists were forced to pivot when their audience shifted from purchasing CDs of their albums to downloading them from iTunes, it may be time for artists to shift from an exclusively in-person concert model to an in-person/online hybrid model.

CONCLUSION

Today, there are more than three billion active Social Media users globally.[169] This amounts to nearly forty percent of the world's population.[170] In the United States, seven in ten Americans are Social Media users.[171] The numbers are staggering, but the reality is undeniable—Social Media has embedded itself in the fabric of American life. The DMCA and the protections it established were codified before the age of Social Media began. Although ISPs do comply with the takedown requests they receive, given the sheer number of takedown requests, it is unrealistic to believe that the Internet of 2018 could be stripped of all or even most infringing content. Currently the DMCA does not provide artists with adequate protection.

There are several potential solutions to the problem of online infringement via SMLS. Perhaps the most radical of the alternatives presented is to shift some of the burden back onto ISPs, specifically Social Media sites. Safe harbor protections can only be afforded to an ISP that does not have actual or red flag knowledge of the infringement. Given the expansive power of Social Media sites to track user activity, it could be suggested that Social Media sites like Facebook do have some form of red flag knowledge. Even if they do not have "knowledge" within the current court interpreted definition, they may still have the

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[168] Akshay Chandra, *Earn Monetization Revenue Through Facebook LiveStreaming*, VIDOOLY (Apr. 6, 2017), https://vidooly.com/blog/earn-monetization-revenue-though-facebook-livestreaming.

[169] Brett Williams, *Social Media Reaches 3 Billion Users Globally, Says New Report*, MASHABLE (Aug. 7, 2017), http://mashable.com/2017/08/07/3-billion-global-social-media-users/#eYAb0.fSEaqG.

[170] *Id.*

[171] *Social Media Fact Sheet*, PEW RES. CTR. (Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/social-media/.

capability to better monitor their sites. If artists want to be absolutely certain that there are no SMLS at their shows, removing the temptation entirely is now a possible solution. With technology like Yondr, shows can be transformed into phone-free performances.

It may also be appropriate to place the burden on the artists to police for infringement because they are best equipped to identify their own intellectual property. When the DMCA was written, legislatures intended for this responsibility to be held solely by artists; however, legislatures at the time could never have imaged how much the Internet would grow. Alternatively, artists could harness SMLS as another form of monetization. The music industry has already undergone extensive change as a result of the digital age, this may just be the next step in that evolution. Ultimately, it is time for Congress to revisit the DMCA because the technology has so far surpassed the law that the law is nothing more than a relic from a pre-digitalized era.

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THE COLLEGE ATHLETE PROTECTION GUARANTEE: ANOTHER FLAWED FIX FOR THE BROKEN SYSTEM OF ATHLETIC RECRUITMENT

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INTRODUCTION

This paper addresses the potential impact of the College Athlete Protection Guarantee: the most recent attempt to substantially increase the amount of additional benefits and protections college athletes receive in exchange for their commitment to a specific institution. There are several serious issues with the current recruitment system—and, more specifically, the National Letter of Intent—which gives college athletes virtually the same amount of compensation they had 50 years ago, while schools generate millions of dollars in revenue from the athletes' abilities.

The College Athlete Protection Guarantee (introduced by the National College Player Association) is the latest attempt to balance the scales between schools and athletes. However, like previously touted "solutions," the College Athlete Protection Guarantee will need to make significant changes to replace the National Letter of Intent. The issues with the College Athlete Protection Guarantee are most apparent when we project its impact on college football recruits. When analyzing this group's socioeconomic background, it becomes clear that the College Athlete Protection Guarantee will only benefit (1) athletes with highly educated guardians and (2) the top 0.13% of recruits who have the leverage to force the schools to negotiate with them. The College Athlete Protection Guarantee is a much better option than the National Letter of Intent for this minute number of athletes.

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However, it is not the solution to providing adequate compensation to all college athletes.

I. THE CURRENT STATE OF COLLEGE ATHLETE RECRUITMENT

Over the last several years, college athletes have begun questioning the National Letter of Intent and the actual benefits and guarantees they receive from it. This binding document creates an imbalance of power between schools and athletes. Athletes often have little to no bargaining power because athletes are unable to amend the document (only the National Letter of Intent Committee can amend it) before the athletes sign it[1] or after the athletes commit to a school.

This lack of power is apparent in situations where athletes have signed National Letters of Intent and then feel powerless, even as athletes on scholarship. For example, the Northwestern University football team attempted to unionize to negotiate their benefits, rather than accepting the limited protections offered to them by the National Letter of Intent.[2] Their appeal was denied.[3] This power imbalance is also apparent in situations like Kyle Hardrick's, who injured his knee while playing for the University of Oklahoma.[4] The school prevented Hardrick from transferring even after Hardrick had to pay for his treatment out-of-pocket, because Hardrick signed the National Letter of Intent with the school.[5] The school ultimately terminated Hardrick's scholarship.[6] After seeing so many athletes denied promised benefits or being locked into a team with an unwanted coaching staff, many high-profile college recruits such as Stephon Marbury

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[1] Michelle Brutlag Hosick, *History of the National Letter of Intent*, NCAA.COM, http://www.ncaa.com/news/ncaa/2011-02-02/history-national-letter-intent (last updated Feb. 2, 2011).

[2] Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union* Bid, N.Y. TIMES (Aug. 17, 2015), https://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrb-says-northwestern-football-players-cannot-unionize.html.

[3] *Id.*

[4] National College Players Association, *The Kyle Hardrick Story – College Athletes Need Legal Protections*, YOUTUBE (2017), https://www.youtube.com/watch?v=lB6Pla9Yx2I&t=193s (last visited Feb. 23, 2018).

[5] *Id.*

[6] *Id.*

and Roquan Smith are choosing not to sign a National Letter of Intent.[7] These are only a few of a countless number of cases where the National Letter of Intent has caused problems for college athletes and illustrates the need for reforming the current recruiting system.

II. THE COST OF COLLEGE ATHLETES

As of the 2014-2015 year, the average cost for students to attend a four-year college was $25,409.00, and if the last 30 years are any indication, the cost will continue to rise.[8] In 2014-2015, colleges in the United States spent over $3 billion in athletic scholarships for varsity athletes, with approximately $2.2 billion of that amount spent on National Collegiate Athletic Association (NCAA) Division I schools.[9] The average athletic scholarship for an NCAA Division I male athlete (per athlete, over all sports sponsored by the schools) is $14,941.[10] As of 2016, athletic scholarships averaged $38,246 for male basketball players and $36,070 for Division 1 Football Bowl Subdivision (FBS) football players.[11] Female athletes playing ice hockey and gymnastics averaged over $40,000 in athletic scholarships per athlete.[12] The most highly compensated individual NCAA Division I athlete received over $63,000 in athletic scholarships in 2016.[13] Based on these figures, some NCAA Division I schools pay over $3.1

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[7] Kevin Scarbinsky, *Scarbinsky: Knight's 'Precautionary' Move May be Revolutionary, too*, AL.COM (May 9, 2012, 5:30 AM), http://blog.al.com/kevin-scarbinsky/2010/05/scarbinsky_knights_precautiona.html; Michael Carvell, *Roquan Smith Won't Sign LOI with New School, Per Coach*, AJC.COM, http://recruiting.blog.ajc.com/2015/02/09/new-roquan-smith-wont-sign-loi-with-new-school-per-coach/ (last updated Feb. 10, 2015).

[8] *Tuition Costs of Colleges and Universities*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=76 (last visited Feb. 21, 2018) (taking into account public and private institutions, and also accounts for decreased tuition for instate residents).

[9] *Average Athletic Scholarship per Varsity Athlete*, SCHOLARSHIPSTATS.COM http://www.scholarshipstats.com/average-per-athlete.html (last visited Feb.21, 2018).

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

million in athletic scholarships every year for their football team alone.[14]

Each party has their eyes set on different amounts—students want more compensation; institutions want to pay less, but still attract the top talent.[15] This rigid dichotomy leads to the question: how can aspiring student-athletes get more benefit from their athletic scholarships without causing institutions to see a dramatic increase in their athletic scholarship costs?

III. COMPENSATING COLLEGE ATHLETES: A BRIEF HISTORY

After the formation of the NCAA in the early 1900s, schools regularly recruited and paid athletes to play.[16] In some instances, athletes who represented the schools were not students but paid professionals such as lawyers and blacksmiths.[17] Schools gave some of the other athletes representing a school high-paying jobs for which the athletes performed little to no work.[18] The first major shift that limited student-athlete compensation was in 1948 with the NCAA's adoption of the "Sanity Codes," which limited financial compensation to tuition and fees, and required any other compensation to be given based on the needs of the athletes.[19] These new limitations on athlete compensation only lasted two years.[20] After numerous southern schools threatened to leave the NCAA in 1950, the code was updated to allow athletic scholarships to include a living stipend.[21]

The next major shift occurred approximately five years later when several schools (now comprising the Ivy League) sought to preserve the ideal of amateurism in college athletics and emphasize the importance of higher education.[22] They decided to

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[14] *Id.*

[15] This statement is based on the inherent self-interest of people and the simple business principle of trying to pay less for equal or greater value.

[16] Dennis A. Johnson, Ed.D. & John Acquaviva, Ph,D., *Point/Counterpoint: Paying College Athletes*, THE SPORTS J. (June 15, 2012), http://thesportjournal.org/article/pointcounterpoint-paying-college-athletes/.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

no longer provide athletic scholarships.[23] Even now, with the revenues of the NCAA reaching $871 million, these schools stand fast in their determination to focus on the "student" portion of the label "student-athletes."[24] The strenuous relationship between the NCAA's continuous emphasis on amateurism in college athletics while constantly trying to generate such incredible revenues has caused some athletes to voice their displeasure with the current compensation system because the amateur designation means no compensation.[25] The National Letter of Intent is just another tool that reinforces this "no pay for play" system.

IV. THE NATIONAL LETTER OF INTENT

The National Letter of Intent "is a binding agreement between a prospective student-athlete and [a] [National Letter of Intent] member institution."[26] Seven college athletic conferences created the National Letter of Intent in 1964 in an effort to stop schools from luring away athletes who were already enrolled and committed to play for another institution.[27] The purpose of this document is to certify that a student-athlete voluntarily agrees to be bound to an institution for one academic year.[28] In exchange for this binding commitment from the student-athletes, the institutions agree to provide an award of financial aid for one academic year.[29] If a student-athlete violates the recruiting rules and fails to uphold their end of the deal, their eligibility is compromised.[30] For example: if a recruit changes their mind about the institution they signed with, the basic penalty requires them to

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[23] *Id.*

[24] *Id.*; *Revenue*, NCAA, http://www.ncaa.org/about/resources/finances/revenue (last visited Feb. 21, 2018).

[25] *See* Johnson & Acquiviva, *supra* note 16.

[26] *About the National Letter of Intent*, NAT'L LETTER OF INTENT, http://www.nationalletter.org/aboutTheNli/index.html (last visited Feb. 21, 2018).

[27] Hosick, *supra* note 1.

[28] *Id.*; *see also About the National Letter of Intent*, *supra* note 26; NCAA, *What is the National Letter of Intent?*, http://www.ncaa.org/student-athletes/future/eligibility-center/what-national-letter-intent (last visited Feb. 21, 2018).

[29] Hosick, *supra* note 1; *see also About the National Letter of Intent*, *supra* note 26; National Collegiate Athletic Association, *supra* note 28.

[30] Hosick, *supra* note 1.

lose one year of competition at the next institution they sign a National Letter of Intent with.[31] The original rules of the National Letter of Intent remain, although some additional rules have been added by the National Letter of Intent program and NCAA administrators as coaches and institutions try to side-step their obligations to these newly signed recruits. [32]

New rules surrounding the National Letter of Intent include when recruits can sign the letter and limitations on the amount of contact coaches can have with recruits during the "signing period."[33] The most notable addition to the rules of the National Letter of Intent came in 2008, when the NCAA and National Letter of Intent Committee received reports that some schools were including "out clauses" in their National Letter of Intent Agreements. [34] These out clauses gave the schools the power to rescind their commitment to the student-athletes in the event of a coaching change before the start of the school year.[35] Coaches who verbally promise benefits to recruits and who are subsequently fired after the recruit's commitment cause student-athletes to commit to a school in hopes of benefits they will never receive.[36] Because these agreements are between student-athletes and the institution (not the coaches), the National Letter of Intent committee stepped in, reiterating its position that additional conditions placed within the agreement "made the National Letter of Intent null and void."[37] The committee also cited "competitive-equity" issues by only allowing some schools to offer such releases. [38] Undoubtedly the committee saw problems with allowing certain schools to entice athletes to play for them by including additional elements in their National Letter of Intent agreements. Allowing these institutions to modify the standard agreement would be a slippery slope. Where would the modification end?

The National Letter of Intent is a voluntary program; a student-athlete is not required to sign the document to compete in

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[31] *Id.*; *About the National Letter of Intent*, *supra* note 26.

[32] *See* Hosick, *supra* note 1.

[33] *Id.*

[34] *Id.*

[35] *See id.*

[36] *See* National College Players Association, *CAP Guarantee*, https://www.ncpanow.org/capa (last visited Feb. 21, 2018).

[37] Hosick, *supra* note 1.

[38] *Id.*

collegiate athletics and the school is not required to have their recruits commit to their program by signing the document.[39] However, to the typical sports fan without recruitment experience, the National Letter of Intent appears to be required. Perhaps it is because of the increased attention that high-profile recruits have received from ESPN—whose never-ending coverage of popular recruits' seasons has fueled the hype machine that "National Signing Day" has become. Thousands tune in as the recruits tease several schools with a fine selection of baseball caps. In reality though, these institutions have no obligation to guarantee athletic financial aid to prospective athletes, and these student-athletes are not obligated to commit themselves to play for only one institution.[40] This creates openings for alternative means of acquiring benefits without being subjected to the absurd imbalance of power underneath the National Letter of Intent.

V. ALTERNATIVE APPROACHES TO THE NATIONAL LETTER OF INTENT

Signing a National Letter of Intent has become customary, which means that most athletes do not see any other options. However, some athletes and their families are seeking to combat the power imbalance created by the National Letter of Intent by using one of three alternative methods: unionization, less restrictive agreements, and the College Athlete Protection Guarantee.

A. UNIONIZATION

The most recent and notable effort by college athletes to receive additional compensation is that of the Northwestern Division I football team seeking unionization. In the Spring of 2013, Northwestern Wildcats quarterback Kain Colter reached out to the president of the College Athletes Players Association, Ramogi Huma—whose new proposal is the focus of this article—to inquire about the rights that college athletes have.[41] After

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[39] *About the National Letter of Intent*, *supra* note 26.

[40] *See id.*

[41] *Northwestern Football Union Timeline*, ESPN (Aug. 17, 2015), http://www.espn.com/college-football/story/_/id/13456482/northwestern-football-union-line.

meeting with Huma, Colter and several of his teammates, as well as athletes from other schools, wore black wristbands during games with the phrase "All Players United" as a symbol of their desire to unionize.[42] This demonstration was the spark that illuminated the power struggle between the NCAA (and its member institutions) and college athletes over additional compensation. The imbalance of power was on full display as Northwestern opposed its football player's decisions every step of the way.[43] The struggle began in earnest in January 2014, when Northwestern football players formally asked to be represented by a labor union.[44]

To have a chance at unionizing, the Northwestern football players would have to qualify as employees under the National Labor Relations Act (NLRA).[45] Such employees "are afforded certain rights to join together to improve their wages and working conditions" and "have the right to form a union where none currently exists."[46] The NLRA is administered and enforced by the National Labor Relations Board (NLRB) which consists of five members, who together decide cases involving charges of unfair labor practices and determine representative election questions that come before the NLRB.[47] If a group of employees is eligible to unionize, and therefore collectively bargain, Section 8(d) of the NLRA requires an employer and the representatives of its employees to meet in good faith to discuss to wages, hours, and other terms or conditions of employment.[48] Furthermore, the NLRA requires that an employer bargain with its employees' representative, who is most often selected by a secret-ballot election.[49] The NLRB conducts this secret-ballot election only after a petition for "certification of representatives" is filed by a

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[42] *Id*.

[43] *See id*.

[44] *Id*.

[45] *Employees Rights*, NAT'L LAB. REL. BOARD https://www.nlrb.gov/rights-we-protect/employee-rights (last visited April. 13, 2018).

[46] *Id*.

[47] Office of the General Counsel, *General Principles of Law Under the Statute and Procedures of the National Labor Relations Board*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf (last visited Apr. 13, 2018).

[48] 29 U.S.C. § 158(d) (2012).

[49] *General Principles*, *supra* note 47.

group of employees.[50] The Northwestern University football players tried to go through this process.[51]

The NLRB held hearings on the players' "certification of representation."[52] The Chicago district of the NLRB concluded that the Northwestern football players were employees of the university and could unionize.[53] Soon after the ruling by the Chicago district of the NLRB, Northwestern football coach Pat Fitzgerald encouraged his players to vote against forming a union.[54] Further, Northwestern University appealed the ruling of the NLRB's regional director with a motion opposing the players' ability to form a union, and eventually petitioned the NLRB's Board Members to overturn the ruling.[55] While waiting for the Board Members to review Northwestern's petition, The Big Ten conference, undoubtedly in an effort to show the athletes that they had heard their complaints, announced plans to improve medical insurance and to guarantee multi-year scholarships for its athletes.[56] On August 17, 2015, the NLRB, in a unanimous decision, declined to assert jurisdiction in the case and overturned the previous decision to allow Northwestern's football players to form a union.[57] Because the Board exercised its discretion not to assert jurisdiction, they did not have the authority to allow the athletes of this specific institution to unionize because of the structure of the NCAA Division I FBS.[58] The Board does not have jurisdiction over state-run institutions, which comprise over 85 percent of FBS teams, and every Big Ten school except for Northwestern.[59] Although the NLRB declined the Northwestern players' rights to unionize, they did not rule on whether the athletes were statutory employees, leaving the door open for future reconsideration of this issue.[60]

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[50] *Id.*

[51] *Northwestern football union timeline*, *supra* note 40.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*; Office of Public Affairs, *Board Unanimously Decides to Decline Jurisdiction in Northwestern Case*, NAT'L LAB. REL. BOARD (Aug. 17, 2015), https://www.nlrb.gov/news-outreach/news-story/board-unanimously-decides-decline-jurisdiction-northwestern-case.

[58] *Id.*

[59] *Id.*

[60] *Id.*

The complications associated with trying to get approval for unionization have left many student-athletes wondering what their next avenue might be for obtaining additional compensation. According to Ramogi Huma, the best option is to change the process of how prospective student-athletes' compensation is determined during the recruitment period.[61]

B. FINANCIAL AID AND LESS RESTRICTIVE AGREEMENTS

While choosing not to sign a National Letter of Intent is becoming more common among high-profile basketball recruits than other athletes (for instance, five-star recruits Brandon Knight and Stephon Marbury),[62] there is an increasing number of highly talented high school football stars who are choosing not to sign National Letters of Intent.[63] Roquan Smith, a heavily recruited linebacker from Montezuma, Georgia, started the trend of FBS football players not signing the National Letter of Intent.[64] Smith, who had originally agreed to sign a National Letter of Intent to bind himself to the University of California, Los Angeles (UCLA), refused to sign the letter when ESPN reported that UCLA's defensive coordinator (who had recruited Smith) had accepted a job with the Atlanta Falcons of the National Football League (NFL).[65] Smith, now a standout All-American linebacker for the University of Georgia, informed the University of Georgia that he would not sign a National Letter of Intent because he wanted more flexibility in case something unexpected (like a coaching change) happened again.[66] The school agreed to allow Smith to sign a financial aid agreement which set out the parameters of his scholarship.[67]

The decline in the use of the National Letter of Intent seems to be spurred by one thing—athletes' desire for flexibility. This flexibility includes the right to transfer schools after a

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[61] *Northwestern football union timeline*, *supra* note 41.

[62] Scarbinsky, *supra* note 7.

[63] Carvell, *supra* note 7.

[64] See *id*.

[65] *Id.*; Ray Glier, *High School Recruits Think Twice About Singing Letter of Intent*, N.Y. TIMES (Feb. 13, 2015), https://www.nytimes.com/2015/02/15/sports/ncaafootball/high-school-recruits-think-twice-about-signing-letters-of-intent.html.

[66] Glier, *supra* note 65.

[67] *Id*.

coaching change and has been a topic of discussion since 2003.[68] Andy Katz, a columnist for ESPN, documented how the National Letter of Intent Committee refused to make a change to the wording of the National Letter of Intent after several high-profile coaching changes occurred at many of the nation's top schools including UCLA, North Carolina, Kansas, Georgia, and Clemson.[69] After hearing opinions from many coaches, the committee decided that a change in the language of the National Letter of Intent was not warranted because a high-profile coach can be replaced, but the school's loss of its recruits "would devastate the program."[70] The wording of the National Letter of Intent has not changed since this discussion in 2003 (and the many discussions since), and while proposed alternatives for athletes have been suggested (such as simply signing a non-binding scholarship agreement with the coach[71]), it appears that the National Letter of Intent unequally favors schools over athletes.

The power that schools have over these National Letter of Intent signees has prompted much discussion about the fairness of this contract. In 2015, *Sports Illustrated*'s Andy Staples wrote a compelling article in which he pointedly remarked that the National Letter of Intent is the "worst contract in American sports."[72] Staples called it such because:

> It requires players to sign away their right to be recruited by other schools. If they don't enroll at the school with which they signed, they forfeit a year of eligibility. Not a redshirt year, but one of their four years to play. In return, the NLI guarantees the player nothing. Sure, the NLI claims to guarantee a scholarship, but that simply isn't true. That is contingent on the player being admitted to the school and on the football

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[68] Andy Katz, *Less-Binding NLI May Give Recruits More Options*, ESPN.COM, http://assets.espn.go.com/ncb/columns/katz_andy/1542395.html (last visited Feb. 21, 2018).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] Andy Staples, *Why Prized Recruits Should Refuse to Sign the NLI; More Punt, Pass & Pork*, SPORTS ILLUSTRATED (Feb. 9, 2015), https://www.si.com/college-football/2015/02/09/national-letter-intent-punt-pass-pork.

> program staying below the 85-scholarship limit. A school can dump the player at any point between Signing Day and preseason camp, and he would have no recourse. This guarantee is no different than the one on a conference-approved financial aid form, but it costs the player something the financial aid agreement does not.[73]

Staples' statement supports the idea that other options are available to high school recruits who desire more flexibility than the National Letter of Intent can offer. But with other, more flexible, options available (such as a financial aid agreement), why should any high-profile recruit sign a National Letter of Intent? The truth is: high-profile athletes should not.[74] The athletes who benefit from signing the National Letter of intent are those athletes who have no leverage to negotiate, *i.e.* less talented recruits.[75]

According to Staples, "almost every football recruit *should* sign the National Letter of Intent."[76] Again, these recruits should sign the National Letter of Intent because of the lack of leverage that non-star athletes have.[77] For example, it is in the best interests of the twentieth player in a school's recruiting class to sign a National Letter of Intent because he may lack other attractive options for a free education.[78] On the other hand, top prospects have much more leverage because there are typically multiple schools that are competing for the athlete's commitment.[79] Wanting to win will typically override a school's desire to maintain the status quo of forcing a top prospect to sign a National Letter of Intent.[80] These schools know that if they do not acquiesce to the athlete's request not to sign the binding agreement, another school will, thus hurting the denying school's chances of winning.[81]

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[73] *Id.*

[74] *Id. See* Patrick Hruby, *Why Top NCAA Recruits Shouldn't Sign National Letters of Intent*, VICE SPORTS (Feb. 1, 2017), https://sports.vice.com/en_us/article/pgn38z/why-top-ncaa-recruits-shouldnt-sign-national-letters-of-intent.

[75] Staples, *supra* note 72.

[76] *Id.* (emphasis added).

[77] *Id.*

[78] *Id.*

[79] Hruby, *supra* note 74.

[80] *See id.*

[81] *Id.*

The inherent leverage that comes with being a high-profile recruit seems to be one of the main factors that could finally spur a change to the current system of lopsided binding agreements between athletes and schools. The College Athlete Protection Guarantee is the latest attempt to rectify this imbalance.

C. THE COLLEGE ATHLETE PROTECTION GUARANTEE

Romagi Huma, the president of the National College Players Association, has been working on new ways to help student-athletes receive additional compensation for their commitment to play sports for these revenue-generating institutions. After the NLRB Board rejected Huma's and the Northwestern football players' petition for unionization, it appears Huma continued working on new ways to secure more compensation for college athletes. Huma's attempt to get more compensation for the Northwestern football players through unionization was an attempt to create more benefits *after* the athletes had already committed to play at a specific institution.[82] Huma's new strategy is to try and secure more compensation *before* the student-athletes commit to play by changing the way prospective student-athletes sign with schools.[83]

The National College Players Association website provides a blatant warning to student-athletes: "Warning: A [National] Letter of Intent provides no protection for a player—it only protects the school. Coaches too often use their advantage by breaking verbal promises to recruits after they have gained their trust during the recruiting process."[84] But if signing the National Letter of Intent has become the only way that recruits commit to schools, and the National Letter of Intent Committee will not allow additional conditions to be placed in this binding document, what then can the athletes do to protect themselves? Enter the College Athlete Protection Guarantee.

The College Athlete Protection Guarantee is a binding document that prospective student-athletes can use either to

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[82] *See* Strauss, *supra* note 2.

[83] *See* Dennis Dodd, *Inside the First Legally Binding Contract Between a College Athlete and a School*, CBS SPORTS (June 14, 2017), https://www.cbssports.com/college-football/news/inside-the-first-legally-binding-contract-between-a-college-athlete-and-a-school/.

[84] *CAP Guarantee*, *supra* note 36.

replace the National Letter of Intent or sign in conjunction with the National Letter of Intent as an additional layer of protection for the student-athletes.[85] Huma and the National College Players Association claim that both legal experts and NCAA experts such as Tim Nevius, a former NCAA enforcement official, have thoroughly vetted the document.[86] The College Athlete Protection Guarantee states that student-athletes "can request and secure legally binding protections/benefits worth over $100,000 dollars [sic] beyond a minimum scholarship *without breaking NCAA rules*."[87] Student-athletes are encouraged to use the College Athlete Protection Guarantee to obtain additional physical, academic, and financial protections from a school *before* they commit to attending.[88] According to Huma and the National College Players Association, the College Athlete Protection Guarantee is all about transparency.[89] The document allows prospective student-athletes to navigate through the "overly restrictive NCAA rules" to receive additional protections by helping the athletes know what to ask for from schools.[90]

The College Athlete Protection Guarantee lists some possible protections or benefits that may be available to prospective student-athletes.[91] While most prospective student-athletes would like to obtain all of the additional protections or benefits listed in the College Athlete Protection Guarantee, the document only makes these protections or benefits negotiable between the school, the athlete, and the athlete's family.[92]

The additional protections and benefits that may be available to student-athletes include guaranteed scholarship money, stipend money, reimbursement money, medical expenses, transfer release, off-season and free time activities, and disability insurance.[93] Since 2012, the NCAA has allowed schools to provide multi-year scholarships to their athletes instead of the

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[85] Dodd, *supra* note 83.

[86] *Id.*

[87] National College Players Association, *College Athlete Protection Guarantee*, https://sports.cbsimg.net/images/collegefootball/College-Athlete-Guarantee-CBS-Sports.pdf (last visited Feb. 21, 2018).

[88] *Id.*

[89] Dodd, *supra* note 83.

[90] *CAP Guarantee*, *supra* note 36.

[91] *College Athlete Protection Guarantee*, *supra* note 87.

[92] Dodd, *supra* note 83.

[93] *College Athlete Protection Guarantee*, *supra* note 87.

year-to-year renewal scholarships created by the National Letter of Intent.[94] However, Huma contends that while many schools and several conferences "guarantee" multi-year scholarships, the absence of penalties for schools that violate this guarantee make it a mere policy.[95] The College Athlete Protection Guarantee goes far beyond the simple terms of the agreement of the National Letter of Intent.[96] The College Athlete Protection Guarantee will allow prospective athletes to bind the school to a multi-year scholarship that may also include summer school scholarships, degree completion scholarships for athletes who turn pro before receiving their degree, and graduate school scholarships beyond athletic eligibility.[97] Prospective athletes may also negotiate for stipend and reimbursement money to cover out-of-pocket education-related expenses and other out-of-pocket costs such as phone bills and parking fees that a traditional "full" athletic scholarship would not cover.[98]

Besides negotiating for additional funds, the College Athlete Protection Guarantee will allow prospective student-athletes to negotiate what medical expenses will be covered by the school and the athlete's ability to transfer schools, if necessary.[99] The National Collegiate Players Association has specifically focused on educating prospective student-athletes about these two important items to avoid the unfortunate situations that athletes such as Cameron Johnson, Corey Sutton, and Kyle Hardrick went through to with their respective programs.[100] Cameron Johnson was prevented from transferring from the University of Pittsburgh basketball program after graduating in three years.[101] The

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[94] Dodd, *supra* note 83.

[95] *Id.*

[96] *College Athlete Protection Guarantee*, *supra* note 87.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *See* Alex Kirshner, *The Cameron Johnson Transfer Saga Shows Where the Real Power is in College Sports*, SBNATION (June 6, 2017, 1:40 PM), https://www.sbnation.com/college-basketball/2017/6/6/15746986/cameron-johnson-transfer-unc-pitt; Morgan Moriarty, *Bill Snyder Blocked a Player's Transfer List of 35 Schools, then Relented*, SBNATION, https://www.sbnation.com/college-football/2017/6/1/15727046/bill-snyder-blocking-kansas-state-corey-sutton-transfer-release-35-schools (last updated June 2, 2017); *CAP Guarantee*, *supra* note 35.

[101] Kirshner, *supra* note 100.

University of Pittsburgh held the right to prevent Johnson from transferring to another school within the Atlantic Coast Conference (ACC) unless Pittsburgh declined to renew his scholarship—which they did not, causing Johnson to lose a year of eligibility if he transferred from Pittsburgh to the University of North Carolina.[102] In Corey Sutton's case, Kansas State's head football coach (Bill Snyder) blocked Sutton's request for transfer to thirty-five different schools, including schools outside of the conference, schools never appearing on Kansas State's schedule, and even Division II schools.[103] Similar to Cameron Johnson, Kansas State would allow Sutton to leave, but would not release him from his scholarship, meaning that Sutton would have to sit out the mandatory year of his eligibility before he would able to receive athletic financial aid from another institution.[104]

Finally, the National College Players Association produced a short video of Kyle Hardrick's trouble with Oklahoma State University regarding his medical coverage and inability to transfer, which illustrates the problems which can arise under the National Letter of Intent recruiting system.[105] While playing for Oklahoma State University, Kyle Hardrick was injured during a basketball practice at the beginning of the year.[106] After sending Kyle for x-rays of his injured knee, the coach and training staff informed Kyle and Kyle's mother that Kyle would be fine and that Kyle would be back in a week.[107] The University forced Kyle to continue participating in drills during practice and workouts after he was told by the coaching staff that he had only suffered a pulled quadriceps muscle.[108] After an entire year of suffering pain in his knee, Kyle's mother finally took him to a specialist where doctors informed them that Kyle had actually suffered a significant tear in his meniscus that would need to be surgically repaired.[109] Further, the wear and tear on his knee since the injury has caused degeneration in Kyle's knee comparable to a sixty-year-old.[110]

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[102] *Id.*

[103] Moriarty, *supra* note 100.

[104] *Id.*

[105] *See CAP Guarantee*, *supra* note 36; THE KYLE HARDRICK STORY, *supra* note 4.

[106] THE KYLE HARDRICK STORY, *supra* note 4.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

Following this consultation, Kyle's mother received a phone call from Oklahoma's Athletic Director who notified her that the school would not pay for Kyle's surgery because they went outside of the university for a medical evaluation.[111]

The following fall, the University terminated Kyle's scholarship—something that neither Kyle nor his mother knew the University could do.[112] In an interview with the National College Players Association, Kyle stated that he "went to [the] NCAA camp [where they] tell[] [athletes] what[] [will] happen before you go to college, and they never mentioned [that your scholarship is] not a guaranteed four [years]."[113] Unfortunately, because Kyle only signed the National Letter of Intent, which guarantees the school's commitment to the student-athlete for one year, the school had no obligation to renew his athletic financial aid.[114] The situation worsened when the University of Oklahoma refused to allow Kyle to transfer to another school, leaving him as "a captive" at the University without any of his athletic financial aid to help him complete his degree.[115] The University agreed to allow Kyle to transfer from the school on the condition that Kyle's mother sign a waiver mandating that none of Kyle's relatives would ever be able to attend the University of Oklahoma and that Kyle could not sue the school over the handling of his injuries.[116] These stories are blatant examples of the unbalanced power dynamic between prospective student-athletes and the schools that they want to attend.

What does the College Athlete Protection Guarantee allow student-athletes and their families to negotiate for in terms of medical coverage? With this new document, student-athletes can request that recruiting schools cover up to 100 percent of sports-related medical expenses, including deductibles and copays.[117] Currently, the NCAA does not require schools to pay for the medical expenses associated with these injuries.[118] Student-athletes can also request that recruiting schools cover up

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[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *College Athlete Protection Guarantee*, *supra* note 87.
[118] *Id.*

to 100 percent of the medical insurance premiums paid by either the student-athlete or their parent(s) for their college's student health insurance.[119] Finally, student-athletes can request disability insurance, which can pay the student-athlete a predetermined amount if they have a high chance of playing in professional leagues and are injured while playing college sports.[120]

Disability insurance acts as a safety-net for high-profile athletes who have a chance of earning money in professional leagues, but who must attend college for a certain number of years while risking injuries.[121] The practice of obtaining such disability insurance has become increasingly popular over the last several years, with the likes of top NFL draft picks Marquis Lee, Leonard Fournette, and Jameis Winston each obtaining up to $20 million in coverage.[122] While these insurance policies may be negotiated for by the student-athlete, they are much more intricate than this discussion warrants, and both the student-athletes and the school should inform themselves of the more minute details before agreeing to this type of coverage in a contract.[123]

Finally, the College Athlete Protection Guarantee aims to resolve the transfer issues experienced by countless student-athletes by having schools agree to allow "transfer freedom without college-imposed conditions or restrictions on which schools can contact [the athlete] and provide [the athlete] with athletic scholarship should [the athlete] wish to transfer."[124] However, the College Athlete Protection Guarantee cannot overcome the NCAA or Conference rules that may still require an athlete to sit out for the mandatory "year in residence" at the school that the athlete transfers to, even if the original school agrees to allow freedom to transfer.[125] The athlete can appeal to

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[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] Jill Wieber Lens & Joshua Lens, *Insurance Coverage for Elite Student-Athletes*, 84 MISS. L. J. 128, 151 (2015); Dennis Dodd, *Leonard Fournette's $10M Policies and the Unregulated World of Player Protection*, CBS SPORTS (May 12, 2016), https://www.cbssports.com/college-football/news/leonard-fournettes-10m-policies-and-the-unregulated-world-of-player-protection/.

[123] *See id.*

[124] *College Athlete Protection Guarantee*, *supra* note 87.

[125] *Id.*

the NCAA or the Conference to waive this requirement, but that is definitely not a guarantee.[126]

VI. USING THE COLLEGE ATHLETE PROTECTION GUARANTEE

Student-athletes may use the College Athlete Protection Guarantee either in conjunction with the National Letter of Intent or to replace the National Letter of Intent.[127] Huma and the National College Players Association have provided instructions on how to use the College Athlete Protection Agreement directly on the document.[128] Initially, they give an important preface discussing how to use the document.[129] The prospective student-athlete and their parent(s) or guardian(s) are told that they can negotiate for various protections and benefits directly with prospective colleges instead of accepting the boilerplate language used by the National Letter of Intent.[130] However, they have also issued a warning that if they allow a third party to negotiate with a school on their behalf, the prospective student-athlete's eligibility and scholarship opportunities could be jeopardized because of potential NCAA rule violations.[131] Huma and the National College Players Association then provide five "Steps" the prospective student-athlete and their parent(s)/guardian(s) should follow.[132]

First, the National College Players Association encourages prospective student-athletes to use the College Athlete Protection Guarantee *instead* of the National Letter of Intent.[133] But if the school that the prospective student-athlete wants to play at insists that the recruit sign the National Letter of Intent, the

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[126] *Id.*

[127] Gregg E. Clifton & John G. Long, *National College Players Association Urges Prospective Student-Athletes to Negotiate Scholarship Terms with Colleges*, JACKSON LEWIS (June 16, 2017), https://www.collegeandprosportslaw.com/uncategorized/national-college-players-association-urges-prospective-student-athletes-to-negotiate-scholarship-terms-with-colleges/.

[128] *College Athlete Protection Guarantee*, *supra* note 87.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

National College Players Association urges prospective student-athletes to use the College Athlete Protection Guarantee as well.[134] Huma and the National College Players Association are clearly trying to limit a school's ability to bind the player to their institution, and in turn placing more power in the hands of the prospective student-athlete.

Second, the National College Players Association encourages prospective student-athletes that are using the document to edit the document and to complete it with the protections and benefits they want from the school.[135] The document has been described as "sort of a contract Mad Libs" because the document is set up as a template which the prospective student-athlete fills in before submitting it to recruiting schools for review.[136] Again, a warning is given to those using the document: if the language of the document is changed, the prospective student-athlete may limit the number of benefits and protections available to them and affect the legal enforceability of the agreement.[137]

Third, the prospective student-athlete should send their completed document to each college that is recruiting the student-athlete.[138] Because this document is meant to be used as a negotiating tool, the athlete should send the document without their signature.[139] This allows each school to accept or reject the document or ask to modify various parts of the agreement.[140] By allowing each school the opportunity to review the document without the athlete's signature, the athlete cannot be bound to a certain school without reviewing each school's modifications to the agreement. The athlete is then able to see which schools are willing to provide more benefits and protections to the athlete and allows the athlete to decide what benefits and protections they

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[134] *Id.*

[135] *Id.*

[136] Paul Wiley, *Three Big Questions About the National College Players Association's College Athlete Protection Guarantee*, SBNATION (June 15, 2017), https://www.streakingthelawn.com/2017/6/15/15807830/national-letter-intent-cap-guarantee-scholarship-contract-ncaa-football-ea-sports-virginia-cavaliers.

[137] *College Athlete Protection Guarantee*, *supra* note 87.

[138] *Id.*

[139] *Id.*

[140] *Id.*

want the most.[141] This is where the power struggle between the prospective student-athlete and the school begins to even out.

The fourth step instructs the prospective student-athlete to ask each school to make their best offer as early as August 1 of the athlete's senior year of high school.[142] Each school should supply the prospective student-athlete with a PDF copy of the completed College Athlete Protection Guarantee as a "written scholarship offer" to the athlete.[143] Although the offer can be received as early as August 1, NCAA rules stipulate that the offer cannot be signed until the designated signing day.[144]

Finally, on National Signing Day, the prospective student-athlete should request a signed and dated copy of the final College Athlete Protection Guarantee from the school as its official scholarship offer from step four.[145] After reading this document carefully to ensure that it offers the same benefits and protections as the original offer, the student-athlete should sign, date, and return the official College Athlete Protection Agreement to the school.[146] Huma and the National College Players Association warn any prospective student-athletes who may be required by a school to sign a National Letter of Intent alongside the College Athlete Protection agreement to not sign and submit the National Letter of Intent until they have received a signed and dated copy of the official College Athlete Protection Guarantee from the school.[147] Failure to follow this warning may lead to the prospective student-athlete having no additional benefits or protections provided to them through the College Athlete Protection Guarantee.[148]

In theory, this document will level the power struggle between prospective student-athletes and the schools who recruit them, but the warnings that riddle its instructions are reminders of all of the things that could go wrong while attempting to use the document.

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[141] *See id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*

VII. POTENTIAL PROBLEMS WITH THE COLLEGE ATHLETE PROTECTION GUARANTEE

Upon analyzing the College Athlete Protection Guarantee, it has become apparent that while the document aims to create an equal footing for athletes when negotiating with schools, there are still many problems with the NCAA recruitment process that the Guarantee cannot remedy.

A. LACK OF NEGOTIATION EXPERIENCE

As discussed above, the College Athlete Protection Guarantee gives the athlete the power to request certain additional benefits from the school, benefits that are not provided under the National Letter of Intent.[149] However, a disclaimer at the end of the Guarantee states that "[w]hile current or prospective college athletes may directly secure written guarantees from colleges, they may lose their athletic eligibility if they secure an attorney, agent, or another third party to negotiate individual guarantees with a college."[150] Without being able to receive advice from an outside party, the College Athlete Protection Guarantee appears to do little to shift the recruiting power from the school back to the athlete.

In February 2017, only a few months before the unveiling of the College Athlete Protection Guarantee, Patrick Hruby wrote an article encouraging top prospects not to sign a National Letter of Intent.[151] In his article, Hruby discussed the NCAA's extremely negative attitude toward expanding rights and benefits available for athletes.[152] He stated: "The NCAA fights tooth and nail for amateurism, an arguably illegal system of inarguable economic control; player-friendly reforms such as cost-of-living stipends and the ability to even offer four-year scholarships have come only as a result of legal defeats and public shamings."[153]

Although "player-friendly reform" has come about in a less than efficient manner, it would seem as if athletes today have more power in the negotiation process than before. Warren Zola, a sports law expert and professor at Boston College, disagrees

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[149] *Id.*
[150] *Id.*
[151] Hruby, *supra* note 74.
[152] *Id.*
[153] *Id.*

Zola explained that the biggest problem with the entire negotiation process between athletes and schools is that "[s]chools have lawyers and conferences and all sorts of people looking out for their best interests. Meanwhile, you have an unsophisticated consumer base of athletes who are ill-prepared to enter this multimillion-dollar business." [154] Zola elaborated that these athletes are at an extreme disadvantage in the negotiation process because they are not allowed to have any guidance from third parties and that "any level of guidance [the athletes] get may be deemed to be 'improper benefits.'"[155]

These "improper benefits" are what Huma and the National College Players Association warn athletes about within the College Athlete Protection Guarantee, and can lead to a loss of eligibility.[156] While some athletes may have the resources to competently handle negotiations with these schools and their attorneys (*i.e.* a highly educated or skilled negotiator as their legal guardian), many eligible athletes will not. This will lead to two outcomes: either the athletes will continue to be at a large disadvantage, or the athletes will need to risk their eligibility to ensure that they are getting the best deal available to them. Without proper negotiating leverage, athletes will continue to end up with these take-it-or-leave-it contracts."[157]

The lack of negotiation power available among recruits can be seen through an analysis of the economic or geographical backgrounds of the players who are being highly recruited by the top schools in the country.

B. RACIAL AND ECONOMIC IMPLICATIONS

This analysis will focus on the sport of football. While other sports are certain to feel the impact of the forthcoming discussion, football will best illustrate the effects that the College Athlete Protection Agreement may have on individuals who come from lower-income or less educated backgrounds.

To begin, it is important to understand the demographics of college athletes. In 2013, a study performed by the University of Pennsylvania determined that African-American men

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[154] *Id.*
[155] *Id.*
[156] *College Athlete Protection Guarantee*, *supra* note 87.
[157] *See* Hruby, *supra* note 74.

comprised only 2.8 percent of undergraduate students.[158] However, when looking at athletics, African-Americans make up 57 percent of football teams on average, and approximately 64 percent of men's basketball players.[159] The percentage of African-American athletes varies from conference to conference, with the South Eastern Conference (SEC) claiming the highest percentage of African-American football players at approximately 70 percent.[160] These percentages translate to the National Football League (NFL), where African-Americans comprise nearly 70 percent of the league's players.[161] In contrast, African-American men only make up approximately 6 percent of the United States population.[162]

The high number of African-American football players may come from the societal belief that playing professional sports is "the only way out" for many underprivileged young men. There are many examples of high-profile athletes who believed this ideology to be true; including LeBron James, who began playing football at a young age.[163] In an interview in 2014, James was asked why he will not allow his sons to play football.[164] LeBron, who grew up in a single-parent household, said "I needed a way out [of poverty]," but "my kids don't."[165] This statement from one of the world's best athletes reinforces the belief that those who

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[158] *See* Shaun R. Harper, *Black College Football and Basketball Players are the Most Powerful People of Color on Campus*, THE WASHINGTON POST (Nov. 11, 2015), https://www.washingtonpost.com/posteverything/wp/2015/11/11/black-college-football-and-basketball-players-are-the-most-powerful-people-of-color-on-campus/?utm_term=.580aee08f5ba; Diane Roberts, *College Football's Big Problem with Race*, TIME (Nov. 12, 2015), http://time.com/4110443/college-football-race-problem/ (The sample taken was representative of the institutions of the six major NCAA Division I athletic conferences).

[159] *See* Harper, *supra* note 158; Roberts, *supra* note 158.

[160] Harper, *supra* note 158.

[161] Antonio Moore, *Football's War in the Minds of Black Men*, VICE SPORTS (Dec. 24, 2015, 8:05 AM), https://sports.vice.com/en_us/article/eze4gj/footballs-war-on-the-minds-of-black-men.

[162] *Id.*

[163] *Lebron on Football Ban for His Kids: They Don't Need a Way Out of Poverty*, SPORTS ILLUSTRATED (Nov. 13, 2014), https://www.si.com/nba/2014/11/13/lebron-james-kids-football-ban.

[164] *Id.*

[165] *Id.*

live in poverty are more likely to use athletics (especially football) as "a way out."

Another source which feeds this seemingly pervasive idea among low-income and African-American communities comes directly from the abundant athlete-specific advertising that aspiring young athletes see every day. For example, one of Nike's recent commercials begins with a young African-American boy standing on the street outside his home in a less- affluent neighborhood holding a basketball.[166] His mother, wearing modest clothing, asks "what are you looking at?" The audience is then taken through this boy's daydream.[167]

The boy progresses from playing on a street court surrounded by run-down apartment buildings, to a teenager at a basketball camp instructed by James.[168] Next, the teenager is dribbling his basketball in his home while he longingly watches James play on television.[169] After signing with Duke University to play basketball (his mother and father standing beside him, still dressed in modest clothing), he is shown to work harder and harder until he is eventually drafted by the Cleveland Cavaliers of the National Basketball Association (NBA).[170] The young man's hard work appears to pay off as he plays with his idol (James) and he scores an incredible basket against the Golden State Warriors while his family (now wearing expensive clothing) watch with pride.[171] The commercial ends by flashing back through the daydream to the boy standing in the rundown neighborhood with his basketball; the slogan "Want It All" appearing on the screen.[172] With the slogan "Want It All" and its subtle images of improving the lives of your family, this advertisement from one of the world's largest sporting brands continues to instill the idea that sports are "a way out" for low-income communities. As alluring as this path may seem, it may not be as easy as it appears.

Many journalists and scholars have found that a substantial number of scholarship athletes are from low-income

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[166] eukicks, *Nike Basketball 2017-2018 NBA Commercial*, YOUTUBE (Oct. 17, 2017), https://www.youtube.com/watch?v=Tn70NxIMk2Q.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

families.[173] For example, Dr. Harry Edwards, a sociology professor at the University of California, Berkeley, who is also an expert on African-American athletes and consultant to the San Francisco 49ers and several universities, has stated that "a large number of college football players are already from minority and disadvantaged backgrounds."[174] Furthermore, after analyzing the current state of athletic scholarships, Dr. Boyce Watkins, a finance professor at Syracuse University, said: "the system disproportionately hurts players from lower-income areas, and the African-American community."[175] While the athletic scholarship system which Dr. Watkins analyzed did not include the College Athlete Protection Guarantee,[176] it appears that the proposed system which would contain this new legally binding document would perpetuate the same disparity. Huma and the National College Players Association present the College Athlete Protection Guarantee as a document which will benefit everyone who chooses to use it;[177] however, only athletes with a legal guardian who can competently negotiate with the school's lawyers will truly benefit from the new contract.

As stated above, this analysis focuses on African-American athletes who play football because the majority of the athletes who participate in Division I college football are African-American.[178] However, this analysis applies to all athletes who are similarly situated, regardless of the color of their skin.

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[173] *See e.g.*, Armstrong Williams, *WILLIAMS: The Exploitation of College Athletes*, THE WASHINGTON TIMES (Apr. 6, 2014), https://www.washingtontimes.com/news/2014/apr/6/williams-the-exploitation-of-college-athletes/; April Fulton, *Hunger Games: College Athletes Make Play for Collective Bargaining*, NPR (Apr. 21, 2014, 12:37 PM), https://www.npr.org/sections/thesalt/2014/04/21/304196202/hunger-games-college-athletes-make-play-for-collective-bargaining.

[174] Lekan Oguntoyinbo, *Game Changer: Experts Say Health Risks to Put Football in Hands of Low-Income, Minority Players*, DIVERSE (Jan. 26, 2014), http://diverseeducation.com/article/60354/.

[175] Kai Ryssdal, *NCAA Policy Hits Poor, Minority Neighborhoods Hardest*, MARKETPLACE, (July 8, 2013), https://www.marketplace.org/2013/07/08/wealth-poverty/ncaa-policy-hits-poor-minority-neighborhoods-hardest.

[176] *Id.*

[177] *College Athlete Protection Guarantee*, *supra* note 87.

[178] Harper, *supra* note 158.

Several studies have linked socioeconomic status and educational achievement.[179] These studies imply that there is a strong correlation between economic status and a student's ability to perform in the classroom, partially because poorer areas lack the necessary resources to achieve high performance in academics.[180] A 2011 study illustrates the differences in achievement on standardized reading tests between students from different economic classes.[181] This study determined that, on average, low-income students scored around the 30th percentile, middle-income students scored around the 45th percentile, and upper-income students scored around the 70th percentile.[182] Another study that looked at the effects of economic status and education determined that "the root cause of poverty is a lack of education."[183] These socioeconomic factors will become important as we analyze the demographics of the student-athletes who will be using the College Athlete Protection Guarantee, and whether they will actually benefit from its use in the recruiting process.

The three demographics we will consider for this analysis are: (1) which states have the most football recruits, (2) which states have the most African-American citizens, and (3) which states have the highest levels of poverty. First, it must be determined which states have the largest number of high school football players who are recruited by Division I FBS schools. According to NCAA Research, in 2016, the states that had the highest percentage of high school football players recruited included: Florida, Georgia, Louisiana, the District of Columbia (DC), Maryland, Tennessee, and Alabama.[184] The states with the

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[179] *See, e.g.*, Misty Lacour & Laura D. Tissington, *The Effects of Poverty on Academic Achievement*, 6 EDUC. RES. & REV. 522 (2011); Pamela E. Davis-Kean, *The Influence of Parent Education and Family Income on Child Achievement: The Indirect Role of Parental Expectations and the Home Environment*,19 J. FAM. PSYCHOL. 294 (2005).

[180] Lacour & Tissington, *supra* note 179, at 527.

[181] *Id.* at 522.

[182] *Id.*

[183] Bryan Hickman, *Lack of Education is Root Cause of Poverty*, ROCHESTER BUS. J., (Mar. 13, 2015), https://rbj.net/2015/03/13/lack-of-education-is-root-cause-of-poverty/.

[184] Alex Kirshner, *NCAA Map Ranks States by How Many Football Players Become DI Recruits*, SB NATION (Apr. 18, 2017, 11:39 AM), https://www.sbnation.com/college-football-recruiting/2017/4/18/15340728/recruits-per-state-ncaa-map.

most per capita four- and five-star recruits (those recruits who are highly sought after by the best football schools and, for the purposes of this paper, will have the most leverage because of their special talents) included: DC, Louisiana, Georgia, Mississippi, Alabama, and Florida.[185] Almost all of these states have at least one SEC football school within its borders,[186] where over 70 percent of the student-athletes are African-American.[187]

Next, our analysis uses United States Census Bureau data from 2016 to see which state populations have the largest percentage of African-American citizens. The states with the largest percentage of African Americans are: DC, Mississippi, Louisiana, Georgia, Maryland, South Carolina, and Alabama.[188] This reflects the statistics showing that the majority of SEC schools' football players are African-American and the states with the highest percentage of African-American citizens produce the highest number of four- and five-star football recruits.

Finally, it is important to look at the states with the highest levels of poverty. According to data from the United States Census Bureau for 2016, approximately fourteen percent of all American citizens live below the federal poverty line.[189] Delving deeper into this data reveals that the states with the highest poverty levels include: Mississippi, Louisiana, Kentucky, Arkansas, Alabama, and Georgia.[190] Coincidentally, four of these states are among the top five for the highest percentage of high school football recruits. Combining the data from the three demographics just discussed paints a picture of the average recruits who are likely to attempt negotiations using the College Athlete Protection Guarantee.

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[185] SB Nation College News, *These 10 Maps and Charts Show Where College Football Players Come From*, SB NATION, https://www.sbnation.com/college-football/2016/8/23/12607342/recruits-states-rankings (last updated May 11, 2017).

[186] *2017 Standings*, SEC SPORTS, http://www.secsports.com/standings/football (last visited Feb. 24, 2018).

[187] *African American Population by State*, BLACK DEMOGRAPHICS, http://blackdemographics.com/population/black-state-population/ (last visited Feb. 24, 2018).

[188] *Id.*

[189] Claire Hansen, *States with the Highest Poverty Rate*, U.S. NEWS (Sept. 26, 2017, 4:33 PM), https://www.usnews.com/news/best-states/slideshows/the-10-states-with-the-highest-poverty-rate?slide=1.

[190] *Id.* at slides 2–11.

If lack of education truly is the root cause of poverty,[191] those athletes who come from poverty-stricken areas are less likely to be able to adequately negotiate (or have their legal guardian negotiate for them) with these universities' highly educated lawyers. For example, Mississippi, Louisiana, Alabama, and Georgia are the first, second, seventh, and tenth most poverty-stricken states, respectively.[192] These same states also have the fourth, second, fifth, and third most four- and five-star football recruits in the nation, respectively.[193] These states also have the second, third, seventh, and fourth highest percentage African-American citizens, respectively.[194]

This data (1) indicates that many of these highly recruited football players may come from lower-income areas, and (2) is consistent with the fact that the majority of college football players are African-American and will continue to be so. And if those who will benefit most from using the College Athlete Protection Guarantee are the highly recruited athletes,[195] it follows that, so long as the studies on economic status and education are true, a substantial portion of these top prospects will not have the academic background to negotiate with a highly trained lawyer from these schools. This essentially eliminates any leverage the prospective student-athlete may have in the recruitment process. Thus, implied in this data is the fact that the College Athlete Protection Agreement, while useful to a handful of athletes, does little to nothing to fix the recruiting system that disproportionately hurts African-American athletes and athletes from low-income areas, as Dr. Watkins suggested.[196]

Further evidence suggests that individuals from low-income and African-American backgrounds will continue to be heavily recruited as more highly educated individuals and those who do not need "a way out" prohibit their children from playing football, just like LeBron James has.[197] In 2015, Antonio Moore, writing for Vice Sports, asked why so many African-American

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[191] *See, e.g.*, Lacour & Tissington, *supra* note 179; Davis-Kean, *supra* note 179.

[192] Hansen, *supra* note 189.

[193] SB Nation College News, *supra* note 185.

[194] *African American Population by State*, *supra* note 187.

[195] *See* Hruby, *supra* note 74.

[196] Ryssdal, *supra* note 175.

[197] *See* Moore, *supra* note 161.

families have been "tricked" into willingly allowing their sons to play the dangerous game of football.[198] Moore also notes that while 70 percent of NFL players are African-American, that percentage substantially rises when the highest collision positions are isolated, and noting that nearly 30 percent of all Caucasian NFL players play low-impact positions such as kickers and quarterback.[199] These percentages become more important when analyzing the future makeup of both college football and the NFL because of the recent revelations on the effects football-related concussions have on the brain.[200]

In 2002, Dr. Bennett Omalu and Julian Bailes diagnosed the first professional football player with Chronic Traumatic Encephalopathy, more commonly known as CTE.[201] Arguably the most notable cases of former professional athletes having CTE are the NFL's Junior Seau and professional wrestler Chris Benoit, each of whom committed suicide after struggling with depression and anger issues—common symptoms of CTE.[202] After many years of medical reports and congressional hearings on the connection of concussions and mental illness,[203] the issue of concussions has become a widely discussed concern by the sports community after the release of "Concussion," the 2015 film adaptation of Dr. Omalu's and Dr. Bailes' discovery of CTE.[204]

The increased knowledge of the effects of concussions is a large reason for reduced participation in youth football at various age levels.[205] However, as noted by Antonio Moore, while the

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[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *What Is CTE?*, BRAIN INJ. RES. INST., http://www.protectthebrain.org/Brain-Injury-Research/What-is-CTE-.aspx (last visited Feb. 24, 2018).

[202] *Id.*

[203] Steve Fainaru & Mark Fainaru-Wada, *Youth Football Participation Drops*, ESPN (Nov. 14, 2013), http://www.espn.com/espn/otl/story/_/page/popwarner/pop-warner-youth-football-participation-drops-nfl-concussion-crisis-seen-causal-factor.

[204] *Concussion*, IMDB, http://www.imdb.com/title/tt3322364/?ref_=ttrel_rel_tt (last visited April 14, 2018).

[205] *Youth Football Participation Increases in 2015; Teen Involvement Down, Data Shows*, ESPN (Apr. 17, 2016), http://www.espn.com/espn/otl/story/_/id/15210245/slight-one-year-increase-

concussion issue reaches far beyond the African-American community, the "rags-to-riches promise of the sport" is still extremely enticing for young African-American boys.[206] Moore goes on to note that, even though awareness that football substantially increases the chances of brain injuries, "[f]or too many, this is their answer to debilitating poverty," and that the NFL careers that these young men long for become hopes for economic security not only for themselves, but also for their family and friends.[207] This cycle of low-income and African-American athletes signing up at younger ages is not surprising as the amount of money professional athletes make continues to rise.[208] With the increased knowledge of concussions, we may see football become a sport that is mostly played "by those that either don't fully grasp the damage the sport will do to their bodies . . . or, worse yet, are desperate enough to take that risk" despite this knowledge.[209]

To exacerbate this apparent cycle, it appears that participation in youth football is going down because the children of higher educated and higher earning individuals are not playing anymore.[210] According to Dr. Keith Strudler, Director of the Marist College Center for Sports Communication, the information on concussions "is reaching a lot of people, but it is reaching those who have higher incomes."[211] Dr. Coakley, a professor of sociology at the University of Colorado, postulates that parents who have attended college or graduate school are more apt to see science as a credible source of information, and thus are most likely to know more about head injuries than parents who did not go to college.[212] These theories lead to the conclusion that, while an *increase* in the number of low-income or minority football-playing youth may not be seen, it is possible that the number of Caucasian players (and implied in Dr. Coakley's remarks, economically stable players) will decrease, leaving more

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number-youth-playing-football-data-shows; *see* Fainaru & Fainaru-Wade, *supra* note 203.

[206] Moore, *supra* note 161.

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *See* Oguntoyinbo, *supra* note 174.

[211] *Id.*

[212] *Id.*

opportunities for underprivileged athletes to play at higher levels such as college.[213]

C. ATHLETIC SCHOLARSHIPS DO NOT ELIMINATE POVERTY

Another problem with the current system of recruiting that the College Athlete Player Guarantee will not resolve is the high number of athletes still living below the federal poverty line. In 2013, Huma, the National College Players Association, and Drexel University released a report entitled "The Price of Poverty in Big Time College Sport."[214] This report concluded that 86 percent of college athletes playing for FBS schools on "full" athletic scholarships live the below the poverty line.[215] Huma's interest in the rights of college athletes dates back to 1995 when his roommate at the University of California, Los Angeles, star football player Donnie Edwards, was suspended by the NCAA for accepting anonymously donated groceries after Edwards had said he did not have food in his refrigerator on a local radio program.[216] A year later, Huma formed a student-athletes association that eventually morphed into the National College Players Association.[217] Huma's cause was thrust into the mainstream media in 2014 when basketball star Shabazz Napier, seated in his locker immediately after winning the NCAA Division I men's basketball national championship, stated that he sometimes went to bed hungry.[218] Because an athletic scholarship cannot cover everything, Huma attempts to remedy these issues by trying to help student-athletes negotiate for additional benefits.[219]

There is a substantial gap between what an athletic scholarship covers and what student-athletes are required to pay to maintain an acceptable standard of living. "The Price of Poverty in Big Time College Sport" report revealed that, as of 2012, out-of-pocket cost for a "full" scholarship student-athlete attending an

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[213] *See id.*

[214] Ramogi Huma & Ellen J. Staurowsky, *The Price of Poverty in Big Time College Sport*, NAT'L C. PLAYERS ASS'N, http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf (last visited Apr. 10, 2018).

[215] *Id.* at 4.

[216] Fulton, *supra* note 173.

[217] *Id.*

[218] *Id.*

[219] *Id.*

FBS school is $3,222 per year on average.[220] It is likely that much of these costs go uncovered because many of these students on "full" scholarship "come from low-income families who would otherwise not be able to pay for college, and the NCAA restricts a student-athletes' ability to get a job."[221] As of 2014, the NCAA has probably lowered these out-of-pocket costs by making new rules which allow student-athletes to receive unlimited snacks and meals, but this is only one of the many contributing factors to this gap.[222]

Without other major changes to the current system of college athletics recruiting, the trend of student-athletes living below the federal poverty line will not be remedied. While the College Athlete Protection Guarantee is something new, is not sufficient to bring about those changes. With many college football players currently coming from minority and disadvantaged backgrounds[223] it appears that Huma's plan to have athletes negotiate their way over the poverty line will have little effect if the athletes do not know how to adequately negotiate for those additional protections. If these underprivileged athletes use the College Athlete Protection Guarantee, they will have to choose between attempting to negotiate with the school's highly educated lawyers on their own, or risking their eligibility by having a third party assist them. In this situation, the schools still have all the power when it comes to recruiting, just as they did when only the National Letter of Intent existed.

The College Athlete Protection Guarantee seems to only benefit athletes who come from highly-educated or wealthier backgrounds, and who are the children of parents that can probably afford to keep them above the poverty line by covering these necessary out-of-pocket costs. This new document fails to assist athletes from low-income and African-American communities while providing even greater opportunities for athletes who come from different social and economic classes.

Finally, the College Athlete Protection Guarantee does not decrease the school's leverage in situations where an athlete

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[220] Huma & Staurowsky, *supra* note 214, at 4.

[221] Fulton, *supra* note 173; *see also* Williams, *supra* note 173 (stating that "[m]any of these college athletes [receiving "full-ride" scholarships] are black and come from poverty-stricken communities").

[222] Fulton, *supra* note 173.

[223] Oguntoyinbo, *supra* note 174.

wants to play at a specific school. For example, Marc Isenberg, a California-based athlete advocate and author on the subject of succeeding in life and business as an athlete, has given an account of what happens when a recruit wants to play for a certain school.[224] Before the time of the College Athlete Protection Guarantee, Isenberg recalled an athlete with professional potential whose family was uncomfortable with the National Letter of Intent and tried negotiating with some of the nation's top programs for additional protections such as a guaranteed four-year scholarship and the ability to change schools in the event of a coaching change for the athlete's commitment.[225]

The young man had one top school that he wanted to play for, and he and his family presented their alternate offer to the coach. According to Isenberg, this coach "listened" while the alternate offer was presented to him.[226] However, the coach told the athlete and his family: "'Look, I'm going to the press conference [to announce our recruiting class] tomorrow, and I want to name everybody. If you don't sign [a regular NLI], I might have somebody else waiting in the wings."[227] The amount of pressure this puts on young athletes who envision a professional future and potential life-changing circumstances "is too great."[228] In cases where a school will require an athlete to sign a National Letter of Intent or risk his chance at playing college athletics, the school still holds all the negotiating power. This issue will be more common among underprivileged athletes who view a scholarship to participate in college athletics as their chance for "a way out."

CONCLUSION

Huma and the National College Players Association present the College Athlete Protection Guarantee as a document that can benefit all athletes who are being recruited to play college sports, and even athletes who "walk-on" to a college team.[229] However, the College Athlete Protection Guarantee will only assist athletes who are highly recruited by the nation's top

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[224] Hruby, *supra* note 74.
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] National College Players Association, *supra* note 87.

programs, not the athletes who are being recruited by fewer or smaller schools.[230] According to a study by SB Nation, the odds of being a four- or five-star recruit are about 432 out of 300,000—or 0.14 percent.[231] The chances of being a five-star recruit (and having the most leverage when it comes to negotiating) are approximately 1 one-hundredth of a percent or 1 in every 10,000 players.[232] Using the approximation of 300,000 high school seniors who play football each year, this means that 299,568, or 99.86 percent of all high school seniors will *not* benefit from using the College Athlete Protection Guarantee.[233]

The number of athletes who will benefit from the College Athlete Protection Guarantee is further limited after applying the socioeconomic analysis discussed above. As athletes of highly educated parents participate in football less, the number of recruits who come from low-income and African-American communities will continue to rise. This increase means that the 387 recruits who have the leverage necessary to utilize the College Athlete Protection Guarantee will be reduced because of the inability of many of these recruits to adequately negotiate with the schools' lawyers.

While the College Athlete Protection Guarantee seems good in theory, it will have little effect in remedying the current system of recruitment, which disproportionately disadvantages low-income and African-American communities. If Huma and the College Athletes Players Association want to help student-athletes receive fair compensation, they need to find a more effective solution than the College Athlete Protection Guarantee.

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[230] *See* Hruby, *supra* note 74.

[231] Alex Kirshner, *This Is How Rare It Is to Be a Blue-chip College Football Recruit*, SB NATION (Jan. 26, 2018, 12:20 PM), https://www.sbnation.com/college-football-recruiting/2016/2/2/10879624/recruiting-stars-rankings-high-school-football.

[232] *Id.*

[233] *Id.*

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