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LIABILITY WAIVERS AND PARTICIPATION RATES IN YOUTH SPORTS: AN EMPIRICAL INVESTIGATION

ALFRED C. YEN[∞]
MATTHEW GREGAS[*]

INTRODUCTION

In this Article, we offer an empirical analysis of the relationship between liability waivers signed by parents and participation rates in youth sports. Specifically, we explore whether waiver enforcement is statistically associated with increased participation in youth sports. Our study finds no significant evidence of such a relationship.

The impetus for this investigation comes from an experience shared by parents all over the United States. A parent enrolls his minor child in a sports activity like a school team, club sport, skating party, or tennis camp. Organizers condition the child's participation on the parent signing a liability waiver in the organizers' favor, which often looks like this:

> On behalf of myself and my child, I hereby assume all risks related to participation in the Academy . . . I further hereby, on behalf of

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[∞] Professor of Law and Dean's Distinguished Scholar, Boston College Law School. The authors thank the QuantLaw Conference at the University of Arizona and its participants, Christopher Robertson, and Brian Galle for helpful ideas. Valuable feedback was also received from faculty colloquia at Wake Forest Law School, Northeastern Law School, University of Pittsburgh School of Law, Loyola University School of Law-Chicago, and Trinity College Dublin. And special thanks to research assistants MacLean Wright, Max Scully, Iris Ryou, and Celine Desantis.

[*] Senior Research Statistician, Boston College. PhD Statistics, University of Minnesota.

> myself, my child and anyone claiming through myself or my child, do FOREVER RELEASE [provider's name redacted], its [employees, officers, and volunteers] from any cause of action, claims, or demands of any nature whatsoever, including but not limited to a claim of negligence which I, my child, or anyone claiming through myself or my child, may now or in the future have … howsoever the injury is caused.[1]

Legally, doctrinal reasons exist to doubt the enforceability of these releases. They are contracts of adhesion, and allowing those responsible for children's safety to disclaim duty to discharge those responsibilities reasonably is possibly unconscionable or against public policy.[2] Removing negligence liability presumably lowers youth sports providers' incentives to take safety precautions, thereby raising the likelihood youths will suffer sports-related injuries.

Despite these concerns, many courts enforce youth sports releases.[3] Although these decisions could be justified on grounds of parental autonomy and freedom of contract, the primary argument favoring enforcement asserts that youth sports releases serve minors' interests, even at the cost of greater uncompensated

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[1] Actual release signed by Author Yen on behalf of his son for participation in a soccer camp. Copy on file with Author Yen.

[2] *See* State ex rel. Dunlap v. Berger, 567 S.E.2d 265, 273 (W. Va. 2002) (adhesion contracts include all form contracts offered by one party on an all-or-nothing basis); Woodruff v. Bretz, Inc., 218 P.3d 486, 489 (Mont. 2009) (adhesion contract is a form contract to be signed by a weaker party with little choice about the terms); *see infra* Part I; s*ee also* RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. L. INST. 1981) (explaining a contractual term is unenforceable on public policy grounds when public policy outweighs interest in enforcement); RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981) (explaining an unconscionable contract or term may be unenforceable); Delta Funding Corp. v. Harris, 912 A.2d 104, 110-111 (N.J. 2006) (finding factors determining enforceability of an adhesion contract include unconscionability and public policy); Graham v. Scissor-Tail, Inc., 623 P.2d 165, 173 (Cal. 1998) (holding courts will deny enforcement of unconscionable adhesion contracts).

[3] *See infra* Part I.

injury. Without enforceable waivers,[4] youth sports providers may reduce their offerings or go out of business to avoid tort liability risks. Conversely, allowing youth sports providers to avoid liability increases youth sports opportunities, and youth sports participation by extension, which confers benefits on youths outweighing any increased risk of uncompensated injury.[5]

This policy argument might be right. However, it is plausible only if youth sports participation increases when courts enforce exculpatory agreements signed by parents. However, no prior study has tested whether enforcing youth sports releases has the hypothesized effect. The study described here therefore provides valuable information about the persuasiveness of arguments on either side of a split in contract and tort law.

We conducted our study by applying a linear mixed effects regression analysis[6] to a dataset containing information about high school sports participation rates and the fifty states' law including the District of Columbia from 1988-2014. This allowed us to test for an association between enforcing youth sports releases and high school sports participation rates. Our analysis uncovered no statistically significant association.[7] This

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[4] *See* Zivich v. Mentor Soccer Club, 696 N.E.2d 201, 205-07 (Ohio 1998) (mentioning concern for parental authority and freedom of contract to support decision enforcing youth sports release).

[5] *See infra* Part I.

[6] Regression analysis permits the study of a data set to see if the value of one aspect of the data (sometimes called a predictor or independent variable) can be used to predict the value of another (sometimes called the response or dependent variable). *See* Douglas S. Shafer and Zhiyi Zhang, INTRODUCTORY STATISTICS Ch. 10 (2012), available at https://open.umn.edu/opentextbooks/textbooks/135. A linear mixed effects regression analysis is one designed to accommodate challenges arising when variations in the dependent variable are explained by both the independent variable and random effects. *See* Adrzej Galecki & Tomasz Buzykowski, *Linear Mixed Effect Models Using R: A Step-by-Step Approach*, SPRINGER NAT. (2013); Tony Pistilli, *Using Mixed-Effects Models for Linear Regression*, available at https://towardsdatascience.com/using-mixed-effects-models-for-linear-regression-7b7941d249b; Section Week 8—Linear Mixed Models, available at https://web.stanford.edu/class/psych252/section/Mixed_models_tutorial.html.

[7] *See infra* Part IIB. Enforcing states experienced marginally higher participation rates than states with no law on point (generally less

implies that the major argument given by courts for enforcing youth sports releases lacks empirical support.

The Article proceeds in five parts. First, the Article describes the law governing enforceability of youth sports signed by parents on behalf of children. Second, the Article sets forth the data and methodology on which our empirical study is based. This includes discussion about how ambiguities in state law complicate studying the association between enforcing youth sports releases and high school sports participation. Third, the Article acknowledges possible study limitations. Fourth, the Article discusses the study's results and possible implications. Finally, the Article concludes with thoughts about how courts should react to this study.

I. STATE LAW CONCERNING THE ENFORCEABILITY OF SPORTS LIABILITY WAIVERS SIGNED BY PARENTS ON BEHALF OF CHILDREN

State law varies considerably regarding the enforcement of youth sports releases signed by parents. Although state law is nuanced, the enforceability of youth sports releases generally depends on a state's specific pronouncements and, to a lesser extent, the state's law about releases signed by adults.

Most states enforce sports liability waivers signed by adults.[8] Injured parties have often argued these waivers violate public policy, but courts have generally rejected these challenges by distinguishing essential services like medical services and public transportation from optional sports and recreational activities. Because people cannot afford to reject essential services, courts believe that allowing providers to disclaim liability is unfair, especially when removing the threat of tort liability might

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than 1%), nonenforcing states experienced marginally lower participation rates than states with no law on point (generally less than 1%), and enforcing states experienced marginally higher participation rates than nonenforcing states did (generally less than 1.5%).

[8] *See, e.g.*, Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920, 926 (Minn. 1982) (exculpatory clause in favor of gym and health spa provider not against public interest and therefore enforceable); Chepkevich v. Hidden Valley Resort, L.P., 2 A.3d 1174, 1175 (Pa. 2010) (enforcing release in favor of ski operator); Stelluti v. Casapenn Enter., LLC, 1 A.3d 678, 695 (N.J. 2010) (enforcing release on behalf of fitness center).

compromise public safety. By contrast, people can easily decide not to play sports. Accordingly, it is arguably fair to give people a choice about absolving sports providers of liability as a condition of sports participation.[9] This explains why courts generally enforce sports liability waivers signed by adults when those waivers demonstrate a clear intent to waive the provider's negligence. However, courts will not typically recognize waivers of gross negligence, recklessness, or intentional behavior.[10]

The general enforceability of adult sports liability waivers does not necessarily mean that state courts treat waivers signed by parents on behalf of minor children the same way. At the

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[9] *See* Tunkl v. Regents of University of Cal., 383 P.2d 441 (Cal. 1963). Tunkl is a leading opinion in which the California Supreme Court refused to enforce an exculpatory agreement favoring a hospital. The court began with the premise, "[N]o public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party." *Id.* at 101. However, the court then distinguished the case from ordinary cases because the agreement (one for medical care) was one "affecting the public interest." *Id.* Exculpatory agreements affecting the public interest violate public policy because they frequently involve essential services like healthcare. Individuals unfairly face coercion when providers predicate essential services on waivers of liability, making enforcement of such bargains inappropriate. *Id. See also* Vodopest v. MacGregor, 913 P.2d 779 (Wash. 1996) (holding a preinjury agreement releasing medical researcher for negligent conduct violates public policy). For cases distinguishing recreational sports from essential services, see Platzer v. Mammoth Mountain Ski Area, 128 Cal.Rptr.2d 885, 889 (Cal. Ct. App. 2002) ("California courts have consistently declined to apply *Tunkl* and invalidate exculpatory agreements in the recreational sports context."); Chepkevich v. Hidden Valley Resort, L.P., 2 A.3d 1174, 1191 (Pa. 2010) (enforcing release in favor of ski operator because skiing is a "voluntary recreational activity"); Stelluti v. Casapenn Ents, Enterprises, LLC, 1 A.3d 678 (N.J. 2010) (enforcing release on behalf of fitness center). However, at least one state does not enforce exculpatory agreements at all. *See* Hanks v. Powder Ridge Rest. Corp., 885 A.2d 734, 744-47 (Conn. 2005) (concluding exculpatory agreement in favor of ski area affects public interest and is unenforceable).

[10] *See* RESTATEMENT (SECOND) CONTRACTS § 195(1) (AM. L. INST. 1981) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.").

beginning of the study period in 1988, forty-two of the fifty-one states surveyed had no clear position on the enforceability of youth sports releases, seven would not enforce them, and two had laws suggesting nonenforcement.[11] No state had laws suggesting or establishing enforcement. By the end of the study period in 2014, thirteen states did not enforce youth sports releases, six suggested nonenforcement, three suggested enforcement, eight enforced youth sports releases, and twenty-one had no clear law on the issue. Not surprisingly, state courts express sharply contrasting views about the law.

Courts refusing to enforce youth sports releases generally emphasize protecting minors, elevating their safety and compensation for injury over other policy goals. In the leading case *Scott v. Pacific West Mountain Resort*, a twelve-year-old boy suffered severe head injuries while skiing at a commercial ski resort.[12] He lost control while skiing on a race course laid out by the resort's ski school and apparently slid into a shack near the race course.[13] When the boy sued the ski resort and the school, the defendants claimed a release signed by the boy's mother had absolved the defendants of responsibility.[14] That release contained the following language:

> For and in consideration of the instruction of skiing, I hereby hold harmless Grayson Connor, and the Grayson Connor Ski School and any instructor or chaperon from all claims arising out of the instruction of skiing or in transit to or from the ski area. I accept full responsibility for the cost of treatment for any injury suffered while taking part in the program.[15]

After concluding that the release was clear enough to give notice of an intended waiver, the Washington Supreme Court discussed the public policy implications of enforcing it.[16] The court

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[11] For purposes of this article, the authors will refer to the District of Columbia as a state.

[12] Scott v. Pac. West Mountain Resort, 834 P.2d 6 (Wash. 1992).

[13] *Id.* at 8.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 9.

recognized that Washington generally enforced such exculpatory agreements, but emphasized that waivers signed by parents on behalf of minors required special consideration.[17] In many jurisdictions, parents do not have the general authority to release their children's causes of action.[18] In Washington, parents could not settle a child's claim without a hearing and court approval.[19] The court worried that enforcing youth sports waivers might deprive a child of recourse against a negligent party to pay for care his or her parents could not afford.[20] Accordingly, the court rejected the argument the threat of liability would raise the cost of sports, finding no sufficient justification for allowing sports providers to absolve themselves of liability as a condition to sports participation.[21]

By contrast, courts enforcing youth sports releases often contend that negligence claims pose grave risks to the viability of youth sports. Allowing youth sport providers to absolve themselves of liability therefore increases the availability of youth sports. This argument implicitly assumes that the value of increased youth sports opportunities outweighs any risks of uncompensated injury accompanying youth sports releases.

The leading case *Zivich v. Mentor Soccer Club* expresses this position.[22] In *Zivich*, the seven-year-old plaintiff suffered injury when climbing on a soccer goal after practice.[23] The plaintiff's mother had signed a waiver in the defendant's favor, and the district court relied on the waiver to grant summary judgment against the plaintiff.[24] On appeal, the Ohio Supreme Court looked past the waiver's potential effects on child safety, focusing instead on tort liability's potential effect on individuals and institutions providing youth sports opportunities:

> [F]aced with the very real threat of a lawsuit, and the potential for substantial damage awards, nonprofit organizations and their volunteers

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[17] *Id.* at 11.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 11—12.
[21] *Id.* at 12.
[22] Zivich v. Mentor Soccer Club, 696 N.E.2d 201 (Ohio 1998).
[23] *Id.* at 203.
[24] *Id*. at 203—04.

> could very well decide that the risks are not worth the effort. Hence, invalidation of exculpatory agreements would reduce the number of activities made possible through the uncompensated services of volunteers and their sponsoring organizations. … Accordingly, we believe that public policy justifies giving parents authority to enter into these types of binding agreements on behalf of their minor children.[25]

This led the court to hold that waivers of the sort signed by the plaintiff's mother were valid, and the court upheld the lower court's ruling.[26]

Other courts enforcing youth sports releases follow the reasoning expressed in *Zivich*, extending it for the benefit of public schools. In *Sharon v. City of Newton*, the Massachusetts Supreme Judicial Court wrote, "[t]o hold that releases of the type in question here are unenforceable would expose public schools, who offer many of the extracurricular sports opportunities available to children, to financial costs and risks that will inevitably lead to the reduction of those programs."[27] And, in *Hohe v. San Diego Unified School District*, the California Fourth District Court of Appeals wrote:

> Hohe, like thousands of children participating in recreational activities sponsored by groups of volunteers and parents, was asked to give up her right to sue. The public as a whole receives the benefit of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue without the risks and sometimes overwhelming costs of litigation. Thousands of children benefit from the availability of recreational and sports activities. Those options are steadily decreasing-victims of decreasing financial and tax support for other than the bare essentials of an education. Every learning experience involves risk. In this instance

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[25] *Id*. at 205.
[26] *Id.* at 208.
[27] Sharon v. City of Newton, 769 N.E.2d 738, 747 (Mass. 2002).

> Hohe agreed to shoulder the risk. No public policy forbids the shifting of that burden.[28]

II. TESTING THE EFFECT OF YOUTH SPORTS LIABILITY WAIVERS

The foregoing shows that an empirically testable proposition heavily influences the enforceability of youth sports releases. Put simply, courts enforcing those releases believe that doing so increases youth sports participation. We now describe how we tested this proposition.

A. CONSTRUCTION OF DATASET

1. *BASIC CONSTRUCTION*

We used three sources to construct the dataset used to test the relationship between enforcing youth sports releases and youth sports participation rates. First, we took participation figures compiled and reported annually by the National Federation of State High School Associations (NFHS).[29] The NFHS annually surveys its membership, state high school athletic associations for all fifty states and the District of Columbia, to gather the number of high school students who participate in sports in each state.[30] By relying on NFHS data, we have reconstructed total participation numbers in each of the fifty states and the District of Columbia for a twenty-seven-year period from 1988 to 2014. These numbers include participation by gender.

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[28] *Id.* at 1565. Hohe v. San Diego Unified Sch. Dist., 224 Cal. App. 3d 1559, 1564 (Ct. App. 1990).

[29] Although "NFHS" is not a perfect acronym for "National Federation of State High School Associations," it is the commonly used acronym for the organization. *See* NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, https://www.nfhs.org/who-we-are/aboutus (last visited Sept. 25, 2020).

[30] *High School Participation Survey Archive*, NATIONAL FEDERATION OF STATE HIGH SCHOOL ASS'NS, (Aug. 28, 2019), https://www.nfhs.org/sports-resource-content/high-school-participation-survey-archive/.

Second, we used high school enrollment figures obtained from the National Center for Education Statistics (NCES).[31] The NCES provides secondary school enrollment by state for all years under study. Accordingly, one can approximate the high school sports participation rate for each state in any year by taking the NFHS raw number and dividing it by the high school enrollment figure provided by the NCES.

Third, we compiled data derived from surveying the law of all fifty states and the District of Columbia. This required examining each jurisdiction to determine if the jurisdiction enforced, had not enforced, or had decided nothing about youth sports waivers from 1988 to 2014. For each year, each state was assigned one of the following codes, depending on the state of its law governing the enforceability of youth sports waivers signed by parents in the high school sports context:

-2: Youth sports waivers unenforceable.
-1: Law indicating that youth sports waivers would be invalid, but no definitive ruling.
0: No case or statutory law on point, or law so confusing that no conclusions can fairly be made.
1: Indication that youth sports waivers would be enforced, but no definitive ruling.
2: Youth sports waivers enforceable.

2. *CRITERIA AND PROCESS FOR CODING OF STATE LAW*

Setting the criteria for and assigning the codes for each state required nuanced judgments about the meaning of state law. We next describe the criteria used and the process for applying them.[32]

For a state to be coded -2 or 2, we required clear state law about the enforceability of youth sports releases favoring high schools. Although state supreme courts sometimes provided definitive rulings, we did not condition a -2 or 2 coding on a state

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[31] *Public school enrollment in grades 9 through 12, by region, state, and jurisdiction: Selected years, fall 1990 through fall 2027,* NATIONAL CENTER FOR EDUCATION STATISTICS (Jan. 2018), https://nces.ed.gov/programs/digest/d17/tables/dt17_203.30.asp.

[32] A summary of the relevant law from all 50 states can be found in the Appendix to this article.

supreme court ruling.[33] In a few cases, state legislatures settled the question.[34] In others, we accepted trial or intermediate appellate state court opinions on point because we believed such rulings would establish the law in a state until contradicted or overruled. We did not accept federal court opinions about state law on the grounds such opinions are predictions, not pronouncements, of state law.

-1 or 1 codings often followed nonbinding or unclear state law. Federal court decisions pronouncing state law and unpublished state court opinions received this treatment because these cases do not set binding precedent for future state court decisions. We also assigned -1 or 1 when decisions suggested outcomes without clearly deciding whether to enforce releases favoring high schools.

This ambiguity sometimes arose because courts sometimes make distinctions between for-profit entities and nonprofit or government entities like schools. In *Zivich*, the Ohio Supreme Court justified its decision in part by invoking the image of impecunious nonprofits who would be driven from providing youth sports opportunities by the fear of negligence liability.[35] This image arguably distinguishes nonprofits and government entities from for-profit entities. On the one hand, nonprofits and government actors, like schools, arguably provide youth sports for the public good. These entities might lack resources for damages or insurance because they do not seek or generate sufficient profit. Giving these entities a break from liability might therefore seem fair given their altruistic motives. On the other hand, for-profit entities provide youth sports to make money. They therefore earn enough revenue to pay for insurance, and their monetary motivations make them less deserving of relief from liability.

Although many reasons exist to doubt whether the distinction between non-profit/government and for-profit actors is

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[33] *See* Zivich v. Mentor Soccer Club, 696 N.W.2d 201 (Ohio 1998); Sharon v. City of Newton, 769 N.E.2d 738 (Mass. 2002); Hanks v. Powder Ridge Rest. Corp., 885 A.2d 734 (Conn. 2005).

[34] *See* COLO. REV. STAT. ANN. §13-22-107(3) (West) ("A parent of a child may, on behalf of the child, release or waive the child's prospective claim for negligence."); Alaska Stat. Ann. §09.65.292 (2004) (West).

[35] Zivich, 696 N.E.2d at 205.

indeed valid,[36] some courts accept it. Accordingly, these courts raise the possibility that they would enforce releases favoring nonprofit and government entities, but not those favoring for-profit entities. This means that decisions against enforcing youth sports releases must be read carefully when the defendant is a for-profit entity.[37] In some cases, an opinion indicates that the court would not enforce releases regardless of the entity involved because parents simply lack the power to bind their children to youth sports releases.[38] In other cases, an opinion leaves open the

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[36] The primary reason to doubt this distinction is that many nonprofits have resources comparable to for-profit entities. At the high end of the scale, U.S. Soccer is a 501(c)(3) corporation, with cash assets of over $14 million and net assets of over $145 million. *See* U.S. SOCCER, https://www.developmentfund.ussoccer.com/#homepage (last visited Sept. 26, 2020) ("U.S. Soccer is a 501(c)(3) nonprofit organization."); 2019 Audited Financial statement of U.S. Soccer, available at *Financial Information,* U.S. SOCCER, https://www.ussoccer.com/governance/financial-information (last visited Sept. 26th, 2020). Smaller youth sports clubs may be organized as nonprofit entities, but they mimic for-profits' behavior by charging significant fees to sports participants. Indeed, the *Zivich* defendant, Mentor Soccer Club, presently charges over $900 for participants aged nine to fifteen. *See 2017-18 Program Fees,* MENTOR SOCCER CLUB, https://www.mentorsoccerclub.com/Default.aspx?tabid=31518 (last visited Sept. 26, 2020). And, in 2017, USA Today reported annual club fees (not including travel) of $2,500 to $5,000 for club soccer and up to $6,000 for volleyball. *See Paying to Play: How Much do Club Sports Cost?*, USA TODAY (Aug. 1, 2017), https://usatodayhss.com/2017/paying-to-play-how-much-do-club-sports-cost. At the very least, these assets and revenue streams make many nonprofits fully able to purchase liability insurance. *See Youth Tackle Football Insurance,* Sadler Sports and Recreation Insurance, https://www.sadlersports.com/football/ (last visited Sept. 26, 2020) (quoting tackle football insurance for under $500 per team with coverage offered in all 50 states). *See also* ESPORTSINSURANCE, https://www.esportsinsurance.com/ (last visited Sept. 26, 2020). Similarly, public school systems do not lack money and are fully able and do carry liability insurance.

[37] Decisions to enforce such releases do not present problems because nonprofit and government entities are considered more deserving of liability relief than for-profit entities. Therefore, a decision to enforce a release for a commercial entity surely means they would be enforced on behalf of nonprofits and government entities as well.

[38] *See* Hawkins v. Peart, 37 P.3d 1062, 1063-64 (Utah Sup. Ct. 2001), ("a parent has [no] authority to release a child's cause of action prior to an injury."); Scott v. Pac. W. Mt. Resort, 834 P.2d 6, 12 (Wash. 1992) (en banc) ("We hold that to the extent a parent's release of a third

possibility that a court would refuse to enforce youth sports releases only when the defendant is a for-profit entity.

For example, in *Kirton v. Fields*,[39] the Florida Supreme Court refused to enforce a release executed in favor of a commercial entity.[40] Such a decision might have indicated a -2 coding, but the court carefully phrased its opinion as applying only to "injuries resulting from participation in a commercial activity."[41] In so ruling, the court let stand the earlier case of case of *Gonzalez v. City of Coral Gables*,[42] in which the Third District Court of Appeals enforced a youth sports release in favor of a fire department youth program operated by the City of Coral Gables.[43] In so deciding, the court characterized the youth program as "within the category of commonplace child oriented community or school supported activities for which a parent or guardian may waive his or her child's litigation rights in authorizing the child's participation."[44] This left open the possibility that the court might decide differently if the release favored a government or non-profit entity, so we coded Florida as 1.[45]

Similarly, in *Hojnowski v. Vans Skate Park*,[46] the New Jersey Supreme Court considered a release signed by a parent favoring a commercial skate park.[47] In ruling against enforceability, the court framed the issue narrowly, asking "whether New Jersey's public policy permits a parent to release a minor child's potential tort claims arising out of the minor's use of

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party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable."); Galloway v. State, 790 N.W.2d 252, 259 (Iowa 2010) ("[P]reinjury releases executed by parents purporting to waive the personal injury claims of their minor children violate public policy and are therefore unenforceable.").

[39] 997 So.2d 349 (Fla. 2008).

[40] *Id.* at 358.

[41] *Id.*

[42] 871 So.2d 1067 (Fla. Dist. Ct. App. 2004).

[43] *Id.*

[44] *Id.*

[45] We recognized that we might be wrong about how opinions like *Kirton* would be understood by relevant actors and that future cases might come out differently. We therefore treated codings of 1 and -1 in different ways to see if our results were sensitive to alternate coding decisions. We found no such sensitivity. *See infra* Part IIB.

[46] 901 A.2d 381 (N.J. 2006).

[47] *Id.* at 383.

a *commercial* recreational facility."[48] However, we coded New Jersey as a -1, as opposed to 0, in the wake of *Hojnowski* because an earlier 1970 trial court decision had found a release signed by a parent void against public policy.[49] Because that case made no distinction between for-profit and nonprofit or government entities, we read that case as justifying a -2 code. *Hojnowski* therefore represented a possible, but by no means definite, retrenchment from earlier law.

0 codings generally applied to states whose case and statutory law was silent on the youth sports release issue. However, we also assigned 0 to states with relevant, but confusing, law. For example, in Connecticut, from 1958 until 2002, the primary precedent regarding youth sports releases was *Fedor v. Mauwehu Council, Boy Scouts of America, Inc.*[50] In *Fedor*, the Connecticut Superior Court held a release signed by the plaintiff's father as a condition of attending a boy scout camp void as against public policy. We coded Connecticut as -2 accordingly. Then, in 2002 and 2003, the Connecticut Superior Court issued two unpublished opinions enforcing releases signed by the plaintiffs' parents.[51] If these opinions had been published, they would have justified a 2 coding. However, we could not predict these cases' effects because the relevant opinions were unpublished, so we coded Connecticut as 0. Interestingly, the Connecticut Supreme Court held all exculpatory agreements unenforceable for public policy reasons in 2005, suggesting that we were correct about the unpublished opinions' weak precedential effect.[52]

Similarly, in 1997, Hawaii enacted Hawaii Revised Statutes 663-1.54(b) to address the general enforceability of releases.[53] The statute states:

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[48] *Id.* at 385 (emphasis added).

[49] Fitzgerald v. Newark Morning Ledger Co., 267 A.2d 557 (N.J. Super. Ct. Law Div. 1970).

[50] Fedor v. Manuwhu Council, 143 A.2d 466 (Conn. Super. Ct. 1958).

[51] Fischer v. Rivest, 33 Conn. L. Rptr. 119 (Conn. Super. Ct. 2002) (unpublished); Saccente v. Laflamme, 35 Conn. L. Rptr. 174 (Conn. Super. Ct. 2003) (unpublished).

[52] Hanks v. Powder Ridge Restaurant Corp., 885 A.2d 734, 741—42 (Conn. 2005).

[53] HAW. REV. STAT. § 663-1.54(b) (1997).

> owners and operators of recreational activities shall not be liable for damages for injuries to a patron resulting from inherent risks associated with the recreational activity if the patron participating in the recreational activity voluntarily signs a written release waiving the owner or operator's liability for damages for injuries resulting from the inherent risks.[54]

Importantly, however, "inherent risks" do not include those resulting "from the negligence, gross negligence, or wanton act or omission" of the defendant.[55]

It is hard to know how a statute like this might affect the law going forward, and Hawaii has reported no case clarifying the matter. First, the statute protects "owners and operators of recreational activities" without elaborating on whether a high school falls within "owners and operators."[56] Second, the statute excludes risks arising from the defendant's negligence.[57] This exclusion arguably reduces a release's value to practically nothing because defendants do not face liability for injuries not caused by negligence. However, risks inherent to a sport can be caused, or exacerbated, by a defendant's negligence. For example, drowning is a risk inherent in surfing, but a surfing school can reduce drowning risks by taking reasonable precautions when taking students to the ocean. If a surfing student signs a liability waiver but drowns, does the release protect the defendant because drowning is an inherent risk of surfing? Or, does the release not protect the defendant if the plaintiff alleges the defendant failed to take reasonable precautions to reduce the risk of drowning? Finally, it is not clear whether a parent's signature on a youth sports release would count as one voluntarily signed by the patron. These ambiguities made predicting how Hawaii courts might treat youth sports releases impossible, so we coded the state as 0.

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[54] *Id.*
[55] HAW. REV. STAT. 663-1.54(c)(3) (1997).
[56] *Id.* § 663-1.54(b).
[57] *Id.* § 663-1.54(c)(3).

3. *CALCULATING HIGH SCHOOL SPORTS PARTICIPATION RATES*

We derived state high school sports participation rates from two sources covering 1988 through 2014: (1) the National Federation of State High Schools (NFHS) annual high school athletics participation survey[58] and (2) the National Center for Education Statistics (NCES) Elementary/Secondary Information System website.[59] The NFHS writes playing rules and offers guidance for high school sports[60] and is comprised of state athletic associations from all fifty states and the District of Columbia.[61] Each year, the NFHS surveys its member associations about youth sports participation and publishes the results on both a national and state-by-state basis.[62] We used the figures from these surveys as the number of youths participating in high school sports for each state in a given year, excluding numbers that seemed obviously incorrect.

The most common reason for exclusion was discrepancy in a state's reported data. The NFHS surveys generally offered three different sets of numbers: total participation, participation by gender, and participation by sport broken down by gender. In most cases, those numbers were consistent, with various categories' sums equaling total numbers. In some cases, the sums did not match, leading us to doubt the numbers' accuracy. Therefore, we set an arbitrary 0.1% limit as an acceptable discrepancy and excluded years with larger discrepancies.

Reporting identical results in consecutive years provided the next most common reason for exclusion. For example, Georgia

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[58] Available at *High School Participation Survey Archive*, NAT'L FED'N OF HIGH SCHOOL ASS'NS (Aug. 28, 2019), https://www.nfhs.org/sports-resource-content/high-school-participation-survey-archive/.

[59] *ElSi: Elementary/Secondary Information System*, INST. OF EDUC. SCI., http://nces.ed.gov/ccd/elsi/ (last visited Sept. 19, 2020). We downloaded our information by using the ElSi Table Generator at https://nces.ed.gov/ccd/elsi/tableGenerator.aspx.

[60] *See About Us*. NAT'L FED'N OF HIGH SCHOOL ASS'NS, https://www.nfhs.org/who-we-are/aboutus (last visited Sept. 19, 2020).

[61] *See id.*; *State Association Listing*, NAT'L FED'N OF HIGH SCH. ASS'NS, https://www.nfhs.org/resources/state-association-listing (last visited Sept. 19, 2020) (listing all fifty-one NFHS member state associations).

[62] NFHS, *supra* note 30.

reported two-year pairs of identical results for 1989 to 1990, 1991 to 1992, 1993 to 1994, 1995 to 1996, 1999 to 2000, 2008 to 2009, and 2010 to 2011. Many other states had similar identical reports, both overall or for only one gender. We considered such coincidence extremely unlikely and suspect that this data pattern reflected clerical error or reuse of a prior year's figures in the absence of a completed survey in a given year. We responded by including only one repeating year in our dataset.

Smaller numbers of exclusions resulted from the removal of outliers and other oddities. We removed nine data points because the reported numbers varied significantly from the years before and after.[63] We also removed four years of data from Iowa because the numbers indicated participation rates over 100%.[64] We combined the raw participation numbers obtained from the NFHS with the NCES enrollment figures. Dividing the NFHS numbers by the total secondary school enrollment for each state approximated the fraction of high school students in each state participating in high school sports.

4. *CONTROLS*

We included 3 control variables. First, we controlled for year because participation rates unmistakably rise during the study, regardless of the law adopted by a given state.[65] This trend makes comparing observations from different years potentially inaccurate. Adjusting for year reduces the possibility of such error and was a significant predictor in our model.

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[63] Candidates for such exclusion were initially identified with a three standard deviation rule. After, a visual inspection determined whether the potential outlier truly varied from the surrounding years. The data points removed were West Virginia 2007, Virginia 1990, North Dakota 1990, Oregon 1990 and 1999, Montana 2004, New Mexico 2006, Alaska 1990, and Arkansas 1991 and 2000.

[64] The removed years are 1989, 1991, 1992, and 2008. Participation rates of over 100% could possibly arise if many students in a state participated in multiple sports and were counted as separate individuals for each participation. We do not know if this happened.

[65] Only 7 states experienced falling participation rates over the course of the study: Colorado, Washington, Arizona, Idaho, Nevada, Oregon, and South Dakota.

Second, we controlled for median household income because wealth might affect sports participation rates. To do this, we used data reported by the US Census in 2018 dollars.[66] This control proved a significant predictor in our model.

Third, we controlled for the ratio of male to female participants to isolate the law affecting releases more precisely. Especially in the earlier years studied, the number of boys participating in sports far exceeded the number of girls. That gap decreased considerably in later years of study. The reasons for this decrease probably included changing attitudes towards girls' sports participation and Title IX, which prohibits discrimination on the basis of sex in educational institutions receiving federal funding.[67] We hypothesized that states with highly unequal participation would respond more strongly to Title IX and increase sports participation for girls more rapidly than states with relatively equal participation. Controlling for participation differences between genders allowed us to avoid confounding effects associated with gender, which proved significant.

In addition to the three significant controls mentioned above, we initially controlled for state sovereign immunity and statutory damages caps because such law potentially obviates the

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[66] *Historical Income Tables: Households*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-households.html. (last updated Sept. 8, 2020). Note also for 2013, two sets of figures were reported, which have been combined by the estimated population proportion for the two concurrent surveys. *Historical Income Tables Footnotes*, U.S. CENSUS BUREAU, https://www.census.gov/topics/income-poverty/income/guidance/cps-historic-footnotes.html. (last updated Sept. 4, 2020).

[67] *See* 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."); 34 C.F.R. § 106.41(c) (requiring provision of equal athletic opportunity for members of both sexes). *See also* McCormick ex rel. McCormick v. School Dist. Of Mamaroneck, 370 F.3d 275, 286 (2d Cir. 2004) (applying Title IX to high school sports and noting "[t]he participation of girls and women in high school and college sports has increased dramatically since Title IX was enacted."); Ollier v. Sweetwater Union High School Dist., 858 F.Supp.2d 1093 (S.D. Cal. 2012) (applying Title IX to high school sports). For a description of Title IX's influence on sports, see Dionne Koller, *Not Just One of the Boys: a Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports,* 43 CONN. L. REV. 401 (2010).

value of releases for high schools. Accordingly, we conducted an additional fifty state survey to determine each state's sovereign immunity law throughout the study period. We coded and treated the results of the survey as a categorical variable in our analysis as follows:

2: No waiver of sovereign immunity
1: Partial, limited waiver of sovereign immunity
-1: Partial, larger waiver of sovereign immunity
-2: Complete waiver of sovereign immunity

However, we discovered adding sovereign immunity did not give us new statistically significant information. Accordingly, we followed standard statistical analysis practice and dropped it from the model.[68]

We controlled for damage caps because states sometimes limit the amount a plaintiff may recover in a suit against high schools. This required yet another fifty-state survey, which resulted in a 1 coding if a state capped damages and 0 if a state did not. We decided against trying to code for variations in damage caps because differences among the states were subtle and numerous. We discovered here as well that adding damage cap information to our model did not yield valuable new information, so it too was dropped.

B. ANALYSIS

We used the foregoing data to test the effect of enforcing or not enforcing youth sports releases. The study's null hypothesis was that the law governing these releases does not affect youth sports participation rates. The study tested this hypothesis by measuring the relationship between various legal conditions (i.e., whether the state law was -2, -1, 0, 1, 2, or combinations thereof) and high school youth sports participation rates. The study conducted the analysis with R in a linear mixed effect multilevel model.[69] The response variable was the participation rate, and the

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[68] R. Dennis Cook & Sanford Weisburg, *Applied Regression Including Computing and Graphics*, JOHN WILEY & SONS, INC. (2009).

[69] Adrzej Galecki & Tomasz Buzykowski, *Linear Mixed Effect Models Using R: A Step-by-Step Approach*, SPRINGER NAT. (2013).

predictors were the code assigned to each state's law in a given year, with one exception. For years in which a state's law changed, we did not assign the new code to the state until the following year on the theory it takes time before a population learns about changes in the law and adjusts its behavior.

Because codes -1 and 1 had associated ambiguities, we processed data associated with those codes in three different ways. In the first, we treated codes -1 and 1 identically to code 0. In the second, we excluded that data, including only data linked to state law codes -2, 0, or 2. In the third, we treated codes -1 as -2 and 1 as 2. We were unable to treat -1 and 1 as separate codes because the number of such data points was too small to provide statistical power.[70]

We employed three methods to test how sensitive our analysis was to the coding decisions made about state law. By treating -1 and 1 codes as 0, we treated ambiguous cases as if they told the public nothing about the enforcement of youth sports waivers. This made sense because ambiguous signals about the enforceability of waivers are not likely to influence the behavior of youth sports providers. If a state tells youth sports providers it will or will not enforce waivers, those providers have every reason to arrange their affairs accordingly. However, if no law or ambiguous law exists, the reasons for adjusting behavior are smaller. It might make sense to change nothing until further clarification arrives.

By excluding data associated with -1 and 1 codes, we treated ambiguous cases as noise indecipherable to the general public that therefore ought to be ignored. This is potentially valuable not only because we are clear about what is being measured, but also because the policy debate about the value of enforcing youth sports waivers is expressed in cases that clearly decide whether to enforce waivers. Thus, ignoring states whose laws do not make a clear choice focuses our study on the precise policy dispute raised by the law.

Finally, by including -1 with -2 and 1 with 2, we covered the possibility that the public responded to ambiguous signals about enforcement or nonenforcement as if they were clear. We are not claiming these possible effects occur. We merely tested all possibilities in case they changed the strength of association between the enforceability of youth sports releases and youth sports participation rates.

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[70] Thomas P. Ryan, *Sample Size Determination and Power*, JOHN WILEY & SONS, INC. (2013).

All three data-handling methods indicated no statistically significant relationship between the enforceability of youth sports releases and high school sports participation rates. The principal results follow.

When codes -1 and 1 are treated as 0, the mean adjusted participation rate was 54.02611% in states with no law (i.e., states coded as 0). For states not enforcing youth sports releases, the participation rate fell to 53.61578%. For states enforcing the releases, the participation rate rose to 54.66165%. For the difference between states with no law and states not enforcing releases, the p value[71] was 0.6086. For the difference between states with no law and states enforcing releases, the p value was 0.5068. And, for the difference between states not enforcing releases and states enforcing releases, the p value was 0.3877. These p values fall short of statistical significance at either a 0.10 or 0.05% significance level. Figure 1 summarizes these results.

[71] The P value is a measure of how statistically likely a given observation (particularly an observation that varies from the null hypothesis) is if the null hypothesis is true. If this probability is high, statisticians interpret the observation as consistent with the null hypothesis. Intuitively, this means it is "no big surprise" to observe variances from the null hypothesis of this size. If the probability is small, statisticians interpret the observation as evidence (not proof) that the null hypothesis is false. Probabilities associated with such interpretation are labeled statistically significant. *See* Stephanie Glen, *P-Value in Statistical Hypothesis Tests: What is it?,* available at https://www.statisticshowto.com/p-value/; *P Values*, available at https://www.statsdirect.com/help/basics/p_values.htm; Amy Gallo, *A Refresher on Statistical Significance*, Harvard Business Review, February 16, 2016, available at https://hbr.org/2016/02/a-refresher-on-statistical-significance. For a textbook-style explanation, see Douglas S. Shafer and Zhiyi Zhang, INTRODUCTORY STATISTICS 356-363 (2012), available at https://open.umn.edu/opentextbooks/textbooks/135.

Figure 1
(-1 and 1 = 0)

	Change	Part %	P Value
No Law as "control"		54.02611	
Not Enforceable	-0.41033	53.61578	*0.6086
Enforceable	0.63554	54.66165	*0.5068
Not Enforceable as "control"		53.61578	
Enforceable	1.04586	54.66344	0.3877

*P-value represents test of difference from No Law as "control condition"

When data associated with codes -1 and 1 are excluded, the mean adjusted participation rate was 54.32471% in states with no law (i.e., states coded as 0). For states not enforcing youth sports releases, the participation rate fell to 53.37484%. For states enforcing releases, the participation rate rose to 54.91457%. For the difference between states with no law and states not enforcing releases, the p value was 0.3053. For the difference between states with no law and states enforcing releases, the p value was 0.5490. And, for the difference between states not enforcing releases and states enforcing releases, the p value was 0.2333. These p values fall short of statistical significance at either a 0.10 or 0.05 significance level. Figure 2 summarizes these results.

Figure 2
(-1 and 1 excluded)

	Change	Part %	P Value
No Law as "control"		54.32471	
Not Enforceable	-0.94987	53.37484	*0.3053
Enforceable	0.58716	54.91457	*0.5490
Not Enforceable as "control"		53.37484	
Enforceable	1.53702	54.91186	0.2333

* P-value represents test of difference from No Law as "control condition"

When codes -1 and 1 are treated as -2 and 2 respectively, the mean adjusted participation rate was 53.84683% in states with no law (i.e., states coded as 0). For states not enforcing youth sports releases, the participation rate rose to 53.93076%. For states enforcing the releases, the participation rate rose to 54.97869%. For the difference between states with no law and states not enforcing releases, the p value was 0.9138. For the difference between states with no law and states enforcing releases, the p value was 0.1747. And, for the difference between states not enforcing releases and states enforcing releases, the p value was 0.3281. These p values fall short of statistical significance at either a 0.10 or 0.05 significance level. Figure 3 summarizes these results.

Figure 3
(-1 = -2 and 1 = 2)

	Change	**Part %**	**P Value**
No Law as "control"		53.84683	
Not Enforceable	0.08393	53.93076	*0.9138
Enforceable	1.13186	54.97869	*0.1747
Not Enforceable as "control"		53.93076	
Enforceable	1.04793	54.97869	0.3271

* P-value represents test of difference from No Law as “control condition”

We also tested for sensitivity to the exclusion of outliers and the one-year delay in giving effect to a changed coding about a state’s law. To do this, we repeated our analysis without the delay but with outliers excluded, with the outliers left in but retaining the delay, and without the delay and with outliers left in. All reruns found no statistically significant association between the enforceability of youth sports releases and high school sports participation rates.

III. LIMITATIONS

The study reported here finds no statistically significant relationship between the enforceability of youth sports releases and participation rates. Like all studies of this sort, it has limitations that should be acknowledged.

First, the study is observational, making it more prone to confounding factors that a tightly controlled experimental study might avoid. A hidden factor may exist, masking the effect of enforcing youth sports releases on youth sports participation rates. Similarly, the study's observational nature means that we could not control the nature and timing of youth sports release law changes. For example, state law varies in its details, and our grouping states into five coded categories may overlook statistically significant distinctions. Similarly, unpredictable events may have had consequences that amplified or diminished the effect of enforcing youth sports releases. This could happen if a natural and unpredictable calamity like the recent COVID-19 pandemic caused many families to pull their children from high school sports opportunities when they would otherwise likely have participated.

Second, the study relies on data aggregated at the state level. A more fine-grained aggregation might uncover an overlooked effect in a subset of the statewide population. For example, perhaps enforcement of youth sports releases matters only to high schools in a few very wealthy communities. Their response to the law might get hidden if high schools in other communities do not care about whether youth sports releases can be enforced.

It would be ideal to conduct a study avoiding these limitations. However, we did not have access to data or methods that eliminated the relevant problems. Nevertheless, we still believe that our study has value and insight, even as we acknowledge its potential shortcomings.

IV. IMPLICATIONS

To the extent courts enforce youth sports releases in the belief that doing so increases youth sports participation, our study suggests that this belief is mistaken. Decisions to enforce youth sports releases should therefore be reconsidered and perhaps reversed.

There are, of course, nuances. High schools may appear indifferent to changes in the law concerning youth sports releases for two different reasons. First, high schools may not consider the threat of tort liability significant when deciding how extensive a sports program to offer. Second, perhaps high schools do not respond to changes in the law because they do not know what the law is. These possibilities have potentially different policy ramifications.

If high schools do not care about tort liability when making decisions about sports offerings, then it makes little sense to enforce youth sports releases in hopes of increasing high school sports participation. However, if high schools are ignorant about the law, then perhaps enforcing releases still makes sense because high schools might respond to the law as hypothesized if only they had better information. Thus, if states sent a clearer signal favoring the enforcement of youth sports releases, high school sports participation might rise.

Those who favor enforcing youth sports releases may find this second possibility intriguing, but further reflection shows this situation is unlikely to exist. Although high schools may be ignorant of the law, they would remain ignorant only if they did not consider that knowledge important. Assume for the sake of discussion that high schools are ignorant of the law and that enforcing youth sports releases would materially affect the provision of sports opportunities. High schools in this position would surely try to find out whether releases signed by parents actually offered protection from liability, and they would probably succeed in shedding their ignorance. To start, public high schools have access to this information. If nothing else, governments employ lawyers who could provide the requested guidance. Even private high schools can easily get legal assistance, as they probably have ongoing relationships with lawyers to handle the various legal problems associated with operating a school. Moreover, if the enforceability of youth sports releases genuinely mattered to high schools, they could easily undertake collective action to stay informed about the law. For example, state high school athletic associations or entities like NFHS would probably track the law and inform their members about changes.

The foregoing strongly implies that high schools do not consider the enforcement of youth sports releases materially important to the scope of their sports offerings. If high schools know the law and do not respond to it, then clearly the law matters little. And, if high schools are ignorant of the law and choose to

remain that way, they probably do not consider the law important to their decision-making.

The generalizability of these conclusions to youth sports at large depends on whether high schools are a good representative for other youth sports providers. On one hand, high schools may not respond to tort liability the way other sports providers do. Unlike for-profit or even nonprofit youth sports providers, high schools, especially public high schools, do not sell youth sports opportunities into a marketplace. Instead, high schools offer sports as one component of an integrated educational program. This, along with the strong probability that high schools carry liability insurance regardless of whether they offer sports, might render high schools relatively insensitive to concerns about tort liability when it comes to offering sports. Perhaps high schools consider sports an important part of their educational program which should be cut only as a matter of last resort. Just as liability concerns do not stop high schools from giving students opportunities to conduct potentially dangerous chemistry experiments, those concerns might not prevent high schools from offering sports.[72]

On the other hand, most youth sports providers and high schools could respond the same way to tort liability. If such liability poses the existential threat hypothesized by *Zivich*, *Sharon*, *Hohe*, and other decisions enforcing youth sports releases, those financial consequences should matter to both high schools and other sports providers.[73] Moreover, if high schools are insensitive to changes in the law because they carry liability insurance, it is also likely other youth sports providers carry insurance. Thus, unless a significant percentage of youth sports providers do not carry coverage, or if the cost of that coverage is significantly cheaper for high schools, youth sports providers likely do not significantly alter what they offer in response to changes in the law.[74]

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[72] High schools are possibly also insensitive to tort liability because sovereign immunity or damages caps protect them. As noted earlier, we initially controlled for variations in state law related to these protections and found they did not affect the outcome of our study.

[73] Zivich v. Mentor Soccer Club, 696 N.E.2d 201 (Ohio 1998); Sharon v. City of Newton, 769 N.E.2d 738 (Mass. 2002); Hohe v. San Diego Unified Sch. Dist., 274 Cal. Rptr. 647 (1990).

[74] Enforceable waivers' presence could theoretically affect insurance rates. However, insurance companies do not appear to offer

Ideally, one would conduct another empirical investigation to see if other youth sports providers respond to tort liability as high schools do, but the authors could not find comprehensive sources of data. However, if other sports providers appear not to respond to the law concerning youth sport releases, it is likely that other providers do not consider tort liability a major factor in their decision making. This is because, like high schools, ordinary youth sports providers who consider it important have easy opportunities to learn about whether youth sports releases are enforceable. For example, many sports have national, state, and private governing bodies that could easily monitor the law and notify members about the enforceability of youth sports releases.[75] Those operating sports facilities also have associations that could

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discounts to entities that obtain waivers from participants. *See* SADLER SPORTS & RECREATION INSURANCE, https://www.sadlersports.com/amateur/ (last visited Sept. 19, 2020) (published quotes do not alter premium quoted on the basis of waivers, although quotes do vary by risk of brain injury); *Quote*, ESPORTSINSURANCE, https://quote.esportsinsurance.com/Quote/Create?sport=29 (last visited, Sept. 19, 2020) (quotes offered by state appear not to vary on the basis of whether youth sports waivers are enforced). This matches the personal experience of one author, Yen, who participated in getting insurance to cover a youth soccer event. None of the insurance quotes depended on whether the event obtained waivers from participants even though the state where the event was held, Massachusetts, enforces youth sports releases.

[75] Examples include: U.S. YOUTH SOCCER, https://www.usyouthsoccer.org/ (last visited Sept. 19, 2020) (organized under auspices of U.S. Soccer and overseeing state governing associations); U.S. FIGURE SKATING, https://www.usfigureskating.org/ (last visited Sept. 19,2020) (national governing body of figure skating with individual club memberships); POP WARNER FOOTBALL, https://www.popwarner.com/ (last visited Sept. 19, 2020) (nonprofit overseeing youth football and cheerleading opportunities at the local level); AMATEUR ATHLETIC UNION, https://aausports.org/index.php (last visited Sept. 19, 2020) (nonprofit promoting amateur sports with membership for clubs and organizer of numerous youth competitions).

conduct similar monitoring,[76] with similar associations serving coaches.[77]

CONCLUSION

States differ in the legal treatment of youth sports releases. Some enforce them, others do not, and still others have no clear law. Importantly, states disagree about the policy consequences of enforcing or not enforcing these releases. States refusing to enforce do so because they wish to guard against the social problems associated with uncompensated injuries suffered by youth athletes at the hands of negligent sports providers. States enforcing releases do so because they believe that enforcing releases lowers costs incurred by sports providers, resulting in increased youth sports participation whose benefits outweigh the costs of uncompensated injuries.

The study reported in this Article tests whether the hypothesized benefit of increased youth sports participation exists in high school sports. The study finds no statistically significant relationship between enforcing youth sports releases and participation rates. This finding significantly weakens the case for enforcing youth sports releases.

Of course, states have other reasons for enforcing youth sports releases. These possibilities include freedom of contract and respect for parental decisions made on behalf of minor children. The study of these possibilities lies outside the scope of this article, and courts enforcing youth sports releases have not relied heavily on these rationales for their decisions. Perhaps freedom of contract and respect for parental decision-making justify enforcement. However, this study questions whether the primary existing justification for such enforcement is true. We therefore believe that courts considering youth sports releases should hesitate before finding those releases enforceable.

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[76] Examples include the US INDOOR SPORTS ASS'N, https://usindoor.com/facilities/resources/ (last visited Sept. 19, 2020); U.S. ICE RINK ASS'N, https://www.usicerinks.com/ (last visited Sept. 19, 2020); WORLD WATERPARK ASS'N, https://waterparks.org/web/wwa_show.aspx (last visited Sept. 19, 2020),; and SPORTSPLEX OPERATORS & DEVELOPERS ASS'N, https://www.sportsplexoperators.com/index.html (last visited Sept. 19, 2020).

[77] Examples include the AMERICAN FOOTBALL COACHES ASS'N, https://www.afca.com/ (last visited Sept. 19, 2020); NATIONAL GYMNASTICS COACHES ASS'N, https://gymca.org/98942656 (last visited Sept. 19, 2020); and UNITED SOCCER COACHES, https://unitedsoccercoaches.org/ (last visited Sept. 19, 2020).

APPENDIX: STATE LAW CONCERNING ENFORCEABILITY OF YOUTH SPORTS RELEASES

This appendix describes the law relied on to assign legal codes for each state used in the study. Each entry provides the coding assigned each state, followed by a summary of the relevant law.

ALABAMA:

1988-2009: 0
2010-2014: -1

In 2010, the Middle District of Alabama decided *J.T. ex rel. Thode v. Monster Mt., LLC* and identified the enforceability of youth sports releases as an issue of first impression for the state.[78] The case involved a negligence suit by a minor against a for-profit motocross park's owner.[79] In response, the defendants moved for summary judgment on the basis of a release signed by the minor's parents.[80] The court refused to enforce the release.[81] The court cited Alabama law suggesting that parents lack the ability to waive a child's rights concerning personal injuries.[82] The court also incorrectly noted "the few cases that have upheld a pre-injury waiver have made a point of emphasizing that the policy reasons for doing so are based on the fact of the defendant being a nonprofit sponsor of the activity involved, such as with school extra-curriculars."[83] We decided to code this decision as a -1 because (1) it is a federal decision, and (2) although the court recognized that some states enforce youth sports releases in favor

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[78] *Id.* at 1326. J.T. ex rel. Thode v. Monster Mountain, LLC, 754 F.Supp.2d 1323, 1326 (M.D. Ala. 2010).

[79] *Id.* at 1323—24.

[80] *Id.* at 1325.

[81] *Id.* at 1327.

[82] *Id.* at 1327—28.

[83] *Id.* at 1328. This statement appears to overlook cases in which for-profit entities had successfully asserted preinjury releases before 2010. *See* Platzer v. Mammoth Mountain Ski Area, 104 Cal. App. 4th 1253, 1255 (2002); Vokes ex rel. Vokes v. Ski Ward, Inc., 2005 WL 2009959 (2005); Quirk v. Walker's Gymnastics & Dance, 16 Mass L. Rptr. 502 (2003).

of nonprofits and schools, its citation to Alabama law did not incorporate this distinction. The court likely used this recognition to build confidence in the case's specific result and not to express a limit in Alabama law.

ALASKA:

1988-2003: 0
2004-2014: 2

In 2004, the state enacted Alaska General Statute §09.65.292, which explicitly allows parental waivers of negligence.[84]

ARIZONA:

1988-2014: 0

We found no case law directly on point. Article 18, section 5 of the Arizona Constitution provides that assumption of risk is always a jury question, even if it is express contractual assumption of risk.[85] This does not affect the substantive enforceability of a youth sports release, although it appears to eliminate using such a release at summary judgment.

ARKANSAS:

1988-2014: -1

In the 1987 case *Williams v. United States*, the Eastern District of Arkansas considered a claim for personal injury suffered by a 16-year-old boy at an Air Force base swimming pool.[86] The court held that a release form signed by the parent did not relieve the government of liability because it was "against the sound public policy of Arkansas."[87]

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[84] ALASKA STAT. §09.65.292 (2004).

[85] ARIZ. CONST., Art. 18 §5 (providing "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.").

[86] Williams v. United States, 660 F.Supp. 699, 700 (E.D. Ark. 1987).

[87] *Id.* at 703.

CALIFORNIA:

1988-1989: 0
1990-2014: 2

California clarified its law in 1990 with *Hohe v. San Diego Unified School District*, in which an intermediate appellate court enforced a release signed by a student's parent in favor of a public school.[88] As noted in the main text, *Hohe* is a leading opinion supporting the enforceability of youth sports releases.

COLORADO:

1988-2002: 0
2002: -2
2002-2014: 2

In 1997, the Tenth Circuit enforced a release favoiring a commercial entity in *Brooks v. Timberline Tours, Inc*.[89] However, the opinion was not sufficient to merit a 1 because it did not directly opine on the question of releases signed by parents on behalf of minors and was issued by a federal, not state, court. In 2002, the Colorado Supreme Court refused to enforce a release favoring a commercial entity on public policy grounds.[90] The court cited *Scott v. Pacific West Mountain Resort*, where the Washington Supreme Court held that parents lack the ability to waive their children's rights preinjury.[91] We therefore interpreted *Cooper* as moving Colorado to -2. However, this condition lasted one year. In 2003, the state enacted C.R.S. §13-22-107 which permits parental waivers.[92] This changed the state's coding to 2.

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[88] Hohe v. San Diego Unified Sch. Dist., 224 Cal. App. 3d 1559, 1568 (1990). *See also* Platzer v. Mammoth Mountain Ski Area, 104 Cal. App. 4th 1253, 1255 (2002) (enforcing release in favor of commercial ski operator).

[89] Brooks v. Timberline Tours, Inc., 127 F.3d 1273, 1276 (10th Cir. 1997).

[90] Cooper v. The Aspen Skiing Co., 48 P.3d 1229 (Colo. 2002).

[91] Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 11 (Wash. 1992) ("to the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable").

[92] .COLO. REV. STAT. §13-22-107(3) ("A parent of a child may, on behalf of the child, release or waive the child's prospective claim for

CONNECTICUT:

1988-2002: -2
2002-2004: 0
2005-2014: -2

In 1958, the Connecticut Superior Court refused to enforce a release in favor of the Boy Scouts of America in *Fedor v. Mauwehu Council, Boy Scouts of America.*[93] We used this opinion to assign a -2 as of 1988. In 2002, the unpublished opinion in *Fischer v. Rivest* enforced a release in favor of USA Hockey, the Connecticut Hockey Conference, and the City of Norwich.[94] This case was followed by *Saccente v. Laflamme,* another unpublished opinion in which the Superior Court enforced a release.[95] Because *Fischer* was an unpublished opinion, we interpreted it as creating doubt about the state of the law, not an authoritative holding in favor of enforcement. We therefore assigned a 0. This uncertainty continued through 2004, when two other unpublished opinions from the Superior Court refused to enforce releases.[96] Then, in 2005, in *Hanks v. Powder Ridge Restaurant Corp*., the Connecticut Supreme Court rejected all exculpatory agreements as violating public policy.[97] This resulted in a coding of -2.

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negligence."). *See also* .COLO. REV. STAT. §13-22-107(1)(a)(VI) ("It is the intent of the general assembly to encourage the affordability and availability of youth activities in this state by permitting a parent of a child to release a prospective negligence claim of the child against certain persons and entities involved in providing the opportunity to participate in the activities.").

[93] Fedor v. Mauwehu Council, Boy Scouts of Am., Inc.,143 A.2d 466 (Conn. Super. Ct. 1958).

[94] *Id.* at 1. Fischer v. Rivest, 33 Conn. L. Rptr. 119, 2002 WL 31126288, at *15 (Aug. 15, 2002).

[95] Saccente v. Laflamme, No. CV0100756730, 2003 WL 21716586 (Conn. Super. Ct. July 11, 2003).

[96] Ehrenrich v. Mohawk Mountain Ski Area, No. CV030090988S, 2004 WL 3090681 (Conn. Super. Ct. Jan. 30, 2004); Laliberte v. White Water Mountain Resorts, No. X07CV030083300S, 2004 WL 1965868 (Conn. Super. Ct. Aug. 2, 2004).

[97] Hankes v. Powder Ridge Restaurant Corp., 885 A.2d 734, 741 (Conn. 2005).

DELAWARE:

1988-2014: 0

We found no law on point.

DISTRICT OF COLUMBIA:

1988-2014: 0

We found no law on point.

FLORIDA:

1988-1997: 0
1998-2003: 1
2004-2007: 2
2008-2014: 1

Florida courts do not clearly answer whether they would enforce exculpatory agreements signed by parents in favor of high schools. In the 1998 case *Lantz v. Iron Horse Saloon, Inc*., the Florida District Court of Appeal enforced a release in favor of a commercial entity without considering whether a guardian had authority to execute it.[98] Although this decision is logically consistent with enforcing such releases in favor of high schools, we assigned a 1 because consideration of the precise issue was too thin to provide adequate guidance.

In the 2004 case *Gonzalez v. City of Coral Gables*,[99] the Florida District Court of Appeal enforced a release in favor of a city after school program.[100] In so ruling, it distinguished the city's situation from commercial activities that could insure against loss. This implied that Florida law would no longer enforce releases favoring commercial entities, but would do so for releases favoring nonprofit or governmental entities.[101] Because *Gonzalez* provided a more specific analysis of the precise issue being analyzed, we assigned a code of 2 beginning in 2004.

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[98] Lantz v. Iron Horse Saloon, Inc. 717 So.2d 590, 590-92, (Fla. Dist. Ct. App. 1998)

[99] 871 So.2d 1067 (FL 3d DCA 2004).

[100] Gonzalez v. City of Coral Gables, 871 So.2d 1067, 1067—68 (Fla. Dist. Ct. App. 2004).

[101] *Id*.

Finally, in the 2008 case *Kirton v. Fields*, the Florida Supreme Court refused to enforce a parentally-signed release in favor of a commercial entity.[102] However, the court explicitly left open what it would decide in a noncommercial activity case, even if the overall language of the opinion casts doubt on the enforceability of youth sports releases generally.[103] We therefore interpreted *Kirton* as leaving the *Gonzalez* result intact, but in some doubt, and coded Florida as a 1.[104]

GEORGIA:

1988-2014: 0

No law is directly on point.

HAWAII:

1988-2014: 0

We found no law on point. Hawaii Statutes §663-1.54 permits waivers, but is limited to releases involving "any person who owns or operates a *business* providing recreation activities to the public."[105] Thus, the statute does not affect releases favoring high schools. Additional complications concerning this statute are discussed in the Article's main text.[106]

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[102] Kirton v. Fields, 997 So.2d 349, 350 (Fla. 2008).

[103] *Id.* at 350.

[104] We note, in 2010, Florida amended FLA STAT. §744.301(3) to read, "[N]atural guardians are authorized, on behalf of any of their minor children, to waive and release, in advance, any claim or cause of action against a commercial activity provide . . . from an inherent risk in the activity." FLA STAT. §744.301(3) (2020). This statute partially overrules *Kirton*, but it applies only to commercial activities, leaving open the question of how releases favoring government and nonprofit entities would be treated. Furthermore, because the statute permits releases only for risks "inherent" in an activity, it is unclear how the statute affects releases involving risks inherent in an activity but exacerbated by a sports provider's negligence.

[105] HAW. REV. STAT. § 663-1.54 (2020).

[106] *See supra* notes 53-55 and accompanying text.

IDAHO:

1988-2014: 0

We found no law on point.

ILLINOIS:

1988-2003: 0
2004-2014: -2

In 1994, the Appellate Court of Illinois, Second District decided *Meyer v. Naperville Manner Inc.*[107] The case involved a minor injured in a horseback riding accident.[108] The court held that parents lack the authority to release a child's cause of action before injury.[109] This changed the coding of Illinois from 0 to -2.

INDIANA:

1988-2005: 0
2006-2011: 1
2012-2014: 2

In the 2006 case of *Stowers v. Clinton Cent. School Corp*., the Indiana Court of Appeals appeared to consider releases signed by parents enforceable.[110] In *Stowers,* the plaintiffs were parents suing for the wrongful death of their son, who collapsed during a high school football practice.[111] A jury found for the defendants.[112] On appeal, the plaintiffs argued the trial court erred by admitting a release form signed by the plaintiff's mother. The release acknowledged the risks of playing football and held the defendants harmless of responsibility for injury.[113] The plaintiffs further argued that the trial court erred by failing to instruct the jury that the release in question did not absolve the defendants of responsibility for negligence because the release had no language

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[107] Meyer v. Naperville Manner, Inc., 634 N.E.2d 411 (Ill. App. Ct. 1994).

[108] *Id.*

[109] *Id.* at 414—15.

[110] *Id.* at 749. Stowers v. Clinton Cent. School Corp., 855 N.E.2d 739, 749 (Ind. Ct. App. 2006).

[111] *Id.* at 743—44.

[112] *Id.* at 745.

[113] *Id.* at 748.

specifically referring to negligence. [114] The court ruled the trial court was in error. In so ruling, the court stated that Indiana public policy does not disfavor exculpatory agreements. However, because the release signed by the mother did not refer to negligence, it did not affect the case at hand.[115] The court reversed and remanded for a new trial.[116]

We interpreted *Stowers* as an ambiguous signal in favor of enforcing releases that merited a coding of 1. The court behaved as if a properly drafted release would be enforceable, but the release's validity was not the issue litigated. The question was whether the release was admissible, and if so, in what form. This prevented us from concluding that *Stowers* established the enforceability of youth sports releases.

A clearer signal arrived in 2012. In *Wabash County Young Men's Christian Ass'n, Inc. v. Thompson*, the minor plaintiff was injured during a softball game while sliding into second base.[117] In response, the defendant moved for summary judgment, arguing that a release signed by the plaintiff's mother released the defendant from liability. The release in question applied to "injury or medical expenses incurred while participating in practice or playing in a game," and did not specifically refer to the defendant's potential negligence.[118] The Indiana Court of Appeals concluded that the release form was valid.[119] Although the release did not mention the defendant's possible negligence, the court found that the release still affected risks "inherent in the nature of the activity," even if the defendant's negligence exacerbated those risks.[120] Thus, the release applied to the plaintiff's claim because the risk of being injured while sliding into second base is part of softball.[121] We interpreted this as a sufficiently clear signal that youth sports releases are enforceable and changed the code to 2.

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[114] *Id.* at 749—50.

[115] *Id.* at 749.

[116] *Id.* at 749—50. The court also affirmed other rulings by the trial court not relevant to the enforceability of youth sports releases.

[117] Wabash Cty. Young Men's Ass'n. Inc. v. Thompson, 975 N.E.2d 362, 363 (Ind. Ct. App. 2012).

[118] *Id.* at 364.

[119] *Id.* at 366.

[120] *Id.* at 366—67.

[121] *Id.* at 367.

IOWA:

1988-2009: 0
2010-2014: -2

In 2010, the Iowa Supreme Court held in *Galloway v. State* that "preinjury releases executed by parents purporting to waive the personal injury claims of their minor children violate public policy and are therefore unenforceable."[122] This changed Iowa from 0 to -2.

KANSAS:

1988-2014: 0

We found no law on point.

KENTUCKY:

1988-2014: 0

We found no law on point.

LOUISIANA:

1988-2014: -2

In 1985, Louisiana passed Civil Code Article 2004, which provides, "Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party. Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party." Therefore, Louisiana was coded as a -2 for the entire study.[123]

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[122] Galloway v. State, 790 N.W.2d 252, 259 (Iowa 2010).

[123] *See* Ramirez v. Fair Grounds Corp., 575 So.2d 811 (La. 1991) (interpreting Article 2004 as invalidating preinjury waivers generally).

MAINE:

1988-2014: -2

In *Doyle v. Bowdoin College*, the court mentioned in a footnote that a parent cannot release a child's cause for action.[124] *Rice v. American Skiing Co.* confirmed this understanding of Maine law in 2000.[125] Therefore, Maine is coded as a -2 for the entire duration of the study.

MARYLAND:

1988-2012: 0
2013-2014: 2

In 2013*, BJ's Wholesale Club, Inc. v. Rosen* dealt with the enforceability of an exculpatory clause executed by a child's parent for the purpose of getting the child access to a play structure at a BJ's Wholesale Club.[126] The Maryland Court of Appeals held that the release was enforceable and rejected any distinction between for-profit and nonprofit entities.[127] Therefore, Maryland is coded as a 2. starting in 2013.

MASSACHUSETTS:

1988-2001: 0
2002-2014: 2

In the 2002 case *Sharon v. City of Newton*, a student was injured during cheerleading practice, and the student's parent had signed a waiver releasing liability on the student's behalf.[128] The Massachusetts Supreme Judicial Court enforced the release,

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[124] Doyle v Bowdoin College, Me., 403 A.2d 1206, 1208 (Me. 1979).

[125] *See* Rice v. American Skiing Co., No. Civ.A.CV-99-06, 2000 WL 33677027, at 4* (Me. Super. Ct. May 8, 2000).

[126] BJ's Wholesale Club, Inc. v. Rosen, 80 A.3d 345, 346 (Md. 2013).

[127] *Id.* at 359 ("The distinction between commercial and noncommercial entities, however, is without support in our jurisprudence; we have upheld the legitimacy of exculpatory agreements in commercial settings against adults and the policy arguments upon which we have validated or invalidated exculpatory clauses know no such distinction.").

[128] Sharon v. City of Newton, 769 N.E.2d 738, 741 (Mass. 2002).

writing, "To hold that releases of the type in question here are unenforceable would expose public schools, who offer many of the extracurricular sports opportunities available to children, to financial costs and risks that will inevitably lead to the reduction of those programs."[129] Therefore, Massachusetts is coded as a 2 from 2002 going forward.

MICHIGAN:

1988-2009: 0
2010-2014: -2

In 2010, *Woodman ex rel. Woodman v. Kera LLC* held that a liability waiver signed by a father on his child's behalf is unenforceable.[130] This changed Michigan's coding to -2 beginning with 2010.

MINNESOTA:

1988-2008: 0
2009-2014: 1

In *Moore v. Minnesota Baseball Instructional School,* the Minnesota Court of Appeals enforced a youth sports release.[131] The opinion was unpublished so its weight is questionable. Therefore, Minnesota is coded as a 1, starting in 2009.

MISSISSIPPI:

1988-2014: 0

We did not find law directly on point. However, in *Quinn v. Mississippi State University*,[132] the Mississippi Supreme Court encountered a release signed by a parent but did not directly rule on the issue. Instead, the court held that the plaintiff's tort claim was barred by both sovereign and qualified immunity.[133] The

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[129] *Id.* at 109—10.

[130] Woodman ex rel. Woodman v. Kera LLC, 785 N.W.2d 1, 5 (Mich. 2010) ("[T]he Michigan common law rule is clear: a guardian, including a parent, cannot contractually bind his minor ward.").

[131] Moore v. Minn. Baseball Instructional Sch., No. A08–0845, 2009 WL 818738, at *6 (Minn. Ct. App. Mar. 31, 2009).

[132] Quinn v. Miss. State Univ., 720 So.2d 843 (Miss. 1998).

[133] *Id.* at 852.

court held that the release was relevant only to the plaintiff's breach of implied contract action.[134] We did not interpret this case as making a sufficiently clear statement about enforceability of releases to change the coding from 0.

MISSOURI:

1988-2014: 0

We found no law on point.

MONTANA:

1988-2008: -2
2009-2014: 0

Montana's operative law was largely statutory. In 1895, the state enacted MT Statutes § 28-2-702, providing that contracts exempting a person from responsibility for "fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law."[135] This language suggests that youth sports releases are unenforceable. Indeed, in 1986, the Montana Supreme Court interpreted §28-2-702 to apply only to: "(1) fraud; (2) willful injury to the property or person of another; (3) negligent or willful violation of law."[136] The term "violation of law" included breaches of statutes, constitutions, case law, and common law, making the statute apply to releases of common law negligence.[137] Thus, Montana was coded as -2 at the start of the study period.

In 2009, Montana enacted MT ST 27-1-753. This statute allowed "a written waiver or release entered into prior to engaging in a sport or recreational opportunity for damages or injuries resulting from conduct that constitutes ordinary negligence or for risks that are inherent in the sport or recreational opportunity." However, these waivers could still be challenged "on any legal grounds."[138] This language apparently supersedes §28-2-702's blanket prohibition against sports releases. However, no case has used this provision to enforce a release. Furthermore, we did not know whether the Montana Supreme Court would find youth

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[134] *Id.*
[135] MONT. CODE ANN. § 28-2-702 (West 2020) (enacted 1895).
[136] Miller v. Fallon Cnty, 721 P.2d 342, 346 (Mont. 1986).
[137] *Id.*
[138] MONT. CODE ANN. § 27-1-753(3)(d) (West 2020).

sports releases signed by parents problematic. Accordingly, we coded Montana as a 0 starting in 2009.

NEBRASKA:

1988-2014: 0

We found no law directly on point.

NEVADA:

1988-2014: 0

We found no law directly on point.

NEW HAMPSHIRE:

1988-2013: 0
2014: -1

We found no law directly on point from 1988 through 2013. In 2014, a Massachusetts federal district court interpreted New Hampshire law as not enforcing youth sports releases.[139] We therefore changed the New Hampshire coding to -1 in 2014.[140]

NEW JERSEY:

1988-2006: -2
2007-2014: -1

In *Fitzgerald v. Newark Morning Ledger Co.*,[141] a New Jersey Superior Court held that a parent cannot waive a child's tort claim in advance.[142] Here, the father signed a release as a condition to allow his infant son to go on a trip sponsored by the

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[139] Harrigan v. New England Dragway, Inc., No. CV 13-10132-JCB, 2014 WL 12589625, at *6 (W.D. MA Jan. 2, 2014) (stating no controlling authority exists on the whether a parent can bind a child to an exculpatory agreement).

[140] In 2017, after the study period, a New Hampshire Superior Court opinion found youth sports releases unenforceable. *See* Perry v. SNH Dev., No. 2015-CV-00678, 2017 N.H. Super. LEXIS 32, at *16 (Sept. 13, 2017).

[141] Fitzgerald v. Newark Morning Ledger Co., 267 A.2d 557 (N.J. Super. Ct. Law Div.1970).

[142] *Id.* at 108.

defendant.[143] The court found this agreement void against public policy.[144] New Jersey was therefore coded as -2 at the beginning of the study.

In the 2006 case of *Hojnowski v. Vans Skate Park*,[145] the New Jersey Supreme Court held that a parent cannot bind a minor child to a preinjury waiver of liability.[146] The court framed the issue somewhat narrowly, especially given *Fitzgerald,* as "whether New Jersey's public policy permits a parent to release a minor child's potential tort claims arising out of the minor's use of a commercial recreational facility."[147] This left open what the court might have decided if the defendant had been a non-profit or government entity. Granted, the language and rationale of the opinion suggest that the non-profit situation would be handled the same way. But to be conservative, we coded New Jersey as -1 starting in 2006.

NEW MEXICO:

1988-2014: 0

We found no law directly on point.

NEW YORK:

1988-2014: -2

In the 1978 case of *Santangelo v. City of New York,*[148] the Supreme Court refused to bind a child to a release signed by the child's father in suit against the Greater New York City Ice Hockey League, Inc. This decision was reinforced in *Alexander v. Kendall Cent. School Dist.*, where the Supreme Court stated "a minor is not bound by a release executed by his parent."[149] We

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[143] *Id.* at 105—06.

[144] *Id.* at 107—08.

[145] Hojnowski v. Vans Skate Park, 901 A.2d 381 (N.J. 2006).

[146] *Id.* at 383 ("a parent may not bind a minor child to a pre-injury release of a minor's prospective tort claims resulting from the minor's use of a commercial recreational facility.").

[147] *Id.* at 386.

[148] Santangelo v. City of New York, 411 N.Y.S.2d 666 (App. Div. 2nd Dept. 1978).

[149] *Id.* at 897. Alexander v. Kendall Cent. Sch. Dist., 221 A.D.2d 898 (App. Div. 4th Dept. 1995).

therefore coded New York as -2 for the entire duration of the study.

NORTH CAROLINA:

1988-2010: 0
2011-2014: 1

In 2011, the Eastern District of North Carolina enforced a waiver in favor of a Navy Junior ROTC program.[150] The court identified no controlling precedent and stated that parents generally lacked the power to bind their children to exculpatory agreements.[151] However, the court considered school or community programs different and enforced the release.[152] We therefore changed North Carolina's coding to 1 in 2003.

NORTH DAKOTA:

1988-2002: 0
2003-2014: 2

In the 2003 case of *Kondrad v. Bismarck Park District*, the North Dakota Supreme Court enforced a release signed by a child's mother for an after-school care program operated by the Bismarck Park District.[153] We therefore coded North Dakota as 2 beginning in 2003.

OHIO:

1988-1997: 0
1998-2014: 2

In 1998, the leading case *Zivich v. Mentor Soccer Club* enforced a release signed by a mother in in favor of a nonprofit soccer club.[154] This resulted in our assigning a code of 2 beginning in 1998.

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[150] Kelly v. U.S., 809 F.Supp.2d 429 (E.D. N.C. 2011).

[151] *Id.* at 435—47 ("The parties agree that there is no controlling precedent.").

[152] *Id.*

[153] Kondrad *ex rel.* v. Bismarck Park District, 655 N.W.2d 411 (N.D. 2003).

[154] Zivich v. Mentor Soccer Club, Inc. 696 N.E.2d 201 (Ohio 1998).

OKLAHOMA:

1988-2014: 0

We found no law directly on point.[155]

OREGON:

1988-2014: 0

Oregon did not clarify its law concerning releases until the study period's end. In *Bagley v. Mt. Bachelor, Inc.,* the Oregon Supreme Court held an anticipatory release unenforceable as a violation of public policy and unconscionable.[156] This case was decided on December 18, 2014, a date so late that it could not have affected behavior during the study period. We therefore left Oregon coded as 0.

PENNSYLVANIA:

1988-1997: -1
1998-2014: -2

In the 1987 case *Simmons by Grenell v. Parkette Nat'l Gymnastic Training Center,* the Eastern District of Pennsylvania refused to enforce a release signed by a parent in favor of a gym.[157] This made Pennsylvania a -1 at the study period's beginning. In the 1998 case *Shaner v. State System of Higher Ed.*, the Court of Common Pleas adopted *Simmons*, stating "[u]nder Pennsylvania law, parents do not possess the authority to release the claims or potential claims of a minor child merely because of the parental relationship."[158] This changed the state to -2.

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[155] One year after the study, the Western District of Oklahoma predicted that Oklahoma courts would not enforce exculpatory agreements for children signed by parents. *See* Holly Wethington v. Swainson, 155 F.Supp.3d 1173 (W.D. Ok. 2015).

[156] Bagley v. Mt. Bachelor, Inc., 340 P.3d 27, 30 (Or. 2014).

[157] Simmons v. Parkette Nat'l Gymnastic Training Center, 670 F. Supp. 140 (E.D. Pa. 1987).

[158] Shaner v. State Sys. of Higher Educ., 40 Pa. D. & C.4th 308, 312—13 (Com. Pl. 1998), *aff'd*, 738 A.2d 535 (Pa. Commw. Ct. 1999).

RHODE ISLAND:

1988-2014: 0

Rhode Island law on youth sports releases is unclear. In the 1978 products liability case *Julian v. Zayre Corp.*, the Rhode Island Supreme Court cited to RI G.L. 1956 (1969 Reenactment) § 33-15-1(a), which provided releases by parents are valid if under $1,000.[159] This statute was amended in 1992 to apply to releases up to $10,000.[160] The statute's language is unclear because the dollar figure's existence implies that the claimant's injury already occurred and can be valued. If a court were to agree, the provision could not apply to youth sports releases executed before injury. We could not find case law clarifying this ambiguity or ruling on youth sports releases' enforceability. Therefore, Rhode Island is coded as a 0.

SOUTH CAROLINA:

1988-2014: 0

We found no law directly on point.

SOUTH DAKOTA:

1988-2014: 0

We found no law directly on point.

TENNESSEE:

1988: 0
1989-2014: -2

In the 1989 case *Childress v. Madison County*, the Tennessee Court of Appeals refused to enforce a release signed by the plaintiff's mother.[161] The plaintiff was twenty-years-old and

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[159] Julian v. Zayre Corp., 388 A.2d 813 (R.I. 1978).

[160] R.I. GEN. LAWS §33-15.1-1(b) ("A release given by both parents or by a parent or guardian who has the legal custody of a minor child or by a guardian or adult spouse of a minor spouse shall, where the amount of the release does not exceed ten thousand dollars ($10,000) in value, be valid and binding upon the minor.").

[161] *Id.* at 6-8. Childress v. Madison County, 777 S.W.2d 1, 708 (Tenn. Ct. App. 1989) ("The law is clear that a guardian cannot on behalf

suffered from a developmental disability.[162] The court considered him the equivalent of a child, writing, "The law is clear that a guardian cannot on behalf of an infant or incompetent, exculpate or indemnify against liability those organizations which sponsor activities for children and the mentally disabled."[163] Therefore, Tennessee is coded as a -2 beginning in 1989.[164]

TEXAS:

1988-1992: 0
1993-2014: -2

In the 1993 case *Munoz v. II Jaz, Inc*., the Texas Court of Appeals held parents do not have authority to waive their children's claims.[165] The plaintiff was a child injured at an amusement park after her older sister had signed a release.[166] The court resolved the case by deciding that, even if the older sister had the legal authority to sign on behalf of the parents, the parents lacked the authority to waive the child's claims.[167] We therefore changed Texas' coding to 2.

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of an infant or incompetent, exculpate or indemnify against liability those organizations which sponsor activities for children and the mentally disabled."). *See also* Rogers v. Donelson-Hermitage Chamber of Commerce, 807 S.W.2d 242, 245 (Tenn. Ct. App. 1990) (citing Childress with approval); Blackwell v. Sky High Sports Nashville Operations, LLC, 523 S.W.3d. 624, 632 (Tenn. Ct. App. 2017) (re-affirming Childress and noting difference between Tennessee law and California law).

[162] Childress, 777 S.W.2d at 2.

[163] *Id.* at 7—8.

[164] *See also* Rogers v. Donelson-Hermitage Chamber of Commerce, 807 S.W.2d 242, 245 (Tenn. Ct. App. 1990) (citing Childress with approval); Blackwell v. Sky High Sports Nashville Operations, LLC, 523 S.W.3d. 624, 632 (Tenn. C.t App. 2017) (reaffirming Childress and noting difference between Tennessee law and California law).

[165] Munoz v. II Jaz, Inc., 863 S.W.2d 207, 210 (Tex. App. 1993).

[166] *Id.* at 208.

[167] *Id.* at 209—10.

UTAH:

1988-2000: 0
2001-2014: -2

In the 2001 case *Hawkins ex rel. Hawkins v. Peart*, the Utah Supreme Court considered an eleven-year-old child's action for injuries suffered in a horseback riding accident.[168] The court ruled a waiver signed by the child's mother unenforceable, writing, "a parent has [no] authority to release a child's cause of action prior to an injury."[169] Therefore, we changed Utah's coding to -2 in 2001.

VERMONT:

1988-2014: 0

We found no law directly on point.

VIRGINIA:

1988-1991: 0
1992-2014: -2

Before 1992, Virginia law exhibited conflicts that prevented us from determining the law governing youth sports releases. In the 1890 case *Johnson's Adm'x v. Richmond and Danville R.R. Co.*, the Virginia Supreme Court refused to enforce an adult's apparent liability waiver in favor of a railroad company.[170] However, in the 1977 case *Barnes v. Crysal Plaza*, the Virginia Circuit Court enforced a release signed by an adult in favor of an amusement facility, while recognizing that exculpatory agreements involving "infants" might be treated differently.[171] Therefore, we coded Virginia as 0 to start.

In the 1992 case *Hiett v. Lake Barcroft Community Ass'n, Inc.*, the Virginia Supreme Court held an adult's preinjury release

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[168] *Id.* at 1063—64.

[169] *Id.* at 1066 (quoting Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 10—12 (Wash. 1992)).

[170] Johnson's Adm'x v. Richmond & D.R. Co., 11 S.E. 829 (Va. 1890).

[171] *Id.* Barnes v. Crysal Plaza, 11 Va. Cir. 442 (Va. Cir. Ct. 1977).

void because it was against public policy.[172] The court cited *Johnson's Adm'x* favorably and stated the law had not changed.[173] We therefore changed Virginia's coding to -2 in 1992.

Hiett is weakened somewhat in *Elswick v. Lonesome Pine International Raceway*, where the Virginia Circuit Court of Appeals enforced a release in the context of auto racing because auto racing is an inherently dangerous activity.[174] However, we did not think this was enough to change the effect of *Hiett* overall.

WASHINGTON:

1988-2014: -2

In the 1988 case *Wagenblast v. Odessa Sch. Dist.,* parents sued to invalidate waivers public school districts required them to sign for their children to play sports.[175] The Washington Supreme Court ruled the waivers unenforceable because they violated public policy.[176] Because *Wagenblast* applies directly to high schools, we coded Washington as -2 for the entire study period. In 1992, the Washington Supreme Court, sitting *en banc*, strengthened the *Wagenblast* result in the leading case *Scott v. Pacific West Mountain Resort*, which is described in this Article's main text.[177]

WEST VIRGINIA:

1988-2003: 0
2004-2014: -1

In the 2004 case *Johnson v. New River Scenic Whitewater Tours*, the Southern District of West Virginia considered a wrongful death action on behalf of 14-year-old girl.[178] The court

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[172] *Id.* Hiett v. Lake Barcroft Cmty. Ass'n, 418 S.E.2d 894, 896 (Va. 1992).

[173] *Id.*

[174] Elswick v. Lonesome Pine Int'l Raceway, Inc., No. L99-89, 2001 WL 1262224, at *2 (Va. Cir. Ct. Jan. 9, 2001).

[175] Wagenblast v. Odessa Sch. Dist., 758 P.2d 968, 969 (Wash. 1988).

[176] *Id.* at 975.

[177] *See supra* notes **Error! Bookmark not defined.**-21 and accompanying text.

[178] Johnson v. New River Scenic Whitewater Tours, 313 F.Supp.2d 621, 623-24 (S.D. W. Va. 2004).

held a release signed by chaperone on a rafting trip unenforceable under the provisions of a statute that applied specifically to rafting.[179] The court considered whether a parent could agree to indemnify a defendant for damages resulting from negligent injury to a child, concluding West Virginia courts would not enforce such agreements.[180] Although this case does not hold all youth sports releases unenforceable, we thought its language and tenor was enough to change West Virginia's coding to -1.

WISCONSIN:

1988-1995: 0
1996-2014: -1

Wisconsin was difficult to code. Before 1996, no case law about enforcing youth sports releases existed. In 1996, the Wisconsin Supreme Court decided *Yauger v. Skiing Enterprises, Inc*.[181] *Yauger* involved awrongful death action brought by the parents of an eleven-year-old girl who died in a skiing accident.[182] In its defense, the defendant claimed that a release signed by the decedent's father barred any claim.[183] The trial court granted summary judgment for the defendant, and the plaintiffs appealed.[184] On appeal, the Wisconsin Supreme Court identified a single issue, public policy, and it refused to enforce the agreement because it did not sufficiently signal that the defendant waived negligence.[185] The court did not consider whether parents had the legal authority to waive tort claims on behalf of their children.

Yauger can be read to affect only the proper drafting of releases. This interpretation implies that the Wisconsin Supreme Court would have enforced the agreement in *Yauger* if the release had contained clearer language. However, prior case law about the enforceability of exculpatory agreements creates the impression that the Wisconsin Supreme Court is reluctant to enforce such

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[179] *Id.* at 627—28.
[180] *Id.* at 631—33.
[181] Yauger v. Skiing Enter., Inc., 557 N.W.2d 60, 65 (Wis. 1996).
[182] *Id.* at 61.
[183] *Id.*
[184] *Id.*
[185] *Id.* at 63.

agreements, even when the agreements appear to waive negligence.[186]

Thus, we decided that *Yauger*, along with other Wisconsin case law, indicated a lean against enforcing exculpatory agreements, including youth sports releases. We therefore changed Wisconsin to a -1 starting with 1996. And indeed, in the 2005 case *Atkins v. Swimwest Family Fitness Center*, the Wisconsin Supreme Court again refused to enforce a release even though it stated that the decedent agreed "to assume all liability for myself without regard to fault."[187]

WYOMING:

1988-2014: 0

We found no law directly on point.

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[186] *See* Arnold v. Shawano Cnty. Agr. Soc., 330 N.W.2d 773, 779 (Wis. 1983) (showing where an exculpatory agreement might be unenforceable even though it specifically waived negligence), *overruled on other grounds by* Green Springs Farms v. Kerston, 401 N.W.2d 816, 821 (Wis. 1987); Richards v. Richards, 513 N.W.2d 118, 123 (Wis. 1994) (showing an exculpatory agreement unenforceable for reasons of public policy even though court believed the contract waived negligence).

[187] Atkins v, Swimwest Family Fitness, 691 N.W.2d 334, 340 (Wis. 2005). There is one Court of Appeals decision refusing to enforce a youth sports release, but it is unpublished. *See* Osborn v. Cascade Mountain, Inc., 259 Wis.2d 481 (App. Ct. Wis. 2002) (exculpatory agreement signed by parent enforceable). Given the contrary leanings of the Wisconsin Supreme Court and the unpublished status of this opinion, we chose not to give it weight in our analysis of state law.

Arizona State Sports & Entertainment Law Journal
Disclaimer:

The following article contains racist language used during congressional hearings for the Ku Klux Klan Act of 1871, and more recently by coaches in NCAA athletics. Some readers will find this language offensive. The author believes, however, that quoting such language within these historical and current contexts conveys the injurious effects these slurs and epithets have had on some NCAA athletes. Therefore, the Editors of this Journal have acceded to the author's wishes to convey the authenticity of these injurious verbal experiences.

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WHITEWASHING COACHING RACISM IN NCAA SPORTS: ENFORCING CIVIL RIGHTS THROUGH THE KU KLUX KLAN ACT

MICHAEL H. LEROY[∞]

ABSTRACT

Coaching racism in college sports may be facilitated by NCAA transfer waivers silencing players who complain about racial harassment. Athletic directors and other school officials may have conspired with the NCAA to resolve racism complaints by using nondisclosure agreements and liability releases while avoiding independent investigations and lawsuits. Public information shows an athletic director and the NCAA may have conspired to deter a complaining Black player from seeking legal redress by granting him a transfer waiver on the condition he remain silent while depriving his Black teammates, who transferred with no waiver, equal protection of the laws.

If these suppositions are correct, players could claim their civil rights were violated under the Ku Klux Klan Act of 1871, codified in 42 U.S.C. §1985. The player who received a waiver to play without sitting out a season could state a claim under Section 1985(2) (clause ii), which prohibits conspiracies defeating justice. In *Kush v. Rutledge*, the Supreme Court ruled a player stated such a claim when his abusive coach and athletic director conspired to intimidate witnesses in his lawsuit. In a second scenario, Section 1985(3) could apply to other players who transferred in the spring to escape racial harassment while their school delayed its investigation until the fall semester. Forced by a transfer restriction in the NCAA's Article 14.5.5.1 to sit out the following season, these players could state a claim as a "class of persons" who were denied equal protection.

[∞] Professor, School of Labor and Employment Relations, and College of Law, University of Illinois at Urbana-Champaign. The author thanks Zachary M. Johns, Samuel LeRoy, and Janet LeRoy for their counsel.

I rely on congressional accounts from 1871, showing the Ku Klux Klan's terror campaign extended to schools for Blacks. The law was passed to protect education for Blacks like it protected their suffrage and participation in court proceedings. This history applies to coaching racism. Lawmakers' school terror accounts included the Klan using racial epithets to show how verbal degradation enforced a racial caste. This history is relevant in gyms and locker rooms where college coaches use racial slurs.

My research offers a new blueprint for attorneys and courts in Section 1985(2)(ii) and 1985(3) lawsuits exposing conspiracies to silence Black players. These actions have potential to hold athletic directors, school officials, and NCAA administrators personally liable for damages from these civil rights violations. My research has implications for sexual assault cases in which college athletes were harmed because athletic directors and other school officials ignored their complaints and protected the perpetrators. If Section 1985 liability were personally imposed on athletic directors and other college officials, schools would aggressively extirpate coaching racism.

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"They are bitterly hostile to teachers because the illiterate freedmen look for instruction to the school house. Therefore, they warn away such citizens, and if the warning be disregarded they scourge or kill them."[1]

Rep. Job. Stevenson (R.-Ohio) (1871)

"There are honkies and white people, and there are niggers and black people. Dunigan is a good black kid. There's no nigger in him."[2]

Larry Cochell, Head Baseball Coach
University of Oklahoma (2005)

[1] CONG. GLOBE, 42d Cong., 1st Sess. 287 app. (1871).

[2] Larry Cochell, University of Oklahoma baseball coach, resigned after he used a racial slur to describe one of his African American players during off-camera interviews with ESPN. Eric Stephens, *Details of Cochell's Use of Racial Slur Disclosed*, L.A. TIMES (May 3, 2005), https://www.latimes.com/archives/la-xpm-2005-may-03-sp-cochell3-story.html.

INTRODUCTION

A. COACHING RACISM IN NCAA SPORTS

In support of the Ku Klux Klan Act of 1871 ("Act"), Representative Job Stevenson spoke about the Klan's terror tactics aimed at teachers, students, and schools for black people. In 2005, Larry Cochell, the University of Oklahoma baseball coach, repeated the racist slur the Klan used after the Civil War to terrorize black Americans to a reporter. I explore how universities and colleges (hereafter, schools) appear to collude with the NCAA to exploit a player transfer restriction in Article 14.5.5.1 after a player complains about racism.[3] My research offers a blueprint for attorneys and courts to use the Act to hold athletic directors and other university officials legally responsible for covering up racist treatment by coaches.

Schools often ignore coaching racism until it is publicly exposed. A women's basketball coach threatened her players "a loss would lead to nooses."[4] A men's basketball coach used "nigger" in a talk to his players.[5] A football coach sent a text message with a racial slur.[6] Many more examples have recently

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[3] NAT'L COLLEGIATE ATHLETIC ASS'N, 2020-21 NCAA DIVISION I MANUAL, art. 14.5.5 (2020). Four-Year College Transfers, at art. 14.5.5.1 General Rule, stating: "A transfer student from a four-year institution shall not be eligible for intercollegiate competition at a member institution until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full quarters) at the certifying institution." Residence Requirement Waivers, specifies reasons such as health, recruiting violations, a school's probationary status, and a school's postseason competition restrictions as grounds for waivers of the one-year in residence rule but does not mention relief from discriminatory treatment. *Id.* at 14.7.2 (a)—(d).

[4] Marc Tracy & Alan Blinder, *Sylvia Hatchell Is Out at U.N.C. After Inquiry Supports Team's Complaints*, N.Y. TIMES (April 19, 2019), https://www.nytimes.com/2019/04/19/sports/basketball/north-carolina-sylvia-hatchell.html (coach fired over racial insensitivity, including warning Black players that a loss would "lead to nooses").

[5] Dambrot v. Central Michigan University, 839 F. Supp. 477 (E.D. Mich. 1993) (coach was fired for using "nigger" in a talk he gave to the players and coaching staff).

[6] The Associated Press, *Clemson Assistant Pearman Apologizes for Using Racial Slur*, N.Y.TIMES (June 2, 2020) (Clemson assistant

surfaced.[7] Coaching racism in college sports can be facilitated by an NCAA transfer rule deployed to silence players who complain

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coach Danny Pearman said he made a "grave mistake" when he repeated a racial slur to ex-Tigers tight end D.J. Greenlee at practice three years ago).

[7] Dan Bernstein, *Oklahoma State Players Allege Racism from Coach Mike Gundy As They Rally Around Teammate*, SPORTING NEWS (June 16, 2020), https://www.sportingnews.com/us/ncaa-football/news/oklahoma-state-players-allege-racism-from-mike-gundy/b9vaqvqss2mj17do5jc66pzpz (Coach Mike Gundy accused of series of racist comments); Cindy Boren, *TCU Football Coach Apologizes for Using Racial Slur 'That Is, In Any Context, Unacceptable,'* WASH. POST (Aug. 4, 2020), https://www.washingtonpost.com/sports/2020/08/04/tcu-football-coach-apologizes-using-racial-slur-that-is-any-context-unacceptable/ (coach accused of using slur); Jeff Borzello & Myron Medcalf, *Texas State Coach Danny Kaspar Made Many Racist Remarks, Former Players Say*, ESPN (June 5, 2020), https://www.espn.com/mens-college-basketball/story/_/id/29269697/texas-state-coach-danny-kaspar-used-many-racist-remarks-former-players-say; Jane Coaston, *College Football Players are Taking a Stand Against Racism—and Taking a Big Risk*, VOX (June 17, 2020), https://www.vox.com/2020/6/17/21284501/college-football-race-iowa-george-floyd (Black players in the Iowa football program have reported racist bullying they received from coaching staff staff); Erin Jordan, *Leaked Report Shows Concerns About Racism in Hawkeye Football Were Known by Officials in 2019*, THE GAZETTE (July 30, 2020), https://www.thegazette.com/subject/sports/hawkeyes/iowa-football/leaked-report-diversity-racism-bullying-gary-barta-20200730 (Black players complained that they were repeatedly denigrated and belittled in racial terms by coaches); Myron Medcalf, *Erik Helland Resigns as Badgers Coach, Says He Used Racial Slur While Telling Story*, ESPN (Feb. 6, 2020), https://www.espn.com/mens-college-basketball/story/_/id/28649010/erik-helland-resigns-badgers-coach-says-used-racial-slur-telling-story (racial epithet was used in the presence of several Wisconsin men's basketball players); Mark Schlabach, *Utah Suspends DC Morgan Scalley for Texting Racial Slur in 2013*, ESPN (June 5, 2020), https://www.espn.com/college-football/story/_/id/29272833/utah-suspends-dc-morgan-scalley-texting-racial-slur-2013 (investigation launched into a 2013 text message in which the coach used a racial slur); Audra Streetman, *CSU Pauses Football Activities Amid Allegations Of Racism & Verbal Abuse*, CBSDENVER (Aug. 7, 2020), https://denver.cbslocal.com/2020/08/07/fort-collins-csu-football-investigation-racism-verbal-abuse/ (Colorado State president called for investigation into allegations of racism and verbal abuse in football program).

about racial harassment. Athletic directors and school officials may conspire with the NCAA to use nondisclosure agreements and liability releases to resolve these complaints while avoiding lawsuits and independent investigations.

Using public information,[8] I hypothesize a Big Ten school's athletic director and the NCAA may have conspired to deter a complaining Black player from seeking legal redress by granting him a transfer waiver, provided he remain silent and sign a liability release. This agreement could deprive Black teammates, who transferred without waiving Article 14.5.5.1, equal protection of the laws. If these suppositions are correct, players could claim their civil rights were violated under the Act, codified in 42 U.S.C. §1985.[9] The player who was granted a waiver to play immediately could have a possible claim under Section 1985(2)(ii), which prohibits conspiracies defeating the "due course of justice in any State."[10] In *Kush v. Rutledge*,[11] the Supreme Court ruled a player stated such a claim when he alleged an abusive college football coach and athletic director conspired to intimidate witnesses in his lawsuit.[12] Section 1985(3) could also possibly apply to teammates who transferred between March and June[13] to escape racial harassment while their school delayed[14] investigating racial harassment until the fall semester.[15] Forced by the NCAA's Article 14.5.5.1 to sit the next year,[16] they could state a claim as a "class of persons."[17]

My thesis draws from congressional accounts in 1871 showing the Klan's terror campaign extended to schools for Black students.[18] The law was passed to protect education for Black

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[8] *See*, *e.g.*, Univ. of Ill. Div. of Intercollegiate Athletics, *Executive Summary of Events Involving Illinois Men's Basketball Program*, archived at The-Mark-Smith-Report, http://illinireport.info/wp-content/uploads/2019/04/The-Mark-Smith-Report.pdf.

[9] 42 U.S.C. § 1985(3) (1871) (known as the Enforcement Act of 1871, Civil Rights Act of 1871, or the Ku Klux Klan Act of 1871).

[10] 42 U.S.C. § 1985(2).

[11] 460 U.S. 719 (1983).

[12] *Id.*

[13] *Infra* Table 2 (Timeline of Investigation of Illinois Men's Basketball Coach).

[14] *Infra* Table 2.

[15] *Infra* note 164.

[16] *Supra* note 7.

[17] *Supra* note 9.

[18] *Infra* notes 92—107.

people in the same way it more directly aimed to protect Black suffrage[19] and participation in legal proceedings.[20] This history applies to NCAA coaching racism. Klan attacks on teachers and schools were part of a larger pattern to disperse rising Blacks to preserve white superiority.[21] Lawmakers' school terror accounts included the Klan using "nigger"[22] to show how it enforced a racial caste. This history is relevant for players whose coaches use racial slurs.

My research offers a new blueprint for attorneys and courts for Sections 1985(2)(ii) and 1985(3) lawsuits aiming to expose conspiracies to silence Black players. These actions have potential to hold athletic directors, other school officials, and the NCAA liable for damages from these civil rights violations. My research also has implications for sexual assault cases where coaches, athletic directors, and other school officials conspired to

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[19] *See* Brian J. Gaj, *Section 1985(2) Clause One and Its Scope*, 70 CORNELL. L. REV. 756, 758 (1985) ("Klan controlled elections by murdering leading Republicans and by intimidating Republican supporters").

[20] *See* Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light in State Action and the Fourteenth Amendment*, 11 ST. LOUIS U. L.J. 331, 335 (1967), quoting Rep. George Hoar, CONG. GLOBE, 42d Cong., 1st Sess. 334 app. (1871), stating:

If the jurors of South Carolina constantly and as a rule refuse to do justice between man and man where the rights of a particular class of its citizens are concerned, and that State affords by its legislation no remedy, that is as much a denial to that class of citizens of the equal protection of the laws as if the State itself put on its statute-book a statute enacting that no verdict should be rendered in the courts of that State in favor of this class of citizens.

[21] *See* Rep. Luke Poland, stating:

A large number of men had lived in idleness, and the fruits of idleness had ripened. The country was full of dissipated horse-racing, cock-fighting, roystering fellows, many of whom by the war had become desperate and dangerous men. The liberation of the slaves had deprived them of their means of living, and they were reduced to the desperate and disagreeable duty of earning it for themselves. That this class, under the circumstances, could tolerate equal rights, civil and political, in a negro could hardly be expected.

Cong. Globe, 42nd Cong., 2d. Sess. 493 app. (1871).

[22] *Infra* notes 98—99, 106-107, 109.

ignore complaints and protected perpetrators.[23] If Section 1985 liability were personally imputed to athletic directors and other collegiate sports officials,[24] they would aggressively curb coaching racism.

B. ARTICLE OVERVIEW

Part I frames the theoretical perspectives for my study.[25] Conspiratorially silencing players draws from research relating to nondisclosure agreements and liability releases (Part I.A),[26] the NCAA as a racially exploitative institution (Part I.B),[27] and institutional racism as a more generalized phenomenon (Part I.C).[28]

Part II delves into congressional reports in 1871 of racially motivated attacks on Black schools and their teachers and students.[29] Part II.A explores testimony from hearings on the Ku Klux Klan Act of 1871.[30] In Part II.B, I explain how courts allowed this law to lay dormant for nearly a century but applied it more recently to conspiracies directed at racial and class groups.[31]

Part III applies the Act to conspiracies to silence players' coaching racism complaints.[32] Part III.A presents a conspiracy model between NCAA officials and a school aiming to silence a

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[23] Dan Barry et al., *As F.B.I. Took a Year to Pursue the Nassar Case, Dozens Say They Were Molested*, N.Y. TIMES (Feb. 4, 2018), at A1 (Larry Nassar, former U.S. Gymnastics national team doctor and Michigan State University employee sentenced for sexually abusing female athletes); Joe Drape, *Sandusky Guilty of Sexual Abuse of 10 Young Boys*, N.Y. TIMES (June 22, 2012) (Penn State football coach convicted of sexually assaulting minors); Mike Householder (AP), U. of Michigan Reaching Out to Ex-Athletes about Late Doctor, WASH. POST (April 7, 2020) (university contacted 6,800 former male student-athletes to investigate complaints of sex abuse committed by a university physician).

[24] Under Section 1985, a private conspirator can be liable in compensatory and punitive damages. *See* Griffin, *infra* note 127.

[25] *Infra* notes 47—82.

[26] *Infra* notes 47—54.

[27] *Infra* notes 55—60.

[28] *Infra* notes 61—82.

[29] *Infra* notes 83—143.

[30] *Infra* notes 86—116.

[31] *Infra* notes 117—143.

[32] *Infra* notes 144—173.

player complaining about his coach's alleged racial harassment.[33] Part III.B specifies how the model could work in a conspiracy aimed to defeat a player's attempt to seek redress under Section 1985(2) (clause ii).[34]

In Part IV, I apply this model to a possible conspiracy between a Big Ten school and the NCAA.[35] Part IV.A hypothesizes an approach for a player to assert a plausible claim under Section 1985(2)(ii), assuming his waiver to play at a rival school the next season without losing eligibility resulted from confidentiality and liability release agreements.[36] Part IV.B hypothesizes an approach for a Section 1985(3) claim for other players who may have unresolved complaints about coaching racism but were not included in the school's investigation into racial harassment, which was delayed until they left the campus.[37]

My study concludes by relating theoretical perspectives to these hypothetical case analyses.[38] This section relates how theories about confidentiality and liability release agreements, NCAA exploiting players, and institutional racism apply to NCAA coaching racism.[39] Further, it connects the Ku Klux Act of 1871's legislative history to current examples.[40] My study concludes this civil rights law offers redress to players by holding athletic directors, other schools, and NCAA officials liable for covering-up this serious problem.

C. CAVEATS

My analysis draws from published reports of player complaints, university responses and actions, and the NCAA administering its transfer restriction. Nonetheless, I do not have definitive evidence that the University of Illinois at Urbana-Champaign, its coaches and its officers, the NCAA and its officers, and the University of Missouri and its coaches and officers engaged in wrongdoing. My analysis attempts to connect

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[33] *Infra* notes 144—145.
[34] *Infra* notes 146—173.
[35] *Infra* notes 174—220.
[36] *Infra* notes 174—190.
[37] *Infra* notes 191—220.
[38] *Infra* notes 221—231.
[39] *Infra* notes 221—231.
[40] *Infra* notes 232—236.

publicly sourced information that suggests, without proving, the existence of a conspiracy to deprive players of their civil rights.

I have weighed these informational shortcomings against evidence of odd and suspicious actions. This evidence implies a coordinated plan to cover up complaints about a coach who racially harassed his players. I also weighed the shortcomings of my knowledge against the potential significance of my research question. In addition to cover-ups of coaching racism,[41] NCAA schools have covered-up sexual assaults committed under the supervision of their athletic departments.[42] Athletic directors and senior university officials have perpetrated these cover-ups.[43] As a result, athletes have been traumatized.[44] Recently, Black athletes

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[41] *Infra* notes 223—225, 227—228.

[42] Mark Johnson & Megan Banta, *MSU Finds 8 People Who Failed to Report Larry Nassar or Former Dean William Strampel*, LANSING STATE J. (Sept. 1, 2020), https://www.lansingstatejournal.com/story/news/2020/09/01/msu-larry-nassar-william-strampel-university-advisory-council-sexual-misconduct/5678418002/ (discovering that 1, 2020) (an MSU coach knew as early as 1997 of possible sex abuse after having conversations with two gymnasts); Jennifer Smola, *Ohio State Trustees Move Toward Settling Strauss Lawsuits*, COLUMBUS POST-DISPATCH (Feb. 27, 2020), https://www.dispatch.com/news/20200227/ohio-state-trustees-move-toward-settling-strauss-lawsuits (finding that OSU's Dr. that OSU's Dr. Strauss sexually abused at least 177 students between 1979 and his retirement in 1998 and that university personnel repeatedly failed to act); Kim Kozlowski, *Former University of Michigan Team Doctor Investigated for Multiple Sex Abuse Complaints*, THE DETROIT NEWS (Feb. 19, 2020), https://www.detroitnews.com/story/news/local/michigan/2020/02/19/university-michigan-investigates-sex-complaints-against-former-football-doctor/4712724002/.

[43] Rick Maese, *Iconic Michigan Coach and Others Knew of Doctor's Abuse for Years, New Lawsuit claims*, WASH. POST (July 30, 2020), https://www.washingtonpost.com/sports/2020/07/30/iconic-michigan-coach-others-knew-doctors-abuse-years-new-lawsuit-claims/ (reporting that hundreds of Michigan students and athletes say a school doctor sexually abused them. A lawsuit against the school claims that school officials and coaches, including the athletic director, Don Canham and coach Bo Schembechler, failed to act on numerous complaints).

[44] *See*, *e.g.*, Corky Siemaszko, *University of Michigan Wrestler Says He Was Booted Off Team for Reporting Abusive Doctor*, NBC NEWS (Feb. 27, 2020), https://www.nbcnews.com/news/us-news/university-michigan-wrestler-says-he-was-booted-team-reporting-abusive-n114427627, 2020) (former wrestler said that he was

have become more vocal in describing coaching racism at their schools, and their complaints have indicated obstacles in making their voices heard.[45] This picture of futility is unfortunate insofar as federal civil rights law applies specifically to federally funded schools.[46] The underenforcement of race discrimination laws in NCAA athletics reflects a scarcity of legal theories for these amateur players' lawsuits. For example, employment laws prohibiting race discrimination do not apply because they are amateur athletes.[47] My research offers attorneys and courts a new legal blueprint to hold athletic directors, high-level university officials, and NCAA administrators responsible for violating players' civil rights.

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punished for reporting in a nine-page letter on Dr. Robert Anderson's abuse of him).

[45] Josh Newman, *Utes Football Players Join Pac-12 Boycott If Demands for Racial Justice, Pay and COVID-19 Safety are Not Met*, THE SALT LAKE TRIB. (Aug. 3, 2020), https://www.sltrib.com/sports/utah-utes/2020/08/02/pac-players-threaten/.3, 2020).

[46] Race discrimination against students in federal funded schools is prohibited. See Title VI of the 1964 Civil Rights Act, called "Nondiscrimination if Federally Assisted Programs," applies to all public schools, and other federally funded education programs and activities. Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 255 (codified as amended at Title VI, 42 U.S.C. § 2000d et seq.,) (2018) ("No person in the United States shall, on the ground of race . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); In an empirical study of NCAA player, only one case among sixty reported decisions filed a claim under Title VI for race discrimination. *See* Michael H. LeRoy, *Harassment, Abuse, and Mistreatment in College Sports: Protecting Players through Employment Laws*, 42 BERKELEY J. OF LAB. & EMP. LAW tbl. 1 (forthcoming, Fall 2020).

[47] *See*, *e.g.*, Shephard v. Loyola Marymount Univ., No. BC228705, 2001 WL 35914726 (Cal. Super. Ct. Feb. 23, 2001) (coach created racially discriminatory and hostile environment).

I. THEORY OF A CONSPIRACY BETWEEN UNIVERSITY OFFICIALS AND THE NCAA TO SILENCE COMPLAINTS OF COACHING RACISM

This Article explicates a theory of conspiracy involving school officials and the NCAA to use a transfer rule to silence players who experience racist coaching. In Part I.A, I develop a theory of conspiratorial silencing by drawing from three research streams: (a) confidential settlements, nondisclosure agreements, and liability waivers, (b) the NCAA as a racially exploitative institution embedded in schools, and (c) institutional racism.

A. SILENCING COMPLAINTS THROUGH CONFIDENTIALITY AND NONDISCLOSURE AGREEMENTS, AND LIABILITY RELEASES

Disputes are often resolved through coercive settlements.[48] The growing prevalence of nondisclosure agreements confirms this analysis.[49] There is a "vast ocean of imposed silence policed by the threat of judicially enforceable nondisclosure agreements (NDAs) that often include confidential arbitration clauses that effectively seal the silencing process from public view."[50] This is true in sports. Athletic teams often use

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[48] Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075, (1984), stating:

> Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the
> bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society
> and should be neither encouraged nor praised.

Id. at 1076.

[49] *Id.*

[50] Burt Neuborne, *Limiting the Right to Buy Silence: A Hearing-Centered Approach*, 90 U. COLO. L. REV. 411, 416 (2019); *see* generally Nicole Taylor, *Black Employees, Don't Sign Away Your Right to Speak Out*, N.Y. TIMES (June 23, 2020), https://www.nytimes.com/2020/06/23/opinion/nda-racism-separation-agreements.html ("[N]ot caving in to a 'hush your mouth' document makes it better for the next black person. You can leave the door cracked with a detailed note.").

NDAs.[51] In college and amateur sports, secret agreements have "come to light" in lawsuits.[52] In a recent case, the "NCAA argued that its bylaws require it to keep its investigations strictly confidential. NCAA investigators rely on confidential sources for a lot of information they gather, and promise confidentiality to witnesses to obtain needed facts." [53] Since the COVID-19 pandemic began, NCAA football programs have used controversial liability waivers.[54] Experts question whether these waivers are enforceable.[55] Players have no legal representation to advise them and NCAA schools use these waivers to deflect their legal responsibility for players' wellbeing.

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[51] Lara Grow & Nathaniel Grow, *Protecting Big Data in the Big Leagues*, 74 WASH. & LEE L. REV. 1567, 1604 tbl.1 (2017) (displaying empirical research of 19 teams in four major league sports (MLB, NFL, NHL, and NBA) had only 20% of teams without NDAs).

[52] David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 166 (2019) (discussing how McKayla Maroney, American gold-medal gymnast, settled her lawsuit against USA Gymnastics (USAG) for alleging that the sports federation enabled Dr. Larry Nassar to abuse her. Her settlement required that she refrain from further speech about her ordeal or pay a $125,000 liquidated damages fee, plus the costs and fees of enforcement).

[53] Joey Kaufman, *NCAA Says Schools Cannot Require COVID Liability Waivers*, THE COLUMBUS DISPATCH (Aug. 5, 2020), https://www.buckeyextra.com/sports/20200805/ncaa-says-schools-cannot-require-covid-liability-waiver (reporting football programs in June required players to sign COVID-liability waivers; however, in August the NCAA implemented a policy prohibiting these waivers).

[54] Tim Sullivan, *Attorneys: U of L's 'Binding' COVID-19 Liability Waivers for Athletes May Not Be Enforceable*, LOUISVILLE COURIER J. (Aug. 3, 2020), https://www.courier-journal.com/story/sports/college/louisville/2020/08/03/louisville-football-athletes-required-sign-covid-19-waivers/5570004002/.

[55] *Id*. (statement of attorney Steve Romines) ("Liability waivers are generally not worth much anyway. The lack of bargaining power on behalf of the athletes make them almost worthless in this situation in my opinion.").

B. THE NCAA AS A RACIALLY EXPLOITATIVE INSTITUTION

My second perspective draws from research criticizing the NCAA and schools for exploiting student athletes.[56] In Division I football and basketball, the NCAA's amateur athlete model is derided as outdated.[57] The NCAA profits from its market-fixing rules.[58] Critics advocate a pay-for-play model.[59] As the NCAA markets football and basketball like professional sports leagues, players have tried unsuccessfully to unionize.[60] Recently,

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[56] A pioneering article is Stephen Horn, *Intercollegiate Athletics: Waning Professionalism and Rising Professionalism*, 5 J. COLL. & U. L. 97, 98 (1977), noting:

> Too often the jockeying for power within the NCAA has reflected the economic positions between institutions rather than concerns about what should be the basic purpose of the organization: the protection of student-athletes from unscrupulous actions by those who would exploit them for their own purposes.

[57] Daniel Lazaroff, *The NCAA In Its Second Century: Defender of Amateurism or Antitrust Recidivist*, 86 OR. L. REV. 329, 330 (2007); *see* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 97-108 (2006).

[58] Jeffrey J.R. Sundram, Comment, *The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense,* 85 TUL. L. REV. 543 (2010); *see* Lazaroff, *supra* note 56, at 348.

[59] *See* Comment, Richard Smith, *The Perfect Play: Why the Fair Labor Standards Act Applies to Division I Men's basketball and Football Players*, 67 CATH. U. L. REV. 549 (2018); Sam C. Ehrlich, *The FLSA and the NCAA's Potential Terrible, Horrible, No Good, Very Bad Day*, 39 LOY. L.A. ENT. L. REV. 77 (2018); Marc Edelman, *From Student-Athletes to Employee-Athletes: Why a "Pay for Play" Model of College Sports Would Not Necessarily Make Educational Scholarships Taxable*, 58 B.C. L. REV. 1137 (2017); and Richard Karcher, *Big-Time College Athletes' Status as Employees*, 33 ABA J. LAB. & EMP. L. 31 (2017).

[60] Northwestern University and College Athletes Players Association (CAPA), Petitioner. Case 13–RC–121359 (August 17, 2015). *Also see* Jay D. Lonick, *Bargaining With the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135 (2015). The NLRB ruled that player votes cannot be counted in a representation election because the Board cannot invoke its jurisdiction in this matter.

players have begun to organize themselves to achieve pay-for-play.[61]

C. INSTITUTIONAL RACISM

My third perspective draws from institutional racism. Ian F. Haney López provides a model with conceptual rigor and clarity.[62] Institutional racism is "status-enforcement undertaken in reliance on racial institutions."[63] The idea, "undertaken in reliance,"[64] relates to "the relationship between cognitive processes and racial institutions."[65] The term "racial status-enforcement"[66] relates to "action that has the effect of enforcing a racial status hierarchy."[67]

López's model fits NCAA athletics. As children, Black students are socialized to play sports as a path to higher education.[68] Colleges reinforce this message. Coaches prioritize athletics over academics for Black players compared to white players and are more likely to discourage Black players from participating in activities outside their sport.[69] White student-

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[61] Newman, *supra* note 45.

[62] Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1723 (2000).

[63] *Id.* at 1809.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 1810.

[67] *Id.*

[68] Krystal Beamon & Patricia A. Bell, *Academics Versus Athletics: An Examination of the Effects of Background and Socialization on African American Male Student Athletes*, 43 SOCIAL SCIENCE J. 393 (2006); Kirsten F. Benson, *Constructing Academic Inadequacy: African American Athletes' Stories of Schooling,* 71 J. OF HIGHER ED. 223 (2000). Male athletes in basketball and football and basketball also have lower academic achievement, stronger expectations for a professional sports career, and are socialized more intensely toward sports than their White counterparts. *See* Tamara McNulty Eitle & David Eitle, Race, *Cultural Capital, and the Educational Effects of Participation in Sports*, 75 SOCIOLOGY OF ED. 123—146 (2002); John Hoberman, *The Price of Black Dominance*, 37 SOCIETY 49 (2000).

[69] Brandon Martin et al., *"It Takes a Village" for African American Male Scholar-Athletes: Mentorship by Parents, Faculty, and*

athletes spend more time than Black student-athletes with professors out-of-class.[70] Black and White male student-athletes do not benefit equally from faculty interactions.[71] These empirical studies demonstrate status-enforcement relying on racial institutions.[72]

Relating cognitive processes to racial institutions also has empirical support. The NCAA's testing rules and curriculum standards adversely affect Black students[73] Once on campus, Black athletes live in an environment that is premised on their intellectual inferiority.[74] Black athletes' lower GPAs correlate with lower motivation to succeed in academics.[75] Environmental influences play a role in unequal aspirations. Student-athletes who are "failure acceptors" are more committed to playing their sport than success-oriented students.[76] Another empirical study shows

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Coaches, 4 J. FOR THE STUDY OF SPORTS AND ATHLETES IN EDUC. 277, 288 (2010).

[70] Eddie Comeaux et al., *Purposeful Engagement of First-Year Division I Student-Athletes*, 23 J. OF THE FIRST-YEAR EXPERIENCE & STUDENTS IN TRANSITION 35, 45 (2011).

[71] Eddie Comeaux & C. Keith Harrison, *Faculty and Male Student Athletes: Racial Differences in the Environmental Predictors of Academic Achievement*, 10 RACE ETHNICITY AND EDUC. 99, 199 (2007) (sample of 1031 White and 739 Black football and basketball players attending predominantly White institutions shows that benefits of player interactions with faculty differed by race).

[72] Grow & Grow, *supra* note 51.

[73] Akuoma C. Nwadike et al., *Institutional Racism in the NCAA and the Racial Implications of the "2.3 Or Take a Knee" Legislation*, 26 MARQ. SPORTS L. REV. 523, 535—539 (2016).

[74] Harry Edwards, *The Black 'Dumb Jock': An American Sports Tragedy*, 131 THE COLLEGE BOARD REV. 8 (1984), stating:

> But Black student-athletes are burdened also with the insidiously racist implications of the myth of "innate Black athletic superiority," and the more blatantly racist stereotype of the "dumb Negro" condemned by racial heritage to intellectual inferiority.

Id. at 8.

[75] Joy Gaston-Gayles, *Examining Academic and Athletic Motivation Among Student Athletes at a Division I University*, 45 J. OF COLLEGE STUDENT DEV. 75, 81 (2004) (finding that ethnicity and academic motivation explained an additional 9% of the variance in college GPAs, apart from all other measured factors).

[76] Herbert D. Simons et al., *Academic Motivation and the Student Athlete*, 40 J. OF COLLEGE STUDENT DEV. 151, 159 (1999); *see*

stereotype threat theory explains differences in outcomes between Black and White people, such as whether a task is framed as sports intelligence or natural athletic ability.[77] NCAA athletics' racial character is reflected in Black students' lower graduation rates at many schools, which is lower than graduation rates for nonathlete Black students at the same schools.[78]

Finally, the NCAA's status-enforcement supports a racial status hierarchy.[79] Major NCAA programs are likened to colonial plantations because many White coaches and administrators profit

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also Albert Y. Bimper Jr., *Game Changers: The Role Athletic Identity and Racial Identity Play on Academic Performance*, 55 J. OF COLLEGE STUDENT DEVELOPMENT 795, 803 (2014).

[77] Jeff Stone et al., *Stereotype Threat Effects on Black and White Athletic Performance*, 77 J. OF PERSONALITY AND SOCIAL PSYCHOL. 1213, 1215 (1999).

[78] SHAUN R. HARPER, BLACK MALE STUDENT-ATHLETES AND RACIAL INEQUITIES IN NCAA DIVISION I COLLEGE SPORTS (2018). Harper collected national graduation data for NCAA athletes who entered college in 2007, 2008, 2009, and 2010 and graduated in 2013, 2014, 2015, and 2016. He reported results by conferences. In the Big Ten, for example, only two schools registered high overall graduation rates for Black men with little differences between Black athletes and all Black men on their campus: Northwestern University (graduation rate of 88%, compared to 90% [-2%]; University of Michigan 67 73 [-6%]). Purdue University, had a higher graduation for athletes than for the overall population, but its graduation rates were not high (graduation rate of 61% compared to 57% [4%]). Similarly, at the University of Minnesota, athletes had a 57% graduation rate, compared to the overall rate of 55% [2%]. At Indiana University, Black athletes graduated at the same rate of overall Black men, 58%. Penn State was similar, with a slightly lower graduation rate for Black athletes (59% compared to 63% [-4%]). The University of Wisconsin graduated athletes at 58%, compared to 66% for the overall group [-8%]. Michigan State University had a Black athlete graduation rate of 46% compared to an overall Black male rate of 55% [-9%]. Five schools trailed the others, with double-digit percentage point gaps in the graduation rate compounded by having modest graduation rates for the overall group: University of Iowa (40% compared to 52% [-12%]); University of Maryland (55% compared to 72% [-17%]); University of Nebraska (56% compared to 46% [-10%]); Rutgers University (49% compared to 66% [-17%]); University of Illinois (48% compared to 67% [-19%]); and Ohio State University (41% compared to 66% [-25%]).

[79] López, *supra* note 62.

handsomely off Black players' wage-free labor.[80] Exploiting Black athletes produces athletic surplus-value and marginal revenue for schools through an inequitable financial exchange.[81] Players lack representation while they generate great wealth for their schools. As such, Black players leave school feeling disillusioned.[82]

II. THE KU KLUX KLAN ACT AND ITS RELATIONSHIP TO SCHOOLS, TEACHERS, AND STUDENTS

My research offers a new approach to applying the Ku Klux Klan Act to conspiracies between school and NCAA officials to silence racism complaints. Part II.A is an original analysis of this law's legislative history. Lawmakers in 1871 were primarily concerned with the Klan's efforts to intimidate Black voters and their supporters,[83] and Klan violence against Black schools, teachers, and students. Part II.B explains the Act's

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[80] BILLY HAWKINS, THE NEW PLANTATION: BLACK ATHLETES, COLLEGE SPORTS, AND PREDOMINANTLY WHITE NCAA INSTITUTIONS (2013).

[81] Derek Van Rheenen, *Exploitation in College Sports: Race, Revenue, and Educational Reward*, 48 INT'L REV. FOR THE SOC. OF SPORT 550, 563 (2012); *see also* Garthwaite, *infra* note 243.

[82] Stanley Eitzen, FAIR AND FOUL: BEYOND THE MYTHS AND PARADOXES OF SPORT (2009): Krystal K. Beamon, *"Used Goods": Former African American College Student-Athletes' Perception of Exploitation by Division I Universities*, 77 THE J. OF NEGRO EDUC. 352, 352 (2008).

[83] Gaj, *supra* note 19. Congress took testimony from victims of election violence:

John Thomas, colored, testified:

Question: State whether or not you were molested or otherwise ill-treated on or about or before the election of President and members of Congress on the 3d of November 1868; if so, tell all about it, from the beginning to the end.

Answer: I was whipped one time. They gave me a certificate, ticket, I mean, to vote; the Ku Klux whipped me. They told me if I did not vote the ticket there would be bad times afterward. I took and voted it; that is all; the ticket was Seymour and Blair. It was against my sentiment to vote that way.

Cong. Globe, 42d, 1st Sess. 287 (1871), https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=100/llcg100.db&recNum=640.

jurisprudential evolution.[84] This discussion includes the Supreme Court's *Kush v. Rutledge* ruling,[85] applying this law to a football player who sued the head football coach and athletic director at Arizona State University over witness intimidation in his lawsuit.

A. LEGISLATIVE HEARINGS FOR THE KU KLUX KLAN ACT OF 1871: THE KU KLUX KLAN'S TERROR CAMPAIGN AGAINST SCHOOLS FOR BLACKS

President Ulysses Grant urged Congress to crush the Ku Klux Klan's terror campaign by enacting a comprehensive law to enforce Reconstruction-era civil rights.[86] Republicans viewed the Klan's terror activities as a direct threat to the Fourteenth Amendment's civil liberties promise.[87] Klan groups, allied with the Democratic party, interfered with elections.[88] Congressional

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[84] *Supra* note 9.

[85] *Supra* note 11.

[86] A detailed account appears in Avins, *supra* note 19, at 332, n.10, quoting Pres. Grant's message to Congress:

A condition of affairs now exists in some of the States of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate…. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States..

[87] *See* Rep. Stevenson, stating: "The Ku Klux Klan endanger liberty, equal rights, and impartial suffrage." Cong. Globe, 42d, 1st Sess. 299 (1872), https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=100/llcg100.db&recNum=652.

[88] *See* Herbert Shapiro, *The Ku Klux Klan During Reconstruction: The South Carolina Episode*, 49 THE J. OF NEGRO HIST. 34 (1964), at 37—38:

The violence of the 1868 campaign reached a peak on Election Day. Extensive use was made of force to keep Negroes away from the polls. At White Hall and Greenwood, in Abbeville County, groups of armed whites drove Negroes away from the polls. Two Negroes were killed at White Hall. Testimony was offered that at Santuck in Union County a mob permitted only those with Democratic tickets to vote. In Laurens County Democrats lined up before the Court House poll and excluded Republican voters. At Rock Hill in York County some fifty Republican voters were forced from the poll. At some places economic

Republicans were alarmed by the suppression of freedom for Black people.[89]

My analysis explores legislative accounts of the Klan's intimidation and terror directed at schools for Black students. These racially motivated attacks interfered with education for Black students by forcing teachers to move,[90] or by burning schools.[91] This research is significant because it shows the Act was passed to protect education for Black students in the same way it secured their suffrage and participation in legal proceedings.

Legislative accounts were scattered over months of hearings.[92] During this time, perhaps the worst Klan attack occurred in Louisiana: the St. Landry massacre.[93] It began when the Knights of the White Camelia, a Klan branch, savagely attacked a Black school. General Oliver O. Howard recounted:

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pressure, either along with or instead of force, was used. Typical was the poll in Anderson County where the president of the local Democratic club took down the names of Republican voters for the purpose of giving preference in the renting of land to Negro Democrats.

Despite Republican outcries, the intimidation and violence of the 1868 campaign were not without political effect. The number of Negro voters dropped considerably. At White Hall precinct in Abbeville, according to Democratic and Republican witnesses, of 156 votes cast, four were by Negroes. At Due West precinct in the same county, of more than ninety voters, four again were Negroes. In the county as a whole, out of 4,200 enrolled Negro voters, only 800 were able to cast their ballots. In Laurens County 1,174 Negroes voted although 2,500 were registered. In Anderson between seven and eight hundred out of 1,400 voted.

[89] *See* Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 60 (2007) ("The framers of the Fourteenth Amendment viewed the Black Codes immediately after the Civil War as an attempt to return slavery by other methods and by another name.").

[90] *Infra* note 100.

[91] Cong. Globe, 42d Cong., 2d Sess. 395 (1872); Cong. Globe, 42d Cong., 1st Sess. 276 (1871).

[92] *Id.*

[93] Lorraine Boissoneault, *The Deadliest Massacre in Reconstruction-Era Louisiana Happened 150 Years Ago*, Smithsonian Mag. (Sep. 28, 2018), https://www.smithsonianmag.com/history/story-deadliest-massacre-reconstruction-era-louisiana-180970420/.

> The riot grew out of an assault of Emerson Bentley, an Ohio boy from Columbiana county, who was teaching school in Opelousas and editing a Republican paper. He was attacked in his school room among the children, revolvers were leveled on him while he was brutally beaten and warned away. The Ku Klux, apprehending resistance by the negroes, dispatched couriers to all parts of the parish and gathered their klans, who rallied to Opelousas, killing as they came.[94]

In a different incident, Congress heard from a teacher, John Dunlap. The Klan kidnapped and whipped him for teaching Black students.

> Question: Are you now, and at the time you were beaten, teaching in a school; and if so, was it in a public school?
> Answer: I am now teaching the public school in this place for colored youth, and it was at this time I was beaten by the Ku Klux.[95]

Dunlap testified the Klan came to his home in Shelbyville, Tennessee on July 4, 1868, surrounded it, and shot through the windows.[96] They took him hostage along with James Franklin, a "colored man" whose home in the same town was rampaged.[97] The Klan rode their hostages out of town on horseback, had them strip, and whipped them repeatedly.[98] Dunlap said the attack led to "cutting and bruising me in many places."[99] He said the Klan terrorized him again after he moved from his small community to Nashville, Tennessee: "I was not disturbed again until the first Saturday night in January 1869 when about sixty disguised men, armed and mounted, rode into the public square, hallooing they wanted Dunlap and fried nigger meat."[100]

Rep. Luke Poland reported a similar school attack of a young teacher in Mississippi school for Black students:

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[94] Cong. Globe, 42d Cong., 1st Sess. 296 (1871).
[95] *Id*. at 288.
[96] *Id.*
[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] Cong. Globe, 42d Cong., 1st Sess. 288 (1871); *see id*.

> While thus quietly pursuing his duties the house where he lived was one night surrounded by a large body or armed and disguised men; he was taken by them from his bed in his night-clothes, and in that condition to a swamp at some distance and terribly beaten. He succeeded in escaping with his life. I asked him what they said to him and what reason, if any, they gave for the act. His answer was, 'All they said to me was that they 'would learn me not to come to Mississippi to make niggers as good as white folks.'[101]

Representative Job Stevenson reported several instances of racial terror in Black schools. He noted the Klan was "bitterly hostile to teachers because the illiterate look for instruction to the school house. They therefore warn away such citizens, and if the new warning be disregarded they scourge or kill them."[102]

In one account, William S. Halley, a teacher at a "colored school," received a threatening letter at his house on July 8, 1868, from the Klan of Vengeance:

> Villain, away. Ere another moon wanes, unless you are gone from the place thy foul form desecrates, thy unhallowed soul will be reveling in the hell thy acts here hath made hot for thee. William, eat heartily, and make glad thy carcass, for verily Pale Riders will help on thy digestion! . . . The secret serpent has hissed the last time! Beware! K.K.K."[103]

Representative Stevens also spoke of the Black teacher's plight:

> Malinda Gregory (colored) says— 'That she has been teaching school until June 18, when the Ku Klux came and threatened her life if she did not quit teaching; that she, finding out that they really meant to execute their threat, left the country and came to Nashville.'[104]

He also recounted successful resistance:

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[101] Cong. Globe, 42d Cong., 2d Sess. 494 (1872); *see id.*
[102] Cong. Globe, 42d Cong., 1st Sess. 287 (1871).
[103] *Id*.
[104] *Id*.

> The masked Ku Klux has thus far shown himself to be a coward. The evidence discloses many example . . . A school-master with a half a dozen brave freedmen resisted fifty masks and drove them away.[105]

Senator John Sherman addressed the Senate about what he observed in North Carolina:

> Mr. President, is this not a specimen of barbarity which cannot be equaled in the records of any other nation now on the face of the world, where a harmless man teaching a school is taken at the dead hour of the night from his own home, from his wife, carried off a mile and a half in the woods, and there whipped and scoured and insulted in this way?[106]

Klan violence against schools was part of a larger campaign to undermine racial equality in the South by destroying Black institutions. Senator Aldebert Ames of Mississippi informed his Senate colleagues: "Thirty churches and school-houses burned during Alcorn's administration."[107] Representative Charles Porter attributed the Klan's racial terror to uneducated White people who feared a rising population of educated Black individuals.[108] By including a semiliterate letter from a Klan leader, Porter appeared to suggest white supremacists were motivated by the insecurity that Blacks would surpass them in education. The lawmaker put a violent letter into the legislative record.[109] It bore a cross-like heading, "Confederit + Roads":

> There can be no doubt ez to where the blame should rest. The niggers hev got an insane idea into them that they are reely citizens by virtoo uv the fifteenth amendment, notwithstanding the fact that every justice uv the peace in Kentucky has declared it unconstooshnol, and

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[105] *Id*. at 299.
[106] *Id.* at 276.
[107] Cong. Globe, 42d Cong., 2d Sess. 395 (1872).
[108] *Id.*
[109] Cong. Globe, 42d, 1st Sess. 276 (1872), https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=100/llcg100.db&recNum=629.

> consekently void and uv no effect. They bleev they hev rights as citizens, and they won't be managed as they yoosed to be. They insist on bein paid for labor, which alluz irritates the southern mind, and they insist upon continyooaly insultin us by offerin their votes, wich aint to be tolerated for a minit.[110]

The letter documented burning a school for Black students:

> The Corners hez bin agitatid recently at the report . . . that a committee was agoin to visit us for the purpose uv investigatin the trifflin matter uv the killin uv a few niggers and northern men in this part of Kentucky . . . Last Toosday I summoned the leedin citizens uv the Corners afore me in the back room of Bascom's and put em thro the most searchin cross examination. Captain Hugh McPelter wuz the first man examined. I swore the witness on a spellin-book, wich we capehered from the last nigger school-house wich was burnt last year.[111]

Representative Stevenson described how affluent White people supported poor, aimless, and violent youth as racial allies to keep Black people down:

> The masked and sheeted Ku Klux are executioners who volunteer or are assigned to execute the decrees of the Klan. They are the idle, wild young men who abound at the South, a class bred by slavery and fostered in rebellion. They are supported by better men, whose ends they serve.[112]

In a summarizing critique, Representative Maynard explained the Klan used racist slurs to maintain a rigid caste:

> If any of you will take the trouble to examine the southern press, you will find it day after day and week after week,

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[110] *Id.*

[111] *Id*., stating, "Seldom do they attack man until they disarm him . . . They cannot afford to be killed, wounded, or captured. Exposure would follow, trial, conviction, punishment; secrecy and mystery would be gone; and the whole conspiracy exploded."

[112] *Id.* at 299; *See also* Rep. Stevenson, stating that the "Ku Klux Klan endanger liberty, equal rights, and impartial suffrage."

> reiterating and reverberating with the same sentiment, denouncing the colored man, the "nigger," who is to every defeated rebel a standing monument of humiliation, denouncing him as governed by the very worst counsel, and acting under the very vilest passions, known to the human breast . . . When these things are rung in and rung out with every variety of aggravation upon a people who hear them and nothing else, you can very well understand how they go out on their nightly orgies of burning, scourging, and murder.[113]

This legislative history has been largely overlooked. Research shows lawmakers were concerned about racial violence directed at schools for Black students, which has significance for racism in college coaching. Congress could have limited Section 1985(3) to apply to "any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws."[114] However, they added a broader expression in the ellipsis of this quote—"or class of persons."[115] Scholars and courts have already observed the Act was poorly drafted, burdened by its confusing structure and terms.[116] Courts have relied on legislative history to reveal the law's meaning.[117]

This approach can be persuasive in lawsuits against athletic directors, school officials, and the NCAA. My research in this part shows lawmakers viewed students and teachers at Black schools as a class targeted for racial violence by the Klan. The Klan terrorized Black educational institutions, enabling former slaves to become their equals.[118] Lawmakers also included terrorizing quotes from Klansmen,[119] with references to racial slurs.[120]

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[113] *Id.* at 309.

[114] 42 U.S.C. § 1985(3) (1871).

[115] *Id*.

[116] *Id*.

[117] *Id. See also* United Bhd. of Carpenters and Joiners v. Scott, 463 U.S. 825 (1983) (using legislative history to interpret the statute).

[118] *Id.* Cong. Globe, 42d Cong., 1st Sess. 288 (1871).

[119] *Id.*

[120] *Id.*

B. THE JURISPRUDENTIAL EVOLUTION OF THE KU KLAN ACT OF 1871

The Ku Klux Klan Act of 1871 was passed with five sections knitted together in a long, confusing tangle.[121] Its immediate purpose was to eradicate the Klan and its reign of terror.[122] The Supreme Court struck down the law's criminal

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[121] The best summary of the law appears in Kush, *supra* note 11, at 724—25. Because it provides clarity to such a poorly drafted law, it is quoted at length:

Although § 2 contained only one long paragraph when it was originally enacted, that single paragraph outlawed five broad classes of conspiratorial activity. In general terms, § 2 proscribed conspiracies that interfere with (a) the performance of official duties by federal officers; (b) the administration of justice in federal courts; (c) the administration of justice in state courts; (d) the private enjoyment of "equal protection of the laws" and "equal privileges and immunities under the laws"; and (e) the right to support candidates in federal elections. As now codified in § 1985, the long paragraph is divided into three subsections. One of the five classes of prohibited conspiracy is proscribed by § 1985(1), two by § 1985(2), and two by § 1985(3). The civil remedy for a violation of any of the subsections is found at the end of § 1985(3). The reclassification was not intended to change the substantive meaning of the 1871 Act.

Three of the five broad categories, the first two and the fifth, relate to institutions and processes of the federal government—federal officers, § 1985(1); federal judicial proceedings, the first portion of § 1985(2); and federal elections, the second part of § 1985(3). The statutory provisions dealing with these categories of conspiratorial activity contain no language requiring that the conspirators act with intent to deprive their victims of the equal protection of the laws. Nor was such language found in the corresponding portions of § 2 of the 1871 Act . . .

The remaining two categories, however, encompass underlying activity that is not institutionally linked to federal interests and that is usually of primary state concern. The second part of § 1985(2) applies to conspiracies to obstruct the course of justice in state courts, and the first part of § 1985(3) provides a cause of action against two or more persons who "conspire or go in disguise on the highway or on the premises of another." Each of these portions of the statute contains language requiring that the conspirators' actions be motivated by an intent to deprive their victims of the equal protection of the laws.

[122] United Bhd. of Carpenters and Joiners v. Scott, 463 U.S. 825, 836 (1983) (§1985(3) was to neutralize attacks against Blacks and their supporters).

provisions in 1883.[123] This ruling reflected broad judicial hostility to Reconstruction-era civil rights laws.[124] Judicial curtailment of the Act extended to the twentieth century.[125] For nearly 80 years, the Act lay dormant.[126] *Griffin v. Breckenridge*, a landmark case in 1971, revived Section 1985(3).[127] This section provides a civil

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[123] In United States v. Harris, 106 U.S. 629 (1883), the Court declared the criminal conspiracy section of the Ku Klux Klan Act of 1871 unconstitutional.

[124] Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L.REV. 1323 (1952), at 1357:

> The civil rights program of the Reconstruction era has thus come down to a pitiful handful of statutory provisions, most of which are burdened by the dead weight of strict constructionism. The great fervor with which the elected representatives of the people decided to nationalize civil rights has been 'cooled by the breath of judicial construction (citation omitted).' One by one, the constitutional amendments and the civil rights statutes have been blown down by that breath. The few stark remnants that remain are mute testimony to the power of the judiciary to render impotent the expressed will of the people.

[125] James v. Bowman, 190 U.S. 127, 142 (1903); Hodges v. United States, 203 U.S. 1, 10 (1906), *overruled by* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968).

[126] Collins v. Hardyman, 341 U.S. 651, 661 (1951), marked a major setback in efforts to revive Section 1985(3). The law was revived, however, after courts were presented with evidence of congressional intent behind Section 1985(3). *See*, *e.g.*, Byrd v. Sexton, 277 F.2d 418, 427 (8th Cir. 1960) ("We are impressed here with the particular history and origin of these sections, with their specific original purpose and with their dormancy until recent years."). This court also attributed resourceful plaintiffs' lawyers for invoking "the application of the Civil Rights Act in situations far removed from those which were no doubt predominantly in the minds of the members of Congress in 1871 when they first enacted the legislation." *Id*. *See also* Koch v. Zuieback, 194 F.Supp. 651, 657 (S.D. Cal. 1961) ("[T]he fact that they were initially designed for a particular purpose, coupled with the fact of slipshod draftsmanship, has resulted in a deep suspicion of these laws and a judicial reluctance to apply them in any but the most limited situations").

[127] 403 U.S. 88, 101—04 (1971). The Black plaintiffs who sued under Section 1985(3) sought compensatory and punitive damages from two white men who beat them with deadly weapons. *Id*. at 89. Griffin quoted the text of that law, including its provision that '"the party so injured or deprived may have an action for the recovery of damages,

remedy for a private conspiracy depriving a person of equal protection, privileges, or immunities based on their race or class.[128]

Section 1985(3) applies to conspiracies motivated by racial animus.[129] In the 1970s, courts began to broaden the law's scope beyond race.[130] These later cases involved the law's

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occasioned by such injury or deprivation, against any one or more of the conspirators.'" *Id.* at 92.

[128] Eugene Griffin and other Black men were stopped in their car by White men who mistook them as civil rights activists and beat them. Reading the law's text, examining its legislative history, and comparing it to related provisions in the Ku Klux Klan Act, the Court concluded that Congress intended this statute to reach private conspiracies. *Id.* at 101. Griffin also concluded that "the varieties of private conduct that [Congress] may make criminally punishable or civilly remediable [under Section Two of the Thirteenth Amendment] extend far beyond the actual imposition of slavery or involuntary servitude." *See also* 403 U.S. at 105.

[129] *See* Crumsey v. Just. Knights of the Ku Klux Klan, No. 1-80-287, slip op. at 690 (E.D. Tenn. 1982), reported in Charles H. Jones, *An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment*, HARV. C.R.-C.L. L. REV. 689 (1986) (shooting of five Black women by Klansmen results in judgment of $535,000 under Section 1985(3) and injunction prohibiting Klan from engaging in violence and entering Black community); Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan, 518 F.Supp. 993, 993 (S.D.Tex. 1981) (section 1985(3) injunction following cross burning and shooting a cannon directed at Vietnamese fishermen).

[130] *See*, *e.g.*, Glasson v. City of Louisville, 518 F.2d 899, 912 (6th Cir. 1975) (supporters of a political candidate); Weise v. Syracuse Univ., 522 F.2d 397, 397 (2d Cir. 1975) (female faculty members); Means v. Wilson, 522 F.2d 833, 833 (8th Cir. 1975) (Indian supporters of a political candidate); Marlowe v. Fisher Body, 489 F.2d 1057, 1057 (6th Cir. 1973) (Jewish employees); Smith v. Cherry, 489 F.2d 1098, 1098 (7th Cir. 1973) (voters who were deceived as to the effect of their vote); Cameron v. Brock, 473 F.2d 608, 608 (6th Cir. 1973) (supporters of a political candidate); Azar v. Conley, 456 F.2d 1382, 1382 (6th Cir. 1972) (middle class white family); Action v. Gannon, 450 F.2d 1227, 1227 (8th Cir. 1971) (members of a predominantly white Catholic parish); Harrison v. Brooks, 446 F.2d 404, 404 (1st Cir. 1971) (married couple); Richardson v. Miller, 446 F.2d 1247, 1247 (3d Cir. 1971) (persons who advocated racial equality in employment opportunities).

enigmatic use of "class."[131] Claims by women[132] and the disabled[133] alleging class-based interference with rights have often failed.[134] Courts have resisted interpreting class to mean "any group of people"— instead, they have limited Section 1985(3) to animus against a group experiencing prejudice.[135]

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[131] Trautz v. Weisman, 819 F.Supp. 282, 291 (S.D.N.Y.1993), explains the lack of precision around "class," observing: "The best that can be said of § 1985(3) jurisprudence thus far is that it has been marred by fits and starts, plagued by inconsistencies, and left in flux by the Supreme Court." *See also* Note, Matthew C. Hans, *Lake v. Arnold: The Disabled and the Confused Jurisprudence of at 42 U.S.C. § 1985(3)*, 15 J. CONTEMP. HEALTH L. & POL'Y 673, 696 (1999).

Earlier, the Supreme Court tried to clarify the meaning of "class" in Section 1985(3). *See* United B'hd of Carpenters and Joiners of America v. Scott, 463 U.S. 825 (1983). However, the facts in that case were so atypical that the decision failed to clear up questions of interpretation. *Id.* at 839. The Court ruled that class-based animus does not extend to group of nonunion workers who alleged that union workers conspired to assault them for crossing a picket line at a construction site. *Id.* at 838. Rejecting the Section 1985(3) claims of injured nonunion workers, the Court concluded that Griffin limited §1985(3) "to combat the prevalent animus against Negroes and their supporters. The latter included Republicans generally, as well as others, such as Northerners who came South with sympathetic views towards the Negro." *Id*. at 836.

[132] Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 286 (1993) (ruling that abortion providers who seek to enjoin protesters from blocking access to their clinics, thereby depriving women their constitutional right to terminate a pregnancy, lack Section 1985(3)'s requirement of invidious animus because protesters oppose abortion but not women as a group).

[133] D'Amato v. Wis. Gas Co., 760 F.2d 1474, 1474 (7th Cir.1985) and Wilhelm v. Cont'l Title Co., 720 F.2d 1173, 1173 (10th Cir. 1983) held that disabled individuals do not fall within the purview of Section 1985(3). For cases holding that disabled people may state a claim under Section 1985(3), see Lake v. Arnold, 112 F.3d 682, 682 (3d Cir. 1997); People by Abrams v. 11 Cornwell Co., 695 F.2d 34, 34 (2d Cir. 1982), *vacated in part on other grounds*, 718 F.2d 22 (2d Cir. 1983).

[134] Kush, *supra* note 11.

[135] Warner v. Greenebaum, 104 Fed.Appx. 493, 493 (6th Cir. 2004) (environmentalists not a class); Johnson v. Hettleman, 812 F.2d 1401, 1401 (4th Cir. 1987) ("Section 1985(3) does not encompass conspiracies motivated by economic, political or commercial animus."); Kimble v. D. J. McDuffy, Inc., 648 F.2d 340, 340 (5th Cir. 1981) (employees who file workers compensation claims are not a racial or

Some courts have applied Section 1985(3) to conspiracies motivated by animus against Republicans and other political groups,[136] equal rights advocates for Blacks,[137] and religious groups.[138]

The Supreme Court applied a related provision of the Act, Section 1985(2)(ii), in *Kush*.[139] This law prohibits private actor conspiracies from denying equal protection by interfering with courts.[140] Remarkably, this case involved a college football coach, Kush, violently attacking his punter, Kevin Rutledge, in a game.[141] After Kevin Rutledge sued the coach, he alleged the coach and athletic director at Arizona State University interfered with his lawsuit by intimidating witnesses.[142] Kush and other officials argued no racial animus existed and the Act did not apply because

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political class); Browder v. Tipton, 630 F.2d 1149, 1149 (6th Cir. 1980) (picket-line crossers who were falsely accused of criminal conduct in a labor dispute were not a class protected); McLellan v. Miss. Power & Light Co., 545 F.2d 919, 925—26 (5th Cir. 1977) (bankrupt persons not a class); Lopez v. Arrowhead Ranches, 523 F.2d 924, 924 (9th Cir. 1975) (citizens have no fundamental right to a job); Hughes v. Ranger Fuel Corp., 467 F.2d 6, 6 (4th Cir. 1972) (environmentalists are not a class); O'Neill v. Grayson Co. Hosp., 472 F.2d 1140, 1140 (6th Cir. 1973) (county hospital's refusal to grant admitting privileges to a physician not a form of invidious discrimination); Place v. Shepard, 446 F.2d 1239, 1246 (6th Cir. 1971) (hostile treatment of a nurse who criticized hospital care did not allege racial or class-based discrimination). *Cf.*, Westberry v. Gilman Paper Co., 507 F.2d 206, 206 (5th Cir. 1975) (environmentalist may be part of a class where there is a murder conspiracy claim). More recent federal district court rulings have followed this trend. *See* Ruff-El v. Nicholas Fin. Inc., 2012 WL 252134, at *4 (S.D. Ohio Jan. 26, 2012) (failure to state class-based animus in a claim against seizure of personal property); Friedrich v. Se. Christian Church of Jefferson Cnty., 2005 WL 2333638, at *4 (W.D. Ky. Sept. 22, 2005) (animal rights activists arrested for protesting are not a class).

[136] Keating v. Carey, 706 F.2d 377, 387 (2d Cir. 1983) ("In our view, Congress did not seek to protect only Republicans, but to prohibit political discrimination in general.").

[137] *Id.* at 386—88.

[138] *See, e.g.*, Ward v. Connor, 657 F.2d 45, 48 (4th Cir. 1981) ("[R]eligious discrimination, being akin to invidious racial bias, falls within the ambit of §1985(c).").

[139] Kush, *supra* note 11, at 720.

[140] *Id*. at 725.

[141] *Id*. at 720—721.

[142] *Id*.

the player and coach were both White.[143] The Court rejected this view, and held Section 1985(2)(ii)'s text prohibits conspiracies to deny equal protection by interfering with courts, regardless of racial animus.[144]

More recently, the Court applied Section 1985(2)(i-ii) in *Haddle v. Garrison*[145] to an at-will employee who was fired in retaliation for cooperating with federal authorities in a Medicare fraud investigation.[146] The Court ruled the "gist of the wrong at which § 1985(2) is directed is not deprivation of property, but intimidation or retaliation against witnesses in federal-court proceedings."[147] Significantly, the court found alleging third-party interference with at-will employment relationships was a claim for relief under § 1985(2).[148]

Although *Haddle* was a federal lawsuit, it shows a player who complains to an athletic director about a coach's racism is similar to an employee who opposes his employer's fraudulent practices. Both situations involve wrongdoers whose fear of exposure to legal proceedings leads them to interfere with independent investigations.

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[143] *Id*. at 726.

[144] *Id*.

[145] 525 U.S. 121, 127.

[146] *Id*. at 123. Haddle's employer was in bankruptcy when his fired-superiors conspired with a remaining company officer to terminate Haddle's employment. *Id.* The conspiracy was meant to intimidate Haddle and retaliate against him for answering a grand jury summons. *Id.*

[147] *Id*. at 125.

[148] *Id*. at 126.

III. APPLYING THE KU KLUX KLAN ACT TO CONSPIRACIES TO SILENCE PLAYER COMPLAINTS OF COACHING RACISM

This Article suggests a new approach for applying the Act to conspiracies between NCAA and school officials to silence players who complain about coaching racism. Table 1 diagrams a hypothetical conspiracy. This table describes each step in the conspiracy. Part III.B discusses events at the University of Illinois at Urbana-Champaign that plausibly fit within the Table 1 model. These public sources suggest a conspiracy, but no conclusive evidence of wrongdoing exists.

A. MODEL OF A CONSPIRACY BETWEEN NCAA OFFICIALS AND A SCHOOL: SILENCING COMPLAINTS OF RACIST TREATMENT OF PLAYER

A model imputing liability to school officials who handle complaints of coaching racism by intentionally delaying or impeding information gathering should be imposed because the Act pertains to concealed conspiracies. The statute references secretive racial conspiracies, saying "two or more persons in any State . . . (who) conspire or *go in disguise*"[149] to deprive "any person or class of persons of the equal protection of the laws (emphasis added)."[150] The model below is a graphical attempt to diagram a racial conspiracy indicating concealment. Additionally, coaching racism is real. This model offers a litigation theory to address this problem. Pretrial tools such as subpoenas, discovery, and depositions, can unearth more information than research for a law review article.

[149] *Id*. at 124 n.1.
[150] *Id*.

Table 1A
Hypothetical Conspiracy Between NCAA and School: Silencing Complaints of Racist Treatment of Player

Table 1B
Sequence of Hypothetical School-NCAA Conspiracy to Silence Player Complaint of Coaching Racism

First, Coach A (Box 1) uses a racist epithet, slur, insult, or threat in the player's presence (Box 2).

Second, the player (Box 2) reports the incident to a School A official (Box 3).

Third, School A (Box 3) makes an initial assessment to determine the complaint's credibility.

Fourth, if the complaint is credible, and the player is unsatisfied with the school's response, School A (Box 3) promises to release the player (Box 2) without limiting his transfer, with the understanding he pursues no legal redress and keeps silent.

Fifth, to effectuate School A's agreement with the player, a school official communicates the situation to the NCAA (Box 4).

Sixth, the NCAA (Box 4) requests School A (Box 3) to address the complaint by taking remedial action.

Seventh, the NCAA (Box 4) communicates the possibility of a transfer waiver to the School A (Box 3), and School A (Box 3) discloses this information to the player (Box 2).

Eighth, the player (Box 2) is released from the scholarship by the School A (Box 3), and contacts School B (Box 5 and Box 6) to transfer.

Ninth, the NCAA (Box 4) informs School B the player (Box 2) has a release and may be granted a transfer-restriction waiver.

Tenth, School B (Box 5) offers the player (Box 2) a scholarship.

Eleventh, before the next season starts, the NCAA (Box 4) approves the player's (Box 2) petition for a waiver of the transfer penalty, after the player maintains silence for some time.

Twelfth, after the player (Box 2) fulfills his part of the agreement by making no complaint of race discrimination to a federal or state court, the NCAA grants him immediate eligibility (Box 7).

B. APPLYING THE NCAA-SCHOOL CONSPIRACY MODEL: CASE STUDY OF THE RACIAL HARASSMENT COMPLAINT AGAINST THE UNIVERSITY OF ILLINOIS'S MEN'S BASKETBALL COACH IN 2017-2018 SEASON

1. *INVESTIGATING UNIVERSITY OF ILLINOIS BASKETBALL COACH OVER RACIAL HARASSMENT: A BLACK PLAYER WHO TRANSFERRED WITH AN NCAA WAIVER WITHOUT LOSING ELIGIBILITY*

On April 12, 2019, the Division of Intercollegiate Athletics (DIA) at the University of Illinois at Urbana-Champaign (UIUC) issued a thirty-five page press release concerning claims of abuse and racial harassment by its men's basketball coach.[151] DIA received allegations about Coach Brad Underwood's "communication style and interactions with student-athletes on his team . . . "[152] These communications consisted of "abuse, racial harassment, and punitive use of physical activity."[153] The press release "specifically discredited" these allegations.[154] The publicly reported events below, from first through eleventh, are direct quotes from published sources. The sequence corresponds to the hexagons (called boxes, *infra*) in Table 1A:

First, a coach (Box 1) uses a racist epithet, slur, insult, or threat in the player's presence (Box 2).

> The allegations against Underwood after the 2017-18 basketball season, accused the coach of "verbal abuse, racial harassment and punitive use of physical activity," according to a summary released by the Division of Intercollegiate Athletics following media inquiries.[155]

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[151] The events in the timeline are based on reporting in *UIUC Division of Intercollegiate Athletics*, THE-MARK-SMITH-REPORT (April 4, 2019), http://illinireport.info/wp-content/uploads/2019/04/The-Mark-Smith-Report.pdf.

[152] *Id.* at 1.

[153] *Id.*

[154] *Id.*

[155] Julie Wurth, *Underwood Cleared in Probe, but Faculty Questions Remain*, NEWS-GAZETTE (April 12, 2019), https://www.news-

Second, the player (Box 2) reports the incident to a school official.

> In an interview with News-Gazette Media, Underwood and (Athletic Director) Whitman refused to provide more details or say whether it was a former or current player, parent or someone else who lodged the complaints, in order to protect the identity of those involved.[156]

Third, the university (Box 3) makes an initial assessment to determine the complaint's credibility.

> "Needless to say, the allegations were sufficiently concerning that obviously we thought it was appropriate to take immediate action and to look into the matter more carefully," Whitman said.[157]

Fourth, the school (Box 4) promises to release the player (Box 2) if this individual is unsatisfied with the school's response. The player's transfer is not limited given the understanding he may not pursue legal redress and must keep the matter silent.

> "I had a chance to work with Missouri on the substance of the waiver for Mark, and I felt comfortable with the contents of that waiver. I felt comfortable with the justification that they provided. I would not have supported the waiver for Mark if the justification was something that made me feel uncomfortable or was inaccurate," Whitman said.[158]

Fifth, the school communicates the situation to the NCAA (Box 4).

> Smith received a waiver from the NCAA to play at Missouri this year, *which Whitman signed off on*. Whitman wouldn't comment on whether the waiver was

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gazette.com/news/underwood-cleared-in-probe-but-faculty-questions-remain/article_dd6d526d-7d90-5004-a3de-1aa96316fddf.html.

[156] *Id.*

[157] *Id.*

[158] *Id.*

> related to the allegations against Underwood (emphasis added).[159]

Sixth, the NCAA (Box 4) requests the school (Box 3) to address the complaint by taking remedial action. The NCAA's role in remediating this coach's behavior may not exist in a record, but a news report contains information about the school's remediation approach:

> However, Whitman also said he had spoken to Underwood before the allegations surfaced about ways to improve his "use of language" and his interactions with players.
>
> "I saw notable changes in the way he interacted with the team this year," Whitman told News-Gazette Media. "He coaches in a certain way, and I don't expect him to change the way he coaches. He's intense, he creates an environment where he makes his players uncomfortable to get them to go places they didn't think they could go. I think that's important for our program to grow and improve."[160]

Seventh, the NCAAA communicates the possibility of a player transfer waiver to the school. The school (Box 3) then discloses this information to the player (Box 2).

> (Mark) Smith, joined by his dad Anthony and his mom Yvonne, met with Illinois athletic director Josh Whitman, who granted a scholarship release that should be finalized by mid-week. Smith moved off campus Sunday and will finish the semester as a student at Illinois while making a decision on his next school.[161]
>
> . . .

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[159] *Id.*

[160] *Id.*

[161] Greg Shashack, *Edwardsville's Smith Leaving Illinois - "I Just Don't Fit the System,"* THE TELEGRAPH (March 5, 2018), https://www.thetelegraph.com/sports/article/COLLEGE-MEN-8217-S-BASKETBALL-12729192.php.

> Smith received a waiver from the NCAA to play at Missouri this year, which Whitman signed off on. Whitman wouldn't comment on whether the waiver was related to the allegations against Underwood.[162]

Eighth, the school (Box 3) releases the player (Box 2) from his scholarship, and the player contacts School B (Box 5 and Box 6) to transfer.

> Smith announced his transfer to the University of Missouri on April 15. At this time, he still was under an NCAA rule that would require him to sit out and lose that year of eligibility.[163]

Ninth, the NCAA (Box 4) informs School B that the player (Box 2) has a scholarship release and may qualify for a transfer-penalty waiver.

> Missouri added some quality depth to its rotation on Friday night as the program announced that Illinois transfer Mark Smith will be immediately eligible for the 2018-19 season after receiving a waiver from the NCAA.[164]

Tenth, School B (Box 5 and Box 6) offers the player (Box 2) a scholarship.

> Welcome to the #Mizzou Family @ Mark_Smith_13! Signed Mark Smith.[165]

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[162] The events in the timeline are based on reporting in *UIUC Division of Intercollegiate Athletics*, *supra* note 151.

[163] Dave Matter, *Mizzou Basketball Lands Illinois Transfer Mark Smith*, ST. LOUIS POST-DISP. (April 15, 2018).

[164] Scott Phillips, *Missouri's Mark Smith Receives NCAA Waiver for Immediate Eligibility*, NBCSPORTS (Oct. 27, 2018), https://collegebasketball.nbcsports.com/2018/10/27/missouris-mark-smith-receives-ncaa-waiver-for-immediate-eligibility/.

[165] @Mizzou Hoops (10:33 a.m., April 16, 2018), republished in Josh Matejka & Tashan Reed, *Rounding Up Mizzou's 2018 Recruiting Class: The Transfers*, ROCK M NATION (May 17, 2018), https://www.rockmnation.com/2018/5/17/17330288/missouri-basketball-2018-kj-santos-mark-smith.

Eleventh, the NCAA (Box 4) approves the player's (Box 1) petition for a waiver of the transfer penalty before the next season starts.

> The NCAA granted Smith an immediate waiver to play at Missouri on or about October 27, 2019.[166]

Twelfth, the player (1) does not complain about underlying racial discrimination to a federal or state court. Through July 21, 2020 I researched legal databases in PACER, Westlaw, Bloomberg Law, and the Champaign County Illinois Circuit Court and found no recorded lawsuit filed by Mark Smith against the University of Illinois at Urbana-Champaign, its athletic officials, coach, or other university employees.

2. *INVESTIGATING UNIVERSITY OF ILLINOIS BASKETBALL COACH OVER RACIAL HARASSMENT: TWO BLACK PLAYERS TRANSFERRED RESULTING IN LOSS OF ELIGIBILITY FOR ONE SEASON AND NO NCAA WAIVER*

An April 12, 2019 press release announced six Illinois players were departing with remaining eligibility.[167] The press release gave a vague time frame for the player allegations, stating they were received after the 2017-18 men's basketball season, but before the 2018-19 season.[168] These times mark the beginning and endpoints in Table 2, from late February, when one season ended, to October, when the next season began. The press release also obscured the time when the investigation occurred: "The review, which took nearly a month to prepare, execute, and conclude, included interviews with all *returning* scholarship men's basketball student-athletes."[169] Nonetheless, this establishes the

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[166] Phillips, *supra* note 164.

[167] The events in the timeline are based on reporting in *UIUC Division of Intercollegiate Athletics*, *supra* note 151. The press release did not reference the six players. For this information, *see* Shannon Ryan, *Brad Underwood's 2nd Roster, With 8 Newcomers, Means Another Illinois Team Requires Patience*, CHICAGO TRIB. (Oct. 11, 2018).

[168] *UIUC Division of Intercollegiate Athletics*, *supra* note 151, at 1—2.

[169] *Id.* at 1.

investigation commenced only after scholarship players returned for the 2018-2019 academic year. Notably, investigation of team members did not begin in early March when Mark Smith and his parents met with the Illinois athletic director.[170]

The report did not state how many players were included in the investigation. Table 2A depicts the investigation using the press release and other public sources. It focused on four players— the "*returning* scholarship men's basketball student-athletes"[171]— excluding six scholarship players who left Illinois with remaining eligibility. The investigation may have added returning walk-on players, including the coach's son.

[170] *Id.* at 8 ("Both of our colleagues informed us they were aware of the allegations. They told us the matter had been investigated in September, and they participated in the investigation.").

[171] *Id.*

Table 2A **Investigating Allegations Into Coach Underwood's "Verbal Abuse, Racial Harassment, and Punitive Use of Physical Activity"**				
	Included in Investigation	NCAA Waived Art. 14.5.5.1 Transfer Rule	Ended College Basketball Career	Player's Race
Scholarship Players with Remaining Eligibility Who Left Illinois After 2017—2018 (Date of Publicizing Departure)				
Mark Smith* (March 5, 2018)	**Not Likely**	**Yes**	**No**	**Black**
Te'Jon Lucas* (March 26, 2018)	**Not Likely**	**No**	**No**	**Black**
Greg Eboigbodin* (June 7, 2018)	**Not Likely**	**No**	**No**	**Black**
Leron Black (March 15, 2018)	Not Likely	N/A (Pro)	Yes	Black
Michael Finke (March 26, 2018)	Not Likely	N/A (Grad)	No	White
Matic Vesel (April 25, 2018)	Not Likely	(Left U.S.)	Yes	White
Scholarship Players with Remaining Eligibility Who Returned to Illinois After 2017—2018				
Trent Frazier	Likely	Not Apply	No	Black
Da'Monte Williams	Likely	Not Apply	No	Black
Trent Frazier	Likely	Not Apply	No	Black
Kipper Nichols	Likely	Not Apply	No	Black
Bold Font Highlights Players and Circumstances for Analysis of Section 1985(2) (clause ii) and Section 1985(3) claims in Part V				

The DIA press release failed to answer questions germane to the analysis in Section 1985(2)(ii) and Section 1985(3) Part V. These questions suggest the possibility of a conspiracy to silence coaching racism complaints.

1. Why did the school limit its investigation to returning players? Why did the press release fail to mention six scholarship players left after the 2017-2018 season?[172]

2. Why did the April 2019 press release state that "(c)laims related to racial harassment and punitive use of physical activity were *specifically discredited* (emphasis added)"[173] when the press release said only returning players were investigated? The exclusion of the transferring players from the investigation undermines the DIA's exculpatory statement.

3. The press release stated, "In addition, Whitman … communicated directly with the source of the original allegations to better understand those concerns and to build evaluation of those claims into the review process."[174] Did this communication express support for a transfer waiver in exchange for signing a confidentiality agreement?

4. The press release occurred more than two weeks after a second Black player, Te'Jon Lucas, announced he was leaving Illinois with remaining eligibility. Considering Illinois spoke to only one source in spring 2018, but two Black players with remaining eligibility separately announced transfers in March,

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[172] The six players were Mark Smith, Te'Jon Lucas, Greg Eboigbodin, Michael Finke, LeRon Black, and Matic Vesel. For the dates the players announced their intention to leave Illinois, *see* Alex Brzezinski, *Mark Smith to Transfer from Illinois*, SPORTING NEWS (Mar. 5, 2019), https://www.sportingnews.com/us/basketball/news/mark-smith-to-transfer-illinois-college-basketball/1t8tz1yjcaqxi1fdtnjw376rbo; Shannon Ryan, *Illinois Forward Leron Black Leaving to Pursue Pro Career*, CHICAGO TRIBUNE (Mar. 15, 2018), https://www.chicagotribune.com/sports/college/ct-spt-illinois-leron-black-leaving-20180315-story.html; *Illinois' Finke, Lucas decide to Transfer*, ASSOCIATED PRESS (Mar. 26, 2018), https://apnews.com/article/f4b7efc93e38421b8cc02948a6acb614; Stephen Cohn, *Matic Vesel Will Not Return to Illinois Basketball, Per Derek Piper*, THE CHAMPAIGN ROOM (Apr. 25, 2018), https://www.thechampaignroom.com/2018/4/25/17083394/matic-vesel-intends-to-transfer-illinois-fighting-illini-slovenia-basketball-big-ten-mark-smith; Jeremy Werner, *Te'Jon Lucas: 'I still love Illinois,'* ILLINI INQUIRER (Apr. 25, 2018), https://247sports.com/college/illinois/Article/TeJon-Lucas-discusses-his-transfer-from-Illinois-to-UW-Milwaukee-117676130/; Derek Piper, *Greg Eboigbodin Will Transfer from Illinois*, ILLINI INQUIRER (June 7, 2018), https://247sports.com/college/illinois/Article/Sophomore-center-Greg-Eboigbodin-will-transfer-from-Illinois-Fighting-Illini-118811247/.

[173] *Id.*

[174] *Id.*

how could the press release say "(c)laims related to racial harassment and punitive use of physical activity were *specifically discredited*"?[175]

5. Following the press release becoming public, a news interviewer asked the athletic director why the "six players who left the program last year were not interviewed as part of the Underwood investigation."[176] The athletic director "said they had all done exit interviews before graduating or leaving the university, a standard practice."[177] He added: "We had just spoken to each of those individuals and felt like we had a good pulse on their experience . . . and nothing had been brought to our attention that resonated with any of these allegations."[178] Why were standard exit interviews used as a proxy for investigation into allegations of misconduct?

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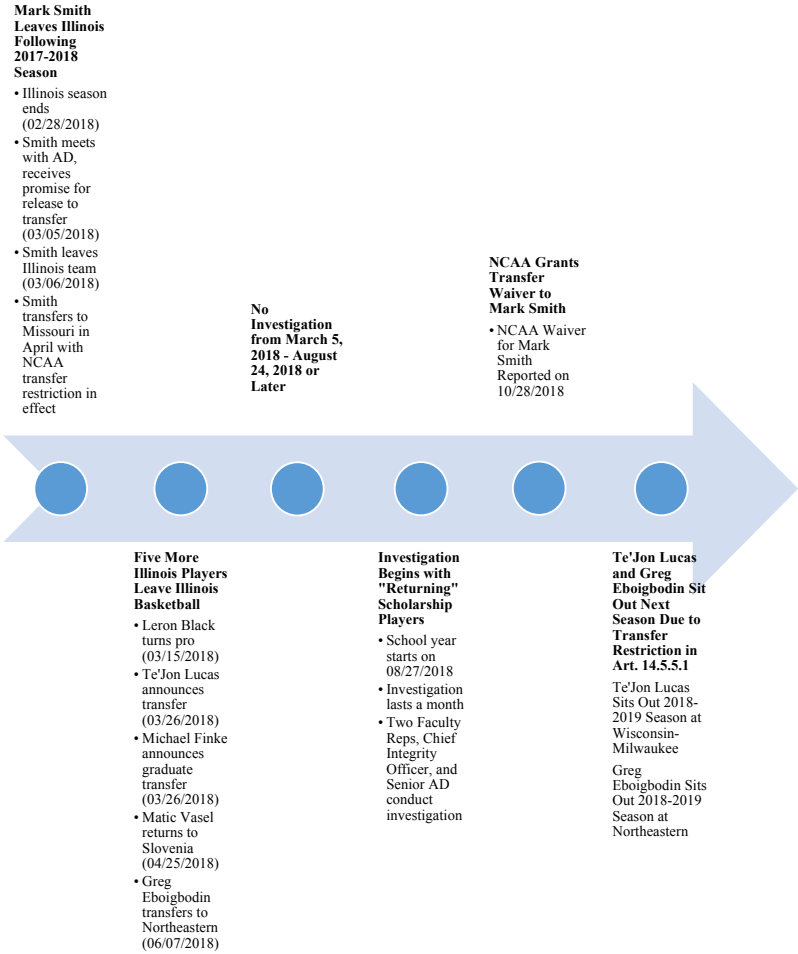
[175] Wurth, *supra* note 155.
[176] *Id.*
[177] *Id.*
[178] *Id.*

Table 2B
Timeline Investigating
Illinois Men's Basketball Coach



Part III concludes by assessing my model in Part III.A and timeline of events in Part III.B. In a Section 1985 complaint, a plaintiff must show (1) the conspiracy exists; (2) a conspiratorial purpose to deprive a person or class of persons of a civil right; (3) committing an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff.[179] The model in Table 1A is potentially helpful to plaintiffs in the first and third elements because it depicts unusual communications between a player and an athletic director, and the NCAA and the school where the athlete transfers.

Due to incomplete information, my model is weaker for the second and fourth elements. A player would have no injury if his only intention was to transfer without contemplating legal action and the transfer was granted with no conditions. That scenario is possible in the Illinois case. Then, no evidence of a conspiratorial purpose would exist. Also, if the player was free to comment on allegations his coach engaged in racial harassment, or free to pursue legal action, these conditions would significantly weaken a claim the other transferring Black players were injured by a cover-up. These conditions would indicate that the complaining player was not silenced.

IV. LEGAL ANALYSIS OF A RACIAL HARASSMENT COMPLAINT AGAINST A COACH

The analysis in Part III began with an abstract model and added publicly reported facts matching the model's elements with varying degrees of closeness. In Part IV, the analysis applies Section 1985(2)(ii) to the player who received a transfer waiver, and Section 1985(3) to two Black players who transferred close in time without a waiver. This demonstrates the players could state claims under Section 1985 at least to survive a motion to dismiss.

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[179] The first clause in Section 1985(3) pertains to overt actions of intimidation by the conspirators, including "to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court," and related forms of obstructing a witness or party involved in a federal court proceeding. *See* 42 U.S.C. § 1985(2)—(3). Smith's waiver resulted between Illinois and Missouri, with no evidence of force, intimidation, or threat by anyone at these schools.

A. A PLAUSIBLE SECTION 1985(2) (CLAUSE II) CONSPIRACY

The analysis proceeds on the possibility Illinois had a confidentiality agreement with a transferring player. This inference comes from the athletic director's published interview, where he stated: "I had a chance to work with Missouri on the substance of the waiver for Mark, and I felt comfortable with the contents of that waiver."[180] This quote indicates a negotiation over formal agreement's substantive terms. Because the University of Missouri worked on the waiver, it could mean the terms applied to Smith after his departure from Illinois and during his enrollment at his new school. The analysis focuses on Section 1985(2)(ii) because no background facts suggest Smith's waiver implicated the more coercive terms in clause i.[181] Clause ii, in contrast, plausibly fits Smith's circumstances. The analysis below tracks the complaint's requirements under Section 1985(2).

The Requirement of a "Conspiracy" Between "Two or More Persons": For clause ii, Section 1985(2) requires proof of a conspiracy between two or more persons. A plaintiff must present evidence of overt action to further the conspiracy.[182] This element could relate to the Illinois athletic director and officials at the NCAA. A news report stated "Smith received a *waiver from the NCAA* to play at Missouri this year, *which Whitman signed off on* (emphasis added)."[183] "Signed off on" plausibly refers to an agreement between the NCAA and athletic director.

The Conspiracy's Purpose Must be to Impede, Hinder, Obstruct, or Defeat, in any Matter, the Due Course of Justice. During an interview, the Illinois athletic director suggested a possible connection between his discussions with the basketball

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[180] Wurth, *supra* note 155.

[181] The first clause in Section 1985(3) pertains to overt actions of intimidation by the conspirators, including "to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court," and related forms of obstructing a witness or party involved in a federal court proceeding. *See* 42 U.S.C. § 1985(2)—(3). Smith's waiver resulted from between Illinois and Missouri, with no evidence of force, intimidation, or threat by anyone at these schools.

[182] State officers are "persons" liable for Section 1985(2) violations. *See*, *e.g.*, Kush, *supra* note 11, where a coach, assistant coach, and athletic director were sued along with their school's board of regents.

[183] Wurth, *supra* note 155.

coach and Smith's waiver— an interview where he admitted the coach's behavior required corrective intervention.[184] This is potentially important to the Section 1985(2)(ii) claim because the athletic director admitted the coach's interactions with players created a problem. He did not deny the coach interacted improperly with his players.

The Supreme Court has not ruled on the meaning in Section 1985(2)(ii) of "impeding, hindering, obstructing, or defeating"[185] justice. My analysis focuses on the Act's use of "defeating," the least aggressive of its transitive verbs. This word has several definitions, including "to balk or defeat in an endeavor."[186] I focus on "defeating" because the interaction by the Illinois athletic director, and Smith and his parents, appeared to be more mutual and cooperative compared to the *Kush* case involving intimidation and obstruction.

Section 1985(2) Requires the Alleged Conspirators Have Discriminatory Intent in Depriving Any Citizen of the Equal Protection of the Laws. If Smith were subjected to racial harassment by his coach at Illinois, a state university, Smith would likely have an equal protection claim. Smith could rely on *Doe by Doe v. City of Belleville, Ill*.[187] The Seventh Circuit reversed a trial court order dismissing an equal protection claim by two sixteen year-old boys who were subjected to pervasive homophobic taunts while working summer jobs for an Illinois municipality.[188] In its opinion, the Court "also [found] the record adequate to support the finding of discriminatory intent that their Equal Protection claim requires."[189] The boys' supervisor, and former Marine coworker, taunted the teenagers with homophobic insinuations.[190] Although

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[184] Wurth, *supra* note 155. ("However, Whitman also said he had spoken to Underwood before the allegations surfaced about ways to improve his 'use of language' and his interactions with players.").

[185] Kush, *supra* note 11 (quoting the Ku Klux Klan Act is its entirety).

[186] MERRIAM-WEBSTER ONLINE DICTIONARY (Definition 1A).

[187] 119 F.3d 563 (7th Cir. 1997).

[188] *Id*. at 566.

[189] *Id*. at 598.

[190] *Id*. at 567 ("Dawe, a former Marine of imposing stature, constantly referred to H. as 'queer' and 'fag' and urged H. to 'go back to San Francisco with the rest of the queers.'"). The court added: "Like Dawe, Stan Goodwin, the plaintiffs' supervisor, referred to H. as a 'queer' or 'fag' because H. wore an earring. Once, in reference to Dawe's

the teenagers sued as employees under a sex discrimination theory, the equal protection ruling in *Doe by Doe* could apply to Smith, a nonemployee student athlete at a state university, if he claimed invidious racial harassment by his coach.

Smith could also make an equal protection claim based on his status as a minor. His birthdate is August 16, 1999.[191] Smith played during the 2017-2018 season.[192] Smith could have enrolled at Illinois in summer school as a seventeen year-old and participated in basketball team workouts.[193] The University of Illinois at Urbana-Champaign maintains a policy intended to protect minors from abuse and neglect by employees.[194] If Smith

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repeated announcement that he planned to take H. 'out to the woods' for sexual purposes, Goodwin asked Dawe whether H. was 'tight or loose,' 'would he scream or what?'" *Compare* Coach Underwood's allegedly repeated use of "pussy" and "fucking pussy" in *UIUC Division of Intercollegiate Athletics*, *supra* note 151. The derogatory or vulgar use of "pussy" means "a weak, cowardly, or effeminate man." *See* DICTIONARY at https://www.google.com/search?rlz=1C1EKKP_enUS774US775&sxsrf=ALeKk00uKY9FM7mj230EmzfwE30s7hjjRg:1605643158093&q=Dictionary&stick=H4sIAAAAAAAAAONQesSoyi3w8sc9YSmZSWtOXmMU4-LzL0jNc8lMLsnMz0ssqrRiUWJKzeNZxMqFEAMA7_QXqzcAAAA&zx=1605643518023#dobs=pussy.

[191] University of Missouri 2020-21 Men's Basketball Roster, https://mutigers.com/sports/mens-basketball/roster.

[192] *2017-18 Illinois Fighting Illini Roster and Stats*, SPORTS REFERENCE COLLEGE BASKETBALL, https://www.sports-reference.com/cbb/schools/illinois/2018.html (last visited Nov. 20, 2020).

[193] *See* NCAA COUNTABLE ATHLETICALLY RELATED ACTIVITIES, https://www.ncaa.org/sites/default/files/20-Hour-Rule-Document.pdf

[194] UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN, THE PROTECTION OF MINORS (2016), https://www.hr.uillinois.edu/cms/One.aspx?portalId=4292&pageId=5689.

I. Policy Statement

The University of Illinois recognizes a fundamental obligation to protect minor children in its care; the youngest and potentially most vulnerable members of its community. Accordingly, the University has adopted certain safeguards intended to better protect minor children when they are on University premises participating in University programs and activities designed to include minors, or when they are in the care of University staff. The University and its employees shall comply with applicable federal and state laws to provide a safe environment for children to learn, discover, and achieve their full potential.

were subjected as a minor to a coach's racial harassment, he could claim the school's policy was not applied to him equally as a basketball player compared to nonplayer minors who are supervised in campus activities.

Depending on the racial harassment's severity, Smith could also file a claim for intentional infliction of emotional distress. In *Irving v. J.L. Marsh, Inc*., a University of Illinois student who returned merchandise to a commercial music store was presented with a receipt for signature on which the clerk wrote, "'Arrogant Nigger refused exchange—says he doesn't like products.'" [195] In 1977, an Illinois appellate court dismissed Irving's claims against the store, including one for intentional infliction of severe emotional distress.[196] Since then, some Illinois courts have declined to dismiss complaints alleging intentional infliction of emotional distress where a defendant allegedly used similar racial slurs.[197]

These precedents address the shortcoming identified in Part IV. *Doe by Doe* shows how bigoted slurs directed at teenage subordinates with a supervisor's knowledge can create a cognizable legal injury. *Irving* and its inconsistent progeny illustrate Illinois courts have not settled on a consistent approach to treating racial slurs as a cause of emotional distress.

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[195] 360 N.E.2d 983 (1977).

[196] *Id*. at 984.

[197] Illinois courts have allowed employment discrimination complaints that allege intentional infliction of emotional distress to proceed where an employer's agents have used racial epithets. While these cases are not directly applicable to Smith because he was not an employee of UIUC, they undermine the ruling in Irving, and would afford Smith an opportunity to allege this tort. *See* James F. Jackson v. Local 705, Intern. Broth. of Teamsters, AFL-CIO, No. 95 C 7510, 2002 WL 460841 (N.D.Ill. Mar. 26, 2002) (denying summary judgment to defendant-union on plaintiff's emotional distress claim which alleged that he was repeatedly called a "nigger" by union officials, and subjected to other racially offensive expressions); and Rodgers v. W.-S. Life Ins. Co., 12 F.3d 668, 675 (7th Cir.1993) ("Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment,' than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates.")

B. A PLAUSIBLE SECTION 1985(3) CONSPIRACY

Two other Black basketball players, Te'Jon Lucas and Greg Eboigbodin, left Illinois with remaining eligibility after racial harassment complaints had been made, but before an investigation was completed. Unlike Mark Smith, Lucas and Eboigbodin did not receive waivers.[198] When Lucas transferred to the University of Wisconsin-Milwaukee and Eboigbodin transferred to Northeastern University, both players were required to sit out for one year due to NCAA's transfer rules in Art. 14.5.5.1.[199] No explanation exists for why Lucas and Eboigbodin were treated differently than Smith.

Section 1985(3) can be applied to their circumstances.[200] This law has disjunctive clauses. I will examine the italicized Section 1985(3) portions:

> *If two or more persons in any State* or Territory *conspire* or go in disguise on the highway or on the premises of another, *for the purpose of depriving*, either directly or *indirectly*, *any* person or *class of persons* of the equal protection of the laws, or *of equal privileges* and immunities *under the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators*.[201]

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[198] *See* Werner, *supra* note 177 (Lucas transfer), and Piper, *supra* note 177 (Eboigbodin transfer).

[199] NAT'L COLLEGIATE ATHLETIC ASS'N, 2020-21 NCAA DIVISION I MANUAL, *supra* note 3.

[200] My analysis uses the a common burden of proof, where a claim under Section 1985(3) must show: (1) the existence of a conspiracy; (2) a conspiratorial purpose to deprive a person or class of persons, directly or indirectly, of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) the commission of an overt act in furtherance of the conspiracy; and (4) either that the plaintiff suffered an injury to her person or property, or depriving a constitutionally protected right or privilege. *See* Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996).

[201] 42 U.S.C. § 1985(3).

1. *Existence of a conspiracy*: Section 1985(3) covers private persons as well as state actors.[202] Officials at Illinois, Missouri, and the NCAA reportedly discussed substantive terms for Smith's waiver.[203] Thus, state university officials and the NCAA's actions are covered by "two or more persons" in this law.[204] Section 1985(3) does not require a conspiracy—a collusive agreement is sufficient to state a claim under the law.[205]

The Illinois athletic director and NCAA officials may have conspired to delay Smith's transfer waiver to protect the coach from a more searching inquiry. The silence may have extended into Smith's time at Missouri, and to other Black players who left Illinois before the investigation. The NCAA did not grant Smith's waiver until October.[206] Lucas and Eboigbodin left Illinois before formal investigation into the coaches' racism

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[202] *See* Vikram David Amar, *The NCAA as Regulator, Litigant, and State Actor*, 52 B.C. L. REV. 415 (2011).

[203] *Id.*

[204] Thomas v. Roach, 165 F.3d 137, 146 (2d Cir. 1999).

[205] *See* Marlowe, *supra* note 130. Marlowe filed a Title VII complaint of religious discrimination, claiming that GM and the UAW restricted his income and harassed him. Later, he refiled his complaint, after he claimed that he learned of a secret conspiracy by the defendants to harass him. Denying the motion to dismiss his Section 1985(3) complaint, the Sixth Circuit reasoned:

> While the amended complaint does not use the word 'conspire' or 'conspiracy' it charges wrongful collusion and secret agreements between the defendants. Collusion is defined in Webster's Third International Dictionary Unabridged, 1971 Ed., as 'a secret agreement or secret cooperation for a fraudulent or deceitful purpose.' An example given is 'a secret agreement between two or more persons to defraud a person his rights often by the forms of law.' We believe that the language of the amended complaint meets the requirement that a conspiracy be charged. The complaint also satisfies the other requirements of § 1985(3) in that it charges that the collusion of the defendants was for the purpose of depriving plaintiff of equal employment opportunities, that the defendants acted in furtherance of their agreement and the result was injury to the plaintiff.

In my analysis of Smith's transfer, I noted that the Illinois athletic director publicly acknowledged that he spoke to Missouri about this player's waiver. Wurth, *supra* note 155. The waiver could have been intended to silence Smith in discussing coaching racism at Illinois even during his time at Missouri.

[206] Phillips, *supra* note 164.

began. The possible Illinois-NCAA conspiracy could silence players' coaching racism complaints. Under Section 1985(2)(ii), a plaintiff may allege an effect "indirectly," a seemingly low threshold for stating a claim.[207] In other words, if there existed a conspiracy to silence Smith and to delay an investigation of team members until the next school year, Lucas and Eboigbodin would have been indirectly injured by not having information about Smith's unique treatment, nor being included in the investigation.

2. *Conspiratorial Purpose to Deprive a Class of Persons of Equal Rights or Privileges*. The putative conspiracy may have been to cover-up adverse publicity and strict accountability for coaching racism. Therefore, the Illinois athletic director may have delayed the investigation until players returned after summer break. Lucas and Eboigbodin could allege their transfers were responses to the athletic department's inaction in investigating the coach for racial harassment.

In other circumstances, university students who leave school after being subjects of a tainted investigation have been ruled a class for stating a complaint under Section 1985(3). In *Brown v. Villanova University*,[208] some students advocated for a greater voice in school affairs.[209] Some were suspended and one was expelled for organizing a publicity event during a weekend when newly admitted applicants visited their school.[210] Rowdy Villanova students disrupted the student rights publicity event by organizing a party.[211] The scene devolved into a heated conflict, and campus police were called to restore order.[212] Villanova University and its president blamed the students' rights group for this unruly event.[213] After proposing a hasty hearing process, Villanova suspended or expelled these students in April.[214]

The court found the university president was personally hostile to the students' rights group.[215] Because it was late in the academic year, the disciplined students had difficulty being

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[207] 42 U.S. Code § 1985(3) (quoting the adverb in the law).

[208] 378 F.Supp. 342 (E.D. Pa. 1974) (students who had exercised first amendment rights held to be sufficient class).

[209] *Id.* at 343.

[210] *Id.*

[211] *Id.*

[212] *Id.* at 343—344.

[213] *Id.* at 344.

[214] *Id.*

[215] *Id.*

admitted to other schools.[216] The lead plaintiff was expelled after the annual admissions cycle ended, thereby delaying his transfer for the following semester.[217] The court found the plaintiffs experienced delay and disruption to their education.[218]

These fact-findings are like the hardships experienced by Lucas and Eboigbodin. Like the Villanova students, their educations were disrupted. Lucas and Eboigbodin were likely harmed looking for a new team in the spring, an off-cycle time for schools to admit students, and an unconventional time for basketball programs to have available scholarships.[219] Moreover, the NCAA's transfer penalty of sitting out the next year was evidence of an injury.

Brown made legal findings in favor of the plaintiffs. Their complaint was "properly based on 42 U.S.C. § 1985, in that there is a substantial probability that plaintiffs will show at trial that there was a conspiracy among some of the defendants to deny plaintiffs rights which are guaranteed them under the constitution . . . "[220] The court also found the plaintiffs "will suffer irreparable injury unless the imposition of their penalties is enjoined."[221]

3. *Overt Act in Furtherance of the Conspiracy*. The athletic director said the six players who left Illinois after the 2017-2018 basketball season, "had all done exit interviews before graduating or leaving the university, *a standard practice* (emphasis added)."[222] The transferring players could argue that using standard exit interviews when people allege racism is an overt act in furtherance of a conspiracy to silence racism complaints.

In *Brown*, the university initially set ten-minute hearings for each student who was charged with violating Villanova's rules.[223] The process was amended after students' counsel

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[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] NAT'L COLLEGIATE ATHLETIC ASS'N, 2020-21 NCAA DIVISION I MANUAL, *supra* note 3, at art. 13.17.2 (outlining a basketball recruiting period that is concentrated in the months before these players transferred).

[220] *Id.* at 345.

[221] *Id.*

[222] Wurth, *supra* note 155.

[223] Brown, *supra* note 208, at 344.

complained.[224] Nonetheless, the court found Dr. Duffy, the Vice-President of Student Affairs, initially testified his decisions were based entirely on the hearing panel's findings; however, on cross examination,[225] he admitted he was involved in making certain decisions for the Villanova administration and based his decisions on discussions outside the hearings with other university officials.[226] *Brown* shows a school's flawed internal investigation can be an "overt act."

4. *Injury to Person or Property, or a Depriving a Constitutionally Protected Right or Privilege*: Lucas and Eboigbodin would need to show they transferred due to the coach's racial harassment. There has been no public reporting of their motivations to transfer. However, they could rely on cases where players who have lost eligibility due to NCAA policies have prevailed in court.[227]

Lucas and Eboigbodin could also claim their standard exit interviews denied them equal protection compared to Smith's face-to-face meeting with the athletic director. Players have won constitutional cases against the NCAA when they demonstrated potential for an economic injury.[228] One federal court has concluded the "opportunity to participate in intercollegiate athletics is of substantial economic value to many students."[229]

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[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *See* Phillip v. Nat'l Collegiate Athletic Ass'n, 960 F. Supp. 552, 557—58 (D. Conn. 1997), where the NCAA counted a student's math sequence as one-third rather than one-half of a credit hour ("Darren Phillip testified at the preliminary injunction hearing, and his testimony was persuasive . . . He feels, perhaps justifiably so, that he has done all one could be expected to do to meet the eligibility requirements."). The Second Circuit also appeared to sympathize with the student by reversing the district court but allowing four months for a rehearing on the matter. *See* Phillip v. Fairfield Univ., 118 F.3d 131, 135 (2d Cir. 1997). *See also* Ganden v. Nat'l Collegiate Athletic Ass'n, No. 96 C 6953,1996 WL 680000 (N.D. Ill. Nov. 21, 1996) (granting the swimmer's motion for a preliminary injunction).

[228] *E.g.*, Nat'l Collegiate Athletics Ass'n v. Yeo, 114 S.W.3d 584 (Tex. App. 2003), *rev'd*, 171 S.W.3d 863 (Tex. 2005); Hill v. Nat'l Collegiate Athletics Ass'n, 1 Cal. App. 4th 1398 (1990), *rev'd,* 865 P.2d 633 (1994).

[229] Behagen v. Intercollegiate Conf. of Fac. Representatives, 346 F.Supp. 602, 604 (D. Minn. 1972).

Courts recognize a "chance to display . . . athletic prowess in college stadiums and arenas throughout the country is worth more in economic terms than the chance to get a college education."[230] College players have also successfully challenged NCAA rules and procedures.[231] The NCAA's strict rules limiting student compensation were not rational under the Equal Protection Clause.[232]

To conclude, Part III applies Section 1985(2)(ii) to the transfer scenario involving a player who received an NCAA waiver, and Section 1985(3) to two transferring players who sat out the following season with no waiver. These two sets of claims potentially differ because a confidentiality and nondisclosure agreement may have prevented the first player from pursuing justice in exposing coaching racism, while the transfer penalty for other transferring players may have denied them equal treatment. All three players could allege facts and cite precedents to state claims that could survive motions to dismiss.

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[230] *Id.*

[231] *Id.*

[232] Wiley v. Nat'l Collegiate Athletic Ass'n, 612 F.2d 473, 478 (10th Cir. 1979) (reporting on an unpublished ruling). This occurred when an impoverished student was granted a $2,621 scholarship for track, and a $1,400 federal grant, which together pushed his compensation above the NCAA's limit. The appeals court ruled that his graduation did not moot the case; but there was no substantial federal question. *Id*. at 474—76. The NCAA's student age limits have created special problems for aliens who competed in another country before enrolling in a U.S. school. A trial court ruled that the NCAA's eligibility rules, as applied to foreign students, violated Equal Protection. Howard Univ. v. Nat'l Collegiate Athletic Ass'n, 510 F.2d 213 (D.C. Cir. 1975); *see also* Buckton v. Nat'l Collegiate Athletic Ass'n, 366 F. Supp. 1152, 1160 (D. Mass. 1973) (NCAA's classification system irrationally discriminates against Canadian hockey players who attend U.S. schools as resident aliens). An appeals court also ruled that the NCAA's classification was arbitrary. Howard U. v. Nat'l Collegiate Athletic Ass'n, 510 F.2d 213, 222 (D.C. Cir. 1975).

CONCLUSION: APPLYING THEORY AND LEGISLATIVE HISTORY TO CASE ANALYSES

In Part III, I developed a theory of how schools and the NCAA could conspire to silence players' coaching racism complaints. In Part IV, I applied the Illinois case study to two codified sections of the Ku Klux Klan Act of 1871. Both sections focused on scenarios specific to one school's handling of complaints about a coach's alleged racial harassment. In this concluding section, I relate these applied analyses to my theoretical discussion in Part I and analysis of legislative history of the Ku Klux Klan Act in Part II.

As part of the conclusion, I also incorporate more recent cases of Black athletes who transferred after allegations against their coaches surfaced relating to racial harassment. Additional discussion shows the Illinois case study likely reveals a generalized pattern of exploiting NCAA transfer rules to cover-up coaching racism.

A. RELATING THEORETICAL PERSPECTIVES TO NCAA COACHING RACISM

Confidentiality Agreements: The public information timeline in Part III suggests Mark Smith signed a confidentiality agreement with the University of Illinois at Urbana-Champaign as a condition for being released from his scholarship and receiving a transfer waiver. The Illinois athletic director's published news interview also referenced two other actors in the context of his "signing off" a waiver: The NCAA and University of Missouri. This is circumstantial evidence consistent with a silencing agreement related to coaching racism.

This situation is not unique. In the Big Ten alone, three other players have transferred due to coaching racism complaints in the short time that has elapsed since Smith's transfer. Rasir Bolton's and DJ Johnson's following accounts explicitly suggest efforts by their former schools to ignore or minimize complaints about coaching racism.

- A Wisconsin basketball player, Kobe King, transferred due to coaching racism.[233] King announced his transfer decision mid-season, on January 29, 2020.[234] News reporting of his circumstances do not indicate if he made prior complaints of a problem with racist coaching; however, Wisconsin acted promptly on his concerns in 2020.

- Rasir Bolton, another basketball player, explained: "A 'noose' around my neck is why I left Penn State,"[235] referring to a racist slur directed at him by Head Coach Patrick Chambers.[236] Bolton did not reveal his reason for transferring in 2019. However, in his July 6, 2020 tweet, Bolton remarked:

> There is serious need for change in the way players are protected and helped across the country when faced with these situations. Surface level resources are not good enough. In most cases it is the Coach who is protected, while the player is left to deal with it or leave.[237]

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[233] Jack Baer, *Report: Wisconsin Investigating Allegation That Staffer Used Racial Epithet in Front of Transferring Player*, YAHOO SPORTS (Feb 5, 2020), https://sports.yahoo.com/wisconsin-basketball-kobe-king-transfer-racial-epithet-045006371.html (reporting that Kobe King could be granted immediate eligibility from the NCAA). King, who informed Wisconsin athletic officials about the incident, transferred to Nebraska but withdrew in June. *See* David Cobb, *After Transferring from Wisconsin to Nebraska, Kobe King Won't Be Playing for Cornhuskers After All*, CBS SPORTS (June 19, 2020), https://www.cbssports.com/college-basketball/news/after-transferring-from-wisconsin-to-nebraska-kobe-king-wont-be-playing-for-cornhuskers-after-all/.

[234] Ryan Young, *Wisconsin Coach Greg Gard 'Disappointed' After Kobe King Announces Plans to Transfer*, YAHOO SPORTS (Jan 29, 2020), https://sports.yahoo.com/wisconsin-badgers-coach-greg-gard-disappointed-kobe-king-transfer-040655818.html.

[235] Mike Rosenstein, *Penn State's Pat Chambers Apologizes for Racially-Charged 'Noose' Comment to Rasir Bolton*, NJ.COM (July 7, 2020), https://www.nj.com/rutgersbasketball/2020/07/penn-states-pat-chambers-apologizes-for-racially-charged-noose-comment-to-rasir-bolton.html (reporting Rasir Bolton's reaction to Penn State's disappointing response to his complaint about his coach's racist comment to him).

[236] *Id*.

[237] *Id*.

> The NCAA granted Bolton eligibility to play at Iowa State without enforcing its requirement to sit out the next season.[238]

- D.J. Johnson, a football player at Iowa, announced his decision to transfer to Purdue on June 12, 2020.[239] Johnson joined numerous former Iowa players who posted online their concerns about the football program's culture of racism and bullying.[240] As of August 2020, Johnson's petition to the NCAA for a transfer waiver was pending.[241]

Table 3 shows a pattern of player transfers directly related to coaching racism. The table portrays the NCAA's intermediating role in facilitating players' movement from one school to another by granting waivers, possibly to suppress legal action. The Mark Smith and Rasir Bolton transfers are similar because the NCAA granted their waivers near the start of the next basketball season. This emerging pattern suggests cooperation by, or even collusion, between schools and the NCAA in a mutual effort to squelch publicity about coaching racism.

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[238] Bolton entered the NCAA transfer portal on April 26, 2019. Mikey Mandarino, *Rasir Bolton Granted Immediate Eligibility To Play For Iowa State*, ONWARD STATE (Sep 25, 2019), https://onwardstate.com/2019/09/25/rasir-bolton-granted-immediate-eligibility-to-play-for-iowa-state/. The NCAA granted Bolton's waiver request around September 24, 2019. *See* Travis Hines, *Iowa State Men's Basketball: Rasir Bolton Declared Immediately Eligible*, AMES TRIB. (Sept. 24, 2019 4:35 PM), https://www.amestrib.com/sports/20190924/iowa-state-mens-basketball-rasir-bolton-declared-immediately-eligible.

[239] *Former Iowa DB D.J. Johnson transferring to Purdue*, THE GAZETTE (June 20, 2020), https://www.thegazette.com/subject/sports/hawkeyes/iowa-football/dj-johnson-iowa-transfer-purdue-20200612.

[240] *Id*.

[241] Tom Dienhart, *Brohm OK With Playing Spring and Fall of 2021, If Need Be*, GOLDANDBLACK (Aug. 9, 2020), https://purdue.rivals.com/news/brohm-ok-with-playing-spring-and-fall-of-2021-if-need-be.

Table 3
Big Ten Player Transfers Related to Coaching Racism

	Leaving School Announcement	**Player Publicizes Complaint**	**NCAA Ruling on Waiver**	**NCAA Waiver Date**
Mark Smith Illinois to Missouri	March 5, 2018	No	Yes	October 27, 2018
Rasir Bolton Penn State to Iowa State	April 26, 2019	Yes (Delayed) July 6, 2020	Yes	September 27, 2019
Kobe King Wisconsin to Nebraska	January 29, 2020	Yes January 29, 2020	Pending	No Ruling
DJ Johnson Iowa to Purdue	May 20, 2020	Yes May 20, 2020	Pending	No Ruling

Table 4 **NCAA Division I Football and Basketball: Coaches and Players by Race (2019)**[242]			
Coaches		***Players***	
FBS Football Head Coach (Black)	9 (13.8%)	FBS Football Student-Athletes (Black)	3,671 (46.1%)
FBS Football Head Coach (Other)	4 (6.1%)	FBS Football Student-Athletes (Other)	1,355 (17.0%)
FBS Football Head Coach (White)	52 (80.0%)	FBS Football Student-Athletes (White)	2,935 (36.9%)
Sub-Total Football	**65**	***Sub-Total Football***	**7,961**
Men's Basketball Head Coach (Black)	10 (14.9%)	Men's Basketball Student-Athlete (Black)	528 (51.4%)
Men's Basketball Head Coach (Other)	3 (4.5%)	Men's Basketball Student-Athlete (Other)	237 (23.0%)
Men's Basketball Head Coach (White)	54 (80.6%)	Men's Basketball Student-Athlete (White)	263 (25.6%)
Sub-Total Men's Basketball	**67**	***Sub-Total Men's Basketball***	**1028**
Women's Basketball Head Coach (Black Female)	8 (18.6%)	Women's Basketball Student-Athlete (Black)	436 (48.4%)
Women's Basketball Head Coach (Other Female)	1 (2.3%)	Women's Basketball Student-Athlete (Other)	247 (27.4%)

[242] *See* NCAA, *Diversity Research: NCAA Race and Gender Demographics Database*, http://www.ncaa.org/about/resources/research/diversity-research.

Women's Basketball Head Coach (White Female)	34 (79.1%)	Women's Basketball Student-Athlete (White)	218 (24.2%)
Sub-Total Women's Basketball Female	**43**	***Sub-Total Women's Basketball***	**901**
Women's Basketball Head Coach (Black Male)	2 (9%)		
Women's Basketball Head Coach (Other Male)	1 (4.6%)		
Women's Basketball Head Coach (White Male)	19 (86.4%)		
Sub-Total Women's Basketball Male	**22**		

For men's sports, in Division I FBS football 80% of head coaches were White and only 13.8% were Black; however, 46.1% of players were Black and 17% were Other Non-White. In Division I basketball, 80.6% of head coaches were White. However, in the player population, 51.4% of individuals were Black and 23% were Other Non-White.

In women's Division I basketball, among female head coaches 79.1% were White and only 18.6% were Black. There were fewer male head coaches. In this group, 86.4% were White and 9% were Black. As in men's sports, most women players were Black (48.4%) or Other Non-White (27.4%).

Racial harassment in collegiate athletics reinforces the power imbalance, already cleaved along racial lines in NCAA sports, between White coaches and players of color. When schools and the NCAA fail to investigate coaching racism vigorously and

independently, and instead deal with this serious problem by relocating players through the NCAA's waiver process, they signal white racist coaches are immune from serious consequences while Black players pay for these injurious incidents by uprooting their education and sitting out a season under NCAA rules.

These demographic inequalities translate into measurable economic disparities cutting along racial lines. A recent economics study concluded "(t)he athletes generating the rents are more likely to be black and come from lower-income neighborhoods, and the rents are shared with a set of athletes and coaches that are more likely to be white."[243] This economic reality may help explain why athletic directors and other officials either benignly dismiss coaching racism, or worse, preserve a racially imbalanced power structure due to their own biases. Exploiting the NCAA transfer process to hide coaching racism may reflect athletic directors' discomfort with upsetting the financial status quo at their schools.

Institutional Racism: Data in Table 4 and my Section 1985 case analyses point to a common contextual agent: institutional racism. Section 1985(3) applies not only to racial groups experiencing animus, but also to a class. To reiterate, the jurisprudence around "class of persons" in the Act is muddled.[244] However, statistics provide empirical grounding for this statutory term in coaching racism context. The fact 51.4% of NCAA Division I men's basketball players in 2019 were Black underscores how three Black players who transferred from Illinois in 2018, and three other Black players who transferred more recently from Big Ten schools, compose an identifiable class able to state Section 1985 claims for relief.

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[243] Craig Garthwaite et al., *Who Profits from Amateurism? Rent Sharing in Modern College Sports,* NAT'L BUREAU OF ECON. RESEARCH (Working Paper 27734, Aug. 2020), http://www.nber.org/papers/w27734.

[244] Trautz v. Weisman, 819 F.Supp. 282, 291 (S.D.N.Y. 1993).

B. RELATING THE LEGISLATIVE HISTORY OF THE KU KLUX KLAN ACT OF 1871 TO COACHING RACISM

The Supreme Court has repeatedly turned to the Act's legislative history. It has examined this record to decipher the act's perplexing structure and to unravel opaque terms.[245] In addition, attorneys have been resourceful in adapting the Act to circumstances far removed from torch-bearing, hooded Klansmen, including a football player's case against his coach.[246] The hypothetical complaints I pose for Section 1985(2)(ii) and Section 1985(3) can be supported by legislative history showing Congress intended to redress conspiracies to interfere with educating Black people.

This legislative history relates to NCAA coaching racism. First, lawmakers understood the Klan's school-based racial hatred had young victims.[247] They seemed to understand racial terror committed against young people in a school was part of the Klan's campaign against Blacks who sought to vote or participate in court proceedings. Second, Klan attacks on teachers and schools widened the spatial separation of Whites and Blacks to preserve white superiority.[248] A terror campaign aimed at Black schools and their teachers was intended to force Blacks to accept a meager life at society's margins. Finally, in terror accounts of Blacks schools lawmakers repeatedly mentioned the Klan using "nigger,"[249] perhaps to show the slur was bayoneted to the Klan's guns, torches, and nooses. That term was more than vulgarity: It was a cudgel, a whip, a verbal rope to drive Blacks into submission.

Racial slurs used by NCAA coaches in gyms and locker rooms are not social faux pas. These painful barbs reinforce the racial hierarchy pervading NCAA athletics. The NCAA transfer rule in Art. 14.5.5.1. maintains a racialized culture of player submission to their coach's oppressive language. This Article demonstrates Section 1985 can be an important new tool to address systemic racism by allowing for personal damages against

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[245] Kush, *supra* note 11, at 720 ("The legislative history supports this conclusion.").

[246] Byrd, *supra* note 126. *See also* Kush, *supra* notes 134—139.

[247] *See supra* notes 92—93.

[248] *See, e.g., supra* note 94.

[249] *Supra* notes 98—99, 106—107, 109.

athletic directors, other school officials, and the NCAA when they conspire to deprive college athletes their civil rights.[250]

[250] Griffin, *supra* note 127.

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FAIR OR FOUL PLAY?: A PROPOSAL TO LIMIT THE SCOPE OF INDEMNITY CLAUSES BETWEEN SPORTS ORGANIZATIONS AND CONCESSIONAIRES FOR ALCOHOL-FUELED THIRD PARTY INJURIES

MADISON STARK[∞]

ABSTRACT

Enjoying an ice-cold beer and attending a live sporting event go hand-in-hand. To cater to all fans, sports organizations often contract with third-party concessionaires to provide food and beverage services at their venues. Sports organizations understand alcohol distribution and consumption is integral to many fans' gameday experiences. Therefore, sports organizations employ concessionaires to sell alcohol. Alcohol and sports, however, have proven to be a volatile mix. Overserved and intoxicated fans have injured other fans and third parties at sporting venues. Consequently, an injured party may seek damages from the concessionaire who overserved the injurer, as well as the sports organization responsible for the entire event. The contracts between concessionaires and sports organizations, however, regularly contain indemnification clauses exculpating the sports organization from liability. Indemnification clauses leave concessionaires fully exposed for an incident to which the sports organization likely contributed. Sports organizations should not be allowed to contract away their liability, as the result proves unjust. Instead of adhering strictly to an indemnification clause's terms as between these parties, courts should distribute fault equitably. This Note proposes courts apply the partial indemnification doctrine in the sports organization and concessionaire contracting context. Further, state legislatures should work to codify the doctrine's principles to ensure the law's uniform application in alcohol-related injury scenarios. Partial

[∞] J.D., Class of 2021, Sandra Day O'Connor College of Law at Arizona State University.

indemnification provides a just resolution by compensating injured victims, and incentivizing concessionaires and sports organizations to closely monitor alcohol consumption at live sporting events.

INTRODUCTION

Brian Stow has become a well-known San Francisco Giants fan over the past decade, but not just for his love of baseball. On Major League Baseball (MLB) Opening Day in 2011, Stow was nearly beaten to death by two Los Angeles Dodgers fans in the Dodgers Stadium parking lot.[1] Excessive alcohol consumption at the game is one factor alleged to have caused the attack.[2]

In 1999, a New York Giants fan left the stadium with a blood-alcohol content level nearly triple the legal limit. The fan crashed into the Verni family, leaving their two-year-old daughter paralyzed.[3] A $110 million judgment was entered against Aramark, the New York Giant's concessionaire responsible for alcohol distribution at the stadium.[4] The Giants, on the other hand, settled with the Verni family for only $700,000.[5]

Although these sports organizations garnered large profits from the assailants' alcohol consumption, both families received limited compensation from the organizations.[6] Inadequate compensation was the by-product of indemnification clauses between the sports organizations and their concessionaires.

Many sports organizations contract with independent concessionaires to provide alcohol at their venues.[7] Distributing and consuming alcohol on-site is risky, so sports organizations

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[1] Lee Jenkins, *The Day that Damned the Dodgers*, SPORTS ILLUSTRATED, Aug. 29, 2011, at 50, 53.

[2] *See generally* Plaintiffs' Complaint for Damages, Stow v. L.A. Dodgers, LLC, No. BC462127, 2011 WL 1998679, ¶ 12 (Cal. Super. Ct. May 24, 2011).

[3] Jane Allande-Hession, *N.F.L. Is Sued over a Crash that Left a Child Paralyzed*, N.Y. TIMES, Oct. 11, 2003, at B5.

[4] Verni v. Stevens, 903 A.2d 475, 484 (N.J. Super. Ct. App. Div. 2006).

[5] *Id.* at 502.

[6] *See supra* text accompanying notes 2—5.

[7] *See* Mike Sunnucks, *Driven to Serve*, SPORTS & BUS. J. (May 14, 2018), https://www.sportsbusinessdaily.com/Journal/Issues/2018/05/14/In-Depth/Concessionaires.aspx.

often include indemnification provisions in their contracts with third parties.[8] Indemnification provisions insulate a sports organization from liability if an alcohol-related injury occurs, while simultaneously shifting all fault to the concessionaire asked to serve alcohol.[9] These clauses allow sports organizations to 'contract away' their duty of care to protect fans and third parties from foreseeable harm at sporting events.[10] Therefore, a plaintiff's recovery is limited against a team who made a large profit from the alcohol sales that led to their injury. Sadly, many fans attend games "with their guard down," assuming a team's venue will be reasonably safe.[11] Allowing sports organizations to use indemnification provisions as a shield from liability permits culpable parties to escape responsibility for negligently contributing to an injury. Thus, indemnification provisions are both unjust and unfair for all parties involved.

In response to this issue, some state courts adopted the doctrine of partial indemnity.[12] Partial indemnity allocates damages among multiple tortfeasors based on a party's comparative fault in causing the third-party injury.[13] Courts adhering to this doctrine recognize full indemnity may be appropriate under some circumstances. However, fairness principles urge courts to move away from the all-or-nothing approach of express indemnification clauses, and move towards equitable distribution of damages based on the parties' relative culpability.[14] These principles can be applied to alcohol-related injury claims to appropriately apportion fault among parties.

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[8] *See* John M. Sadler, *Liquor Liability Insurance for Sports/Recreation Organizations*, SADLER SPORTS & RECREATION INS. BLOG (last visited Oct. 12, 2020) https://www.sadlersports.com/blog/liquor-liability-insurance-sports-recreation-organizations/.

[9] *Id.*

[10] *See* Sample v. Eaton, 302 P.2d 431, 434 (Cal. Dist. Ct. App. 1956) (quoting Winn v. Holmes, 299 P.2d 994, 996 (Cal. Dist. Ct. App. 1956)).

[11] Benjamin Trachman, *Going to Bat for the "Baseball Rule": Atlanta National League Baseball Club, Inc. v. F.F. et. al*., 7 HARVARD J. OF SPORTS & ENT. L. 205, 216 (2016).

[12] Michael A. Hummers, *A Criticism of Judicially Adopted Comparative Partial Indemnity as a Means of Circumventing Pro Rata Contribution Statutes*, 47 J. OF AIR L. & COM 117, 118 (1981).

[13] Dole v. Dow Chem. Co., 282 N.E.2d 288, 290 (N.Y. 1972).

[14] Am. Motorcycle Ass'n. v. Superior Court, 578 P.2d 899, 910 (Cal. 1978).

This Note proposes a statutory solution to remedy the all-or-nothing approach of express indemnification clauses. The Stow and Verni cases demonstrate teams should be held liable when their patrons have suffered serious or deadly injuries at the hands of highly intoxicated sports fans. This Note first analyzes case law and other incidents highlighting when a plaintiff's recovery has been limited against a sports organization because of an indemnification clause with a concessionaire. Second, it provides an overview of the concessions contracting process and indemnity law. Third, it explores the partial indemnity doctrine as an equitable solution to apportioning fault between teams and concessionaires for alcohol-related injuries. Finally, this Note urges state courts to recognize the partial indemnity doctrine and calls upon state legislatures to codify its legal principles. Adopting a partial indemnity statute in the sports organization and concessionaire context will yield consistent judicial decisions, and will adequately serve public policy goals like victim compensation and injury prevention.

I. INEBRIATION, INJURIES, AND INDEMNIFICATION

Consuming alcohol is integral to the live sports atmosphere and professional sports organizations understand alcohol can enhance the fan experience.[15] Seventy-six percent of more than 2,000 senior level professional and collegiate sports executives said concessions are "a critical element of the fan experience."[16] Sports venues and teams regularly consult with independent concessionaires to operate their food and beverage services.[17] Through contract, the independent concessionaire is responsible for overseeing all concession operations at a venue.[18] This responsibility commonly includes alcoholic beverage

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[15] Paul Steinbach, *Sporting Events and Booze a Volatile Mix*, ATHLETIC BUSINESS. (Aug. 2004), https://www.athleticbusiness.com/drugs-alcohol/drinking-games.html.

[16] Sunnucks, *supra* note 7.

[17] Mike Sunnucks, *Concessions snapshots*, SPORTS BUS. J. (May 13, 2013), https://www.sportsbusinessdaily.com/Journal/Issues/2013/05/13/In-Depth/Company-profiles.aspx.

[18] Paul Steinbach, *The Benefits of Outsourcing Concessions*, ATHLETIC BUSINESS (Mar. 2000), https://www.athleticbusiness.com/Marketing/the-benefits-of-outsourcing-concessions.html.

distribution.[19] By allowing concessionaires to sell alcohol at games, sports organizations can increase their sales revenue and improve the fan experience.

While selling and consuming alcohol can be beneficial for both fans and sports organizations, it presents significant liability. Journalist Paul Steinbach notes, "[a]s long as you put a whole bunch of people who are enthusiastic about what they are doing in a big building for four hours and give them the opportunity to consume alcohol, there's a risk that you have to manage—regardless of the sport."[20] According to a Harvard University study analyzing alcohol consumption at sporting events, fans who drink heavily are more likely to experience problems including trouble with the police and risk of injury.[21] Harvard's findings are supported by two decades of third-party injuries resulting from fans being overserved at venues.

A. FAN VS. FAN VIOLENCE LAWSUITS

Brian Stow's near-fatal attack at Dodger Stadium is one of the most prominent sports fan violence incidents. In 2011, Stow attended MLB Opening Day to see the San Francisco Giants take on the rival Los Angeles Dodgers at Dodgers Stadium.[22] Stow attended the game with friends and sat in an outfield section notoriously known for rowdy fans.[23] Other than minor "trash talk," neither Stow nor his friends were involved in altercations inside the ballpark.[24]

After the game, Stow and his friends exited the stadium and walked through the parking lot.[25] Dodgers fans, excited about their 2-1 victory over the Giants, continued to heckle Stow and his entourage.[26] Moments later, the harassment turned into a near-deadly assault as Louie Sanchez, a Dodgers fan, struck Stow from

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[19] *See id.*

[20] Steinbach, *supra* note 15.

[21] *See* Toben F. Nelson, Henry Wechsler, *School Spirits: Alcohol and Collegiate Sports Fans*, 28 ADDICTIVE BEHAVIORS 1, 6 (2003).

[22] Jenkins, *supra* note 1 at 52.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 53.

[26] *Id.*

behind in the side of the head.[27] Witnesses said Stow was unconscious before he hit the ground; his head bounced off the concrete from impact.[28] Stow was repeatedly kicked in the head and torso while on the ground as Marvin Norwood, another Dodgers fan, stood over him exclaiming, "who else wants to fight?"[29] Stow was treated for a fractured skull and internal bleeding.[30] Stow now suffers from permanent brain damage.[31]

Stow's family filed a civil suit against the Dodgers and their owner, Frank McCourt, to recover for Stow's severe injuries and medical costs.[32] The complaint alleged the Dodgers failed to take reasonable action in deterring Stow's aggressive attackers.[33] The complaint further contended the Dodgers "promotion of excessive alcohol consumption" at the stadium and "lack of uniformed security, both inside the stadium and in the parking lot" were among other "unacceptable failures" leading to this incident.[34]

In 2016, while at a Chicago Blackhawk's playoff game against the Anaheim Ducks, John Cooke alleged a fan "consumed large quantities of alcohol…was loud, boisterous and unruly."[35] The fan lost his balance during a goal celebration and fell onto Cooke who was seated in front of him.[36] Cooke suffered personal, life-altering injuries.[37]

Cooke filed a complaint against Levy Restaurants, the concessionaire responsible for distributing food and beverages at the Blackhawks United Center arena.[38] The complaint sought over

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[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *See id.* at 58.

[32] *See generally* Plaintiffs' Complaint for Damages, Stow v. L.A. Dodgers, LLC, No. BC462127 2011 WL 1998679, ¶ 12 (Cal. Super. Ct. May 24, 2011).

[33] *Id.*

[34] *Id.*

[35] Scott A. Andresen, *Imbibing Fan Becomes Pain in the Neck at Blackhawks Game*, SPORTSLITIGATIONALERT.COM (Apr. 29, 2016) http://www.sportslitigationalert.com/archive/002757.php; Complaint, Cooke v. Chicago Blackhawks, No. 2016-L-003550, 2016, ¶11 (Ill. Cir. Ct. Apr. 7, 2016).

[36] Andresen, *supra* note 35; Complaint, *supra* note 35, ¶ 16.

[37] Complaint, *supra* note 35, ¶ 16.

[38] *Id.*

$100,000 from Levy Restaurants for overserving the allegedly intoxicated fan.[39] The complaint also noted security officers ignored grievances about the fan, and the Blackhawks knew, or should have known, the fan was impaired and a posed a danger to spectators seated below him.[40] Levy Restaurants' primary responsibility for Cooke's injuries was likely because of an indemnification clause within the concessions agreement between the Blackhawks and the United Center.

1. *UNRECORDED FAN VS. FAN VIOLENCE INCIDENTS*

Fan violence persists well beyond incidents recorded in court. More often, the mass media captures and recounts alcohol-fueled incidents. On June 4, 1974, the Indians offered beers to fans in attendance for only ten cents each.[41] Over 25,000 fans flocked to Cleveland Municipal Park to witness this game against the Texas Rangers, and more importantly partake in the beverage promotion.[42] During the game, misbehaving fans ran naked onto the field, threw hotdogs at Rangers players, and yelled obscenities from the upper-deck.[43] The situation worsened in the ninth inning when an intoxicated fan tried to grab a Rangers player's hat, resulting in a stadium-clearing riot.[44] Fans poured onto the field from the stands, pelting players and other spectators with cups, rocks, and folding chairs.[45] Radio commentators noted the lack of police protection during the incident.[46] The game eventually ended in a forfeit in the Rangers' favor.[47] Nine individuals were arrested because of the intoxicated frenzy with "no question that

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[39] *Id.*

[40] Complaint, *supra* note 35 at ¶ 17.

[41] *Cleveland Indians' Ten Cent Beer Night: The Worst Idea Ever*, BLEACHERREPORT.COM (Mar. 21, 2009), https://bleacherreport.com/articles/142952-ten-cent-beer-night-the-worst-idea-ever.

[42] Joe Noga, *Fans Riot on 10-cent Beer Night: On this Day in Cleveland Indians History*, CLEVELAND.COM (June 4, 2020), https://www.cleveland.com/tribe/2020/06/fans-riot-on-10-cent-beer-night-on-this-day-in-cleveland-indians-history.html.

[43] *Id.*; *Cleveland Indians' Ten Cent Beer Night: The Worst Idea Ever*, *supra* note 41.

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] *Id*.

beer played a part in the riot."[48] The incident is one of the worst decisions ever made by stadium management.[49]

In 1990, the Los Angeles Times reported Paul Albrecht's assault at the Los Angeles Coliseum.[50] Albrecht wore a Steelers t-shirt and was hit by ice and other items as he walked through boisterous Raiders fans to get to his seat.[51] Moments later, Albrecht was beaten and kicked in the head by a Raiders fan.[52] Albrecht was knocked unconscious, and the assailant was arrested and booked on suspicion of assault with a deadly weapon with great bodily injury.[53] Most notably, the official police report mentioned Albrecht's assailant was "very HBD—police shorthand for had been drinking."[54] Bystanders said Albrecht did not react to the fans harassment; he was just wearing a Steelers t-shirt.[55] Albrecht regained consciousness after he was transported to the University of Southern California Medical Center Intensive Care Unit, but remained in critical condition.[56] Steelers spokesman Don Edwards said, "occasionally there are scuffles in the stands…but something like this, the way it was described…that's a scary sight to see."[57]

B. FAN VS. THIRD PARTY VIOLENCE LAWSUITS

An intoxicated fan presents dangers to both fans within and beyond the stadium limits. For example, on October 24, 1999, Daniel Lanzaro attended a New York Giants football game with his friend, Michael Holder, at Giants Stadium.[58] Lanzaro and

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[48] *Id*.

[49] Geremy Graham, *The Top 20 Drunken Fan Incidents Ever (With Video),* BLEACHERREPORT.COM (Aug. 9, 2010), https://bleacherreport.com/articles/432367-the-top-20-drunken-fan-incidents-ever-with-video.

[50] Patt Morrison, *Steeler Fan Beaten at Coliseum Shows Some Improvement*, L.A. TIMES (Sept. 25, 1990, 12:00 AM), https://www.latimes.com/archives/la-xpm-1990-09-25-me-1247-story.html.

[51] *Id*.

[52] *Id*.

[53] *Id*.

[54] *Id*.

[55] *Id*.

[56] *Id*.

[57] *Id*.

[58] Verni *ex rel.* Burstein v. Harry M. Stevens, Inc., 903 A.2d 475, 484 (N.J. Super. Ct. App. Div. 2006).

Holder tailgated before entering the game.[59] Lanzaro claimed he was drunk before the first quarter ended.[60] Yet the men continued to buy more beer from the concessionaires inside the stadium despite being highly intoxicated.[61] Lanzaro testified he "tipped the server an extra ten dollars to bypass the stadium's two-beer limit."[62] The two men left the game during the third quarter and proceeded to drive to two more local bars.[63]

At approximately 5:47 P.M., Lanzaro swerved across lanes and collided with a car driven by Robert Verni.[64] Verni's wife, Fazila, and two-year-old daughter, Antonia, were both in the back seat of the car.[65] Fazila was found "wedged behind the driver" while Antonia laid unconscious.[66] Lanzaro had a 0.266 blood-alcohol content, which nearly tripled the legal limit.[67]

Fazila and Antonia Verni sued, seeking compensatory and punitive damages against Lanzaro, the Giants, Aramark, and other named defendants.[68] Aramark was the concessionaire who distributed alcohol at Giants Stadium.[69] After a lengthy trial, the court concluded Lanzaro had been served beer while visibly intoxicated at Giants Stadium.[70] The jury found "Lanzaro and the Aramark defendants were equally responsible for the injuries caused by the collision."[71] The court entered a $110 million judgment against Aramark.[72] The Giants settled with the Verni family for only $700,000.[73] Aramark appealed the verdict and later settled with the Verni family for $25 million.[74] Though

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[59] *Id.*
[60] *Id.* at 485.
[61] *Id.*
[62] *Id.*
[63] *Id.* at 486.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* at 484.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at 503.
[74] Henry Gottlieb, *Stadium Beer Vendor Liability Suit Settled for $25 Million*, LAW.COM, (Dec. 5, 2008, 12:00 AM),

Aramark shouldered the legal liability for the tragic injuries, the trial court noted both the National Football League (NFL) and the Giants "had a duty to the Verni's to exercise reasonable care in regulating alcoholic beverages and consumption at Giants Stadium."[75]

The *Verni* case illustrates the "culture of intoxication" at live sporting events and its grave effects.[76] Both Aramark and the Giants breached their duty of care owed to the Verni family, yet the Giants were only responsible for 2.8% of Aramark's total damages.[77] This near-complete shift in liability among these joint tortfeasors is largely because of indemnification. This outcome undermines the notion that liability is borne in direct proportion to a party's fault.[78]

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https://www.law.com/almID/1202426492772/?slreturn=20191010163540.

[75] Richard M. Southall & Linda A. Sharp, T*he National Football League and Its 'Culture of Intoxication:' A Negligent Marketing Analysis of Verni v. Lanzaro*, 16 J. LEGAL ASPECTS SPORT 121, 124 (2006).

[76] Dave Anderson, *'Culture of Intoxication' and a Victim*, N.Y. TIMES (Mar. 23, 2007), https://www.nytimes.com/2007/03/23/sports/football/23anderson.html.

[77] The Giants 2.8% damage liability was calculated by dividing the Giant's settlement amount with the Verni family ($700,000) by Aramark's settlement amount with the Verni family ($25,000,000).

[78] Am. Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 907 (Cal. 1978).

II. CONTRACTING WITH CONCESSIONAIRES, AND THE INDEMNIFICATION PROVISIONS THEREIN

A. CONCESSIONS GENERALLY

Professional sports organizations, like the Giants in *Verni*, commonly contract with independent concessionaire companies to handle food and beverage distribution at their venues.[79] In 2013, 123 United States professional teams had independent concessionaires operating their general and premium food and beverage services.[80] This number has increased because demand for higher-quality concessions at sports venues has heightened.[81]

Sports organizations benefit from employing concessionaires because they often lack the personnel needed to operate food and beverage services.[82] Allowing an independent concessionaire to assume this responsibility saves team executives from dealing with multiple vendors and restaurant brands.[83] Instead, concessionaires are tasked with procuring and training concessions staff, establishing food and beverage menus, securing food and beverage licenses, distributing concessions during live events, and cleaning up after an event.[84]

Aramark, Delaware North Sportservice, and Levy Restaurants are among the largest concessionaire companies in the world.[85] Aramark oversees food and beverage concessions for twelve MLB stadiums, including Fenway Park.[86] Delaware North

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[79] Sunnucks, *supra* note 17.

[80] *Id.*

[81] Pat Evans, *Executives Outline Predictions for Arena and Stadium Concessions in 2019*, FRONT OFFICE SPORTS (Jan. 4, 2019), https://frntofficesport.com/2019-concessions-predictions/.

[82] Lisa White, *Stadium Foodservice Sports the Latest Trends*, FOODSERVICE, https://fesmag.com/departments/segment-spotlight/14174-sporting-the-latest-trends (last visited Nov. 11, 2019).

[83] *Id.*

[84] *See e.g.*, *Premium Food and Beverage, Catering, and Concessions Agreement*, MINNESOTA SPORTS FACILITIES AUTHORITY (March 25, 2013), https://www.msfa.com/df-data/files/CONCESSIONS%20SERVICES/CONCESSIONS%20AGREEMENT.pdf.

[85] Sunnucks, *supra* note 7.

[86] Sam Oches, *Foodservice at the Bat*, QSR (May 2011), https://www.qsrmagazine.com/menu-innovations/foodservice-bat.

Sportservice manages concessions domestically and internationally at venues such as Lambeau Field, Busch Stadium, and Emirates Stadium.[87] Levy Restaurants is the largest food service concessionaire in the United States, serving Dodgers Stadium, Wrigley Field, and Gillette Stadium.[88] Together, these companies handle concessions for most popular United States sports venues.

B. CONCESSIONS CONTRACTS GENERALLY

Concessionaires typically use standard long-form contracts when forming agreements with sports organizations.[89] These contracts generally define the agreement's duration (the "Term"), each party's exclusive or nonexclusive rights and responsibilities, and the fees associated with expected performance (the "Fees").[90]

While terms in these agreements may vary, the standard rights and responsibilities allocated among the parties generally remain the same. According to the Minnesota Vikings concession agreement, the Licensor (team) grants the Contractor (concessionaire) the "sole and exclusive right to render" concession services at the stadium.[91] Such services include, but are not limited to: providing all employees for service distribution; training all employees to perform services; procuring all permits, licenses, and operating authorizations to provide food and beverage services; and providing general maintenance and janitorial services in concession areas.[92] The Vikings' agreement states, "Contractor (concessionaire) shall be permitted and required to serve and sell alcohol beverages at the Events which will take place at the Stadium and on the Plaza (including

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[87] *Venues*, DELAWARE NORTH, https://www.delawarenorth.com/venues (last visited Nov. 16, 2019).

[88] Robert Channick, *From a Chicago Deli to a Super Bowl: How Two Brothers Built a Food Industry Powerhouse*, CHICAGO TRIBUNE (Jan. 31, 2019, 3:25 P.M.), https://www.chicagotribune.com/business/ct-biz-super-bowl-food-provider-levy-chicago-20190129-story.html.

[89] *See, e.g.*, *Premium Food and Beverage, Catering, and Concessions Agreement*, *supra* note 84.

[90] *See id.*

[91] *Id.* at 11.

[92] *Id.*

specifically, Home Games)." [93] With this permission, the concessionaire must properly train employees in accordance with alcohol-serving policies, and must procure and maintain all applicable liquor licenses.[94] These responsibilities are limited, as the Licensor (team) retains final approval over all alcohol-related policies.[95] The contract states: "the sale or other distribution of other intoxicating or alcohol beverages by Contractor (concessionaire) at the Stadium…will be subject to Licensor's (team) reasonable discretion."[96]

Although the concessionaire has permission to sell and distribute alcohol, the sports organization retains authority to oversee the process.[97] Reserving this power is significant given sports organizations often attempt to abandon their oversight authority via indemnification clauses with concessionaires when alcohol-related injuries arise.[98]

C. INDEMNIFICATION CLAUSES IN CONCESSIONAIRE CONTRACTS

Indemnification clauses appear in many standard, long-form contracts. Indemnification provisions serve to shift potential liability costs among parties in designated situations.[99] Teams grant concessionaires expansive responsibility in food and beverage distribution.[100] To insulate themselves from liability, teams include indemnification clauses in their agreements with concessionaires. [101] For example, the Minnesota Vikings indemnification clause states:

> Contractor shall indemnify and hold harmless (i) Licensor, the Team…*from any and all* Claims or Damages arising from, related to or in connection

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[93] *Id.* at 25.
[94] *Id.*
[95] *Id.* at 26.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 41—42.
[99] 41 AM. JUR. 2D *Indemnity* § 1 (2019).
[100] *See, e.g.*, *Premium Food and Beverage, Catering, and Concessions Agreement*, *supra* note 84.
[101] *Id.* at 41—42.

> with (A) Contractor's Services…including any Damages to real property, personal property, or *personal injury to any third Person* or Licensor (including its agents and employees) resulting from the intentional misconduct *or negligent acts or omissions* of Contractor or its agents or employees.[102]

This broad contractual language leaves the concessionaire solely responsible for damages resulting from all food or beverage-related incidents, which is alarming because of the Licensor's (team) final authority with "regard to contractual management of the services to be provided by Contractor (concessionaire)," and the Licensor's ultimate control and "management of the Stadium Site."[103] In short, the team is insulating itself from liability arising from a situation within its control.

D. LEGAL OVERVIEW OF INDEMNIFICATION CLAUSES

In general, indemnity refers to the obligation resting on one party to compensate a second party for damage the second party incurs to a third party.[104] Indemnity is a form of restitution and encompasses any duty to pay for another's damage; it is more than reimbursing a third party's claim.[105] The Third Restatement of Torts defines indemnification as follows:

> (a) When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses, if:

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[102] *Id.*

[103] *Id.* at 20.

[104] 41 AM. JUR. 2D *Indemnity* § 1 (2019).

[105] Dream Theater, Inc. v. Dream Theater, 21 Cal. Rptr. 3d 322, 329 (Ct. App. 2004).

> (1) the indemnitor has agreed by contract to indemnify the indemnitee.[106]

A party's right to indemnify can rest on three bases: an express contract, an implied contract, or equitable concepts arising from the indemnity tort theory.[107] Express indemnity refers to an obligation established by contract.[108] For example, one party may agree to release another if a specified third party injury occurs. Express indemnity provisions are subject to general contract principles, so the indemnity relationship is determined by the parties' intent and language used in contract formation.[109] Express indemnity agreements are generally enforced in accordance with the contracting parties' intent.[110] Therefore, express indemnity contracts avoid equitable considerations or a joint legal obligation among liable parties.[111] The indemnification provisions between sports organizations and concessionaires in this Note concern express contractual agreements.

Express indemnity clauses are generally valid and enforceable.[112] Such agreements will be enforced between parties according to the language of the indemnification clause as it appears in the contract.[113] An indemnity clause is unenforceable when the agreement's terms are inexplicit, or the provision's nature runs counter to public policy.[114] Indemnification provisions between sports organizations and concessionaires have generally been enforced in accordance with these principles despite attributable fault to both parties for the alcohol-related injury.

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[106] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22 (AM. LAW INST. 2000).

[107] 41 AM. JUR. 2D *Indemnity* § 2 (2019).

[108] Prince v. Pacific Gas & Elec., Co., 90 Cal. Rptr. 3d 732, 737 (2009).

[109] 41 AM. JUR. 2D *Indemnity* § 7 (2019).

[110] *Prince*, 90 Cal. Rptr. 3d at 737.

[111] *Id.*

[112] *See* Pitt v. Tyree Org., 90 S.W.3d 244, 252 (Tenn. Ct. App. 2002).

[113] *Id.*

[114] 41 AM. JUR. 2D *Indemnity* § 11 (2019).

III. PARTIAL INDEMNIFICATION: THE MODERN MERGER OF INDEMNIFICATION AND CONTRIBUTION

Historically, express contractual indemnity was not subject to equitable considerations.[115] Courts were reluctant to apportion fault based on a party's role in creating an injury.[116] Instead, judges relied on the express language of an indemnification clause as evidence of the parties' intent at drafting to shift full liability among parties.[117] Express indemnification's all-or-nothing approach became difficult to apply as the legal principle of contribution began to develop.

Contribution means sharing an injury's cost.[118] Contribution "contemplates the distribution of loss among joint tortfeasors based on relative fault, whereas indemnity shifts the entire loss to the joint tortfeasor" who was primarily at fault.[119] Indemnification developed when contribution was unavailable.[120] Thus, courts analyzed contribution and indemnification "in terms of two, ostensibly mutually exclusive doctrines."[121]

Over time, courts recognized indemnity's all-or-nothing approach was in tension with contribution.[122] Indemnification was a rigid and often inequitable remedy when two parties jointly contributed to a plaintiff's injury. Situations arose where the "indemnitee was definitely at fault but not to as great an extent as the indemnitor—so that a decision between all and nothing would be made for all rather than nothing."[123] Courts were concerned the

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[115] *Prince*, 90 Cal. Rptr. 3d at 737.

[116] *See id.*

[117] *Id.*

[118] Downey v. W. Cmty. Coll. Area, 808 N.W.2d 839, 854 (Neb. 2012).

[119] Schulson v. D'Ancona and Pflaum LLC, 821 N.E.2d 643, 647 (Ill. App. Ct. 2004).

[120] RESTATEMENT (SECOND) OF TORTS § 886B(1) (AM. LAW INST. 1979).

[121] Am. Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 907 (Cal. 1978).

[122] RESTATEMENT (SECOND) OF TORTS § 886B(1) (AM. LAW INST. 1979).

[123] *Id.*; *Downey*, 808 N.W.2d at 854.

dichotomy of indemnification and contribution was "more formalistic than substantive."[124]

As a remedy, courts began to move away from the all-or-nothing approach of indemnification, and began apportioning financial responsibilities between the parties based on comparative fault.[125] Courts recognized distributing loss among multiple tortfeasors was the common goal of both indemnification and contribution, and therefore suggested reexamining the concepts' relationship.[126] As the influential Judge Learned Hand noted, "indemnity is only an extreme form of contribution."[127] Thus, progressive states like New York and California merged indemnification and contribution principles to create the doctrine of "partial indemnification," respectively.[128]

Partial indemnification is rooted in the comparative negligence doctrine.[129] Comparative negligence is a common-law tort principle that serves to allocate damages based on a party's contribution to harm.[130] Fault is measured as a percentage.[131] Thus, damages awarded to a plaintiff shall be allocated based on the percentage of negligence attributable to a party.[132]

Like comparative negligence, partial indemnification apportions responsibility among joint tortfeasors depending on each party's relative contribution to the injury.[133] Partial indemnification applies these equitable principles even when an express indemnification agreement exists among tortfeasors.[134] States reasoned "indemnity should be granted in any factual situation in which, as between the parties themselves, it is just and

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[124] *Am. Motorcycle Ass'n*, 578 P.2d at 907.

[125] *Id.* at 910.

[126] *Id.* at 907.

[127] Slattery v. Marra Bros., 186 F.2d 134, 138 (2d Cir. 1951).

[128] RESTATEMENT (SECOND) OF TORTS § 886B(1) & cmt. m (AM. LAW INST. 1979).

[129] *See id.* at cmt. m.

[130] Li v. Yellow Cab Co., 532 P.2d 1226, 1242 (Cal. 1975).

[131] *See e.g.*, Owens v. Truckstops of Am., 915 S.W.2d 420, 425 (Tenn. 1996).

[132] RESTATEMENT (SECOND) OF TORTS § 886B(l) & cmt. m (AM. LAW INST. 1979).

[133] *Id.*

[134] *See* Am. Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 907 (Cal. 1978).

fair that the indemnitor should bear the total responsibility."[135] But where both parties are culpable in creating an injury, and one party is slightly more culpable, fault should be divided proportionately between the parties.[136] Thus, in these states, indemnity is absorbing principles of contribution.

A. NEW YORK

New York was the first state to develop and apply partial indemnification. *Dole v. Dow Chemical Co.* modified New York's traditional indemnity doctrine to permit a tortfeasor to obtain partial indemnification from another tortfeasor on a comparative fault basis.[137]

Dow Chemical Co. ("Dow") was a chemical manufacturer which produced a "penetrating and poisonous fumigant used for control of storage insects and mites."[138] Urban Milling Company ("Urban Milling") purchased the chemical from Dow and used the poison to fumigate a grain storage bin.[139] Shortly after, Urban Milling directed its employee to clean the grain bin.[140] While cleaning, the employee was exposed to the poison and died from inhalation.[141]

The deceased employee's administratrix brought a claim against Dow.[142] The claim asserted Dow was negligent in labeling its chemicals, and failing to warn and instruct users about the chemical's dangerous nature.[143] Dow filed a third party claim against Urban Milling, both denying its own negligence and asserting Urban Milling was negligent for taking improper precautions when fumigating the storage bins.[144] Dow sought full indemnification from Urban Milling.[145] The court reasoned:

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[135] RESTATEMENT (SECOND) OF TORTS § 886B cmt. c (AM. LAW INST. 1979).

[136] *Id.*

[137] Dole v. Dow Chem. Co., 282 N.E.2d 288, 290—91 (N.Y. 1972).

[138] *Id.* at 290.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

> There are situations when the facts would in fairness warrant what Dow here seeks—passing on to Urban all responsibility that may be imposed on Dow for negligence, a traditional full indemnification. There are circumstances where the facts would not, by the same test of fairness, warrant passing on to a third party any of the liability imposed. There are circumstances which would justify apportionment of responsibility between third-party plaintiff and third-party defendant, in effect a partial indemnification.[146]

The court concluded the deciding factor in adjudicating indemnification suits should be "fairness as between the parties." [147] Creating a complementary indemnification and contribution scheme was "necessary to handle the growing problems created by multiple tort liability." [148] Furthermore, merging the two legal principles would closely align with deterrence goals: equitable loss sharing by all wrongdoers and rapid compensation for the plaintiff.[149]

The *Dole* decision created the partial indemnification doctrine in New York and provided a framework for courts to use in resolving indemnification disputes in the future. *Dole* instructed juries to consider a third party defendant's negligence in causing an injury. [150] If that party has negligently contributed to an injury in any way, then the third party defendant shall bear damages in proportion to their fault.[151] If no negligence is found, then full indemnity is an appropriate remedy.[152]

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[146] *Id.* at 291.
[147] *Id.* at 294.
[148] *Id.* at 293.
[149] *Id.*
[150] *Id.* at 295.
[151] *Id*.
[152] *Id*.

1. *NEW YORK GENERAL LIABILITY STATUTE § 15-108*

The partial indemnification doctrine created the predicate for passage of New York General Liability Statute § 15-108.[153] In 2007, New York codified the judicial doctrine:

> When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death … but it reduces the claim of the releasor against the other tortfeasors … in the amount of the released tortfeasor's equitable share of the damages…[154]

The statute's primary goals are to preserve *Dole*'s equitable fault sharing principles and encourage settlements that would have otherwise been inhibited by a traditional indemnification scheme.[155] The statute assures "…a wrongdoer is responsible for no more than his equitable share of damages, but also that once a defendant settles he purchases an everlasting peace."[156]

B. CALIFORNIA

The emergence of New York's partial indemnification doctrine prompted California to reexamine its indemnity regime. In 1978, *American Motorcycle Assn. v. Superior Court* illuminated the deficiencies of the state's traditional all-or-nothing indemnification approach, and spurred reform.[157]

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[153] *In re* E. & S. Dist. Asbestos Litig., 772 F.Supp. 1380, 1392 (E.D.N.Y & S.D.N.Y 1991).

[154] N.Y. GEN. OBLIG. LAW § 15-108 (McKinney 2019).

[155] *In re E. & S. Dist. Asbestos Litig.,* 772 F.Supp. at 1393.

[156] *Id.*

[157] Am. Motorcycle Ass'n. v. Superior Court, 578 P.2d 899, 907 (Cal. 1978).

American Motorcycle Association ("AMA") organized and sponsored a cross-country novice motorcycle race.[158] Glen Gregos was a teenage participant.[159] During the race, Gregos was involved in a severe crash and became paralyzed.[160] Gregos filed suit against AMA claiming negligence in designing, supervising, managing, and administering the race.[161] AMA responded by filing a cross-complaint against Gregos' parents.[162] AMA asserted Gregos' parents negligently failed to exercise their supervision power by allowing their minor son to participate in the race.[163] AMA sought indemnity from Gregos' parents if found liable.[164]

California, following New York, determined its current indemnification scheme was inadequate.[165] The court reasoned traditional indemnification principles "precluded courts from reaching a just solution in a majority of cases in which equity and fairness calls for an apportionment of loss between the wrongdoers in proportion to their relative culpability, rather than imposing the entire loss upon one or the other tortfeasor."[166] As a policy matter, "there is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were unintentionally responsible, to be shouldered onto one alone…while the latter goes scot-free."[167]

The court adopted 'comparative indemnity,' mirroring New York's partial indemnity principles.[168] Comparative indemnity permitted concurrent tortfeasors to obtain partial indemnity from cotortfeasors on a comparative fault basis.[169] The court remanded *American Motorcycle Association* to the lower courts to determine the outcome in accordance with the state's new comparative indemnity doctrine.[170]

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[158] *Id.* at 902.
[159] *Id.*
[160] *Id.* at 902—03.
[161] *Id.* at 902.
[162] *Id.* at 903.
[163] *Id.*
[164] *Id.*
[165] *Id.* at 914.
[166] *Id.* at 910.
[167] *Id.* at 918.
[168] *Id.* at 917.
[169] *Id.*
[170] *Id.*

C. OTHER APPROACHES

New York and California paved the way for other states to adopt doctrines similar to partial and comparative indemnity. Minnesota followed suit in 1977 with *Tolbert v. Gerber Industries, Inc.*[171] In *Tolbert*, a workman installed allegedly defective equipment, and the employer was named a third-party defendant.[172] The trial court awarded the employer 100% indemnity from the manufacturer of the defective part.[173] The manufacturer appealed to the Minnesota Supreme Court.[174] After reviewing the facts, the supreme court determined "in a situation where joint tortfeasors are each culpably negligent, the rule of 100% indemnity…is no longer to be followed but, rather, loss is to be reallocated under principles of contribution based on relative fault."[175] The court found both defendants liable to the plaintiff and ordered damages awarded in proportion to each party's contribution to injury.[176] The court concluded, "the more culpable tortfeasor will continue to bear a greater share of the loss, but at the same time his joint tortfeasor will not continue to escape all liability as in the past."[177]

Missouri adopted the same rationale in its leading case, *Missouri Pacific Railroad v. Whitehead & Kales Co*.[178] The court held despite indemnification, liability should be apportioned based on comparative fault.[179]

New York, California, Minnesota, and Missouri exemplify state courts' willingness to look beyond the application of traditional indemnification law. These courts recognize "the determination of whether or not indemnity should be allowed must of necessity depend upon the facts of each case."[180] Indemnification issues may arise in any context and these cases

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[171] Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362, 364 (Minn. 1977).

[172] *Id.*

[173] *Id*.

[174] *Id.*

[175] *Id.* at 362.

[176] *Id.* at 367—68.

[177] *Id.* at 367.

[178] Missouri Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d 466 (Mo. 1978).

[179] *Id.* at 474.

[180] Am. Motorcycle Ass'n. v. Superior Court, 578 P.2d 899, 909–10 (Cal. 1978).

illustrate that partial indemnification principles can be applied universally. Courts no longer have to grapple "to find some linguistic formulation…for determining when the relative culpability of the parties is sufficiently disparate to warrant placing the entire loss on one party and completely absolving the other."[181] Instead, courts can weave contribution concepts into indemnification, and apportion fault on an equitable basis.

Partial indemnification principles can govern alcohol-related injury disputes in the sports organization and concessionaire context. Sports organizations and concessionaires both play large roles in hosting a sporting event. When alcohol-related injuries occur, both parties likely contributed to the injury. The concessionaire is likely liable for overserving the patron who injured the other fan or third party. While on the other hand, the sports organization is arguably liable for failing to mitigate the risk the intoxicated patron presented to others at the event. If traditional indemnification law governed, a sports organization could successfully contract away their liability through an indemnification clause when they may actually be at fault. This one-sided outcome exculpates potentially culpable sports organizations who may ultimately make a large profit from hosting the game itself. Forcing courts to apply bright-line, all-or-nothing indemnification principles to decide these disputes runs counter to public policy. Instead, courts should apply partial indemnification principles to appropriately apportion fault between concessionaires and sports organizations when alcohol-related incidents arise.

IV. PROPOSED SOLUTIONS

Partial indemnity principles can be directly applied to indemnification disputes involving sports organizations and concessionaires. When an injury occurs because of excessive alcohol consumption, both the sports organization and concessionaire can be held liable as joint tortfeasors.[182] This section explores the duty and potential liability sports organizations owe to injured third parties, and proposes a statutory solution courts can utilize in adjudicating these issues.

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[181] *Id.* at 909.

[182] *See* Verni *ex rel.* Burstein v. Harry M. Stevens, Inc., 903 A.2d 475, 503 (N.J. Super. Ct. App. Div. 2006).

A. SOLUTIONS GENERALLY

1. *SPORTS ORGANIZATIONS' AND CONCESSIONAIRES' DUTY OF CARE*

Sports organizations are liable when inebriated fans cause injury to others at the team's venue. "[S]tadium owners have been found to owe a duty of care to the common fan to protect him or her from foreseeable harm that can occur in the stadium, including the acts of third parties."[183] Sports organizations know fans who enter their venue have the opportunity to purchase and consume alcoholic beverages.[184] Therefore, teams could reasonably foresee fans becoming too intoxicated while at the game. As a result, sports organizations have a duty to mitigate the risks an intoxicated fan poses to others.

Sports organizations breach their duty of care owed to fans and third parties when they fail to address the foreseeable risks intoxicated fans pose. Patrons buy tickets to a live sporting event with the expectation general safety measures will be in place.[185] This duty to provide general safety is breached when teams fail to prevent an intoxicated person, overserved on their own premises, from harming others. Additionally, the sports organization, as the licensor of the concession services supplying the alcoholic beverages, has sole discretion to oversee selling and distributing alcohol at its venue.[186] This general oversight is outlined in most concessionaire contracts.[187] Failing to properly manage concessionaires may constitute a further breach of duty.

As evidenced in the Stow, Cooke and Verni cases, various sports organizations authorized alcohol sales to the defendant who

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[183] Steven J. Swenson, *Unsportsmanlike Conduct: The Duty Placed on Stadium Owners to Protect Against Fan Violence*, 23 MARQ. SPORTS L. REV. 135, 142—43 (2012); *see id.* at 484.

[184] *See* Bearman v. Univ. of Notre Dame, 453 N.E.2d 1196, 1198 (Ind. Ct. App. 1983); RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (AM. LAW INST. 1965).

[185] *See Bearman*, 453 N.E.2d at 1198; RESTATEMENT (SECOND) OF TORTS § 344 cmt. f.

[186] *See, e.g.*, *Premium Food and Beverage, Catering, and Concessions Agreement*, *supra* note 84.

[187] *Id.*

injured these parties.[188] Though the concessionaire supplied the defendant with alcohol, the sports organization failed to mitigate the risks drunk fans presented to others. The sports organizations could have taken precautions by removing the intoxicated fan from the venue or refusing to serve the fan altogether. Additional safety measures would have likely decreased the chances of a drunk fan injuring others. Failing to implement such precautionary measures is a breach of duty because both the concessionaire and the sports organization had the "ability to reach the customer (fan) before an accident occurred."[189]

Once a breach of duty is found, sports organizations and concessionaires should be considered joint tortfeasors. The partial indemnification doctrine can be applied to resolve disputes involving these parties. Thus, an injured plaintiff could recover equitably from both the sports organization and the concessionaire for their injuries, despite an express indemnification provision prompting a contrary outcome. This result closely aligns with the favored judicial objectives of deterrence and accident prevention.[190] One court noted, "[t]o shift the entire loss to [concessionaires] would not serve these [judicial] objectives, for then the [sports organization] would escape scot-free."[191] Partial indemnification warrants against such an unjust outcome.

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[188] *Verni*, 903 A.2d at 175; Complaint, *supra* note 2; Complaint, *supra* note 35.

[189] Ford Motor Co. v. Robert J. Poeschl, Inc., 98 Cal. Rptr. 702, 705 (Ct. App. 1971) (holding Ford and the subsequent car dealer had an ability to reach the customer regarding vehicle recalls before an accident occurred, and because of such ability, fault should be apportioned comparatively among both negligent parties).

[190] *Id.*

[191] *Id.*

2. *APPLICATION OF THE PARTIAL INDEMNIFICATION DOCTRINE TO THE SPORTS CONTEXT*

Courts should apply the partial indemnification doctrine when both a sports organization and a concessionaire have breached their duty of general care to a fan or third party. Concessionaires can breach their duty of care when they overserve an intoxicated fan.[192] Sports organizations can also breach their duty of care when they fail to provide adequate security or oversight at the premises to prevent intoxicated fans from injuring others.

Once a breach is found, courts should apply partial indemnification principles to settle the dispute. As evidenced by *Dole*, situations exist where full indemnification may be appropriate, but more often fairness principles dictate otherwise.[193] If a court determines the sports organization upheld their duty of care, then adherence to the language of the express indemnification clause, effectively releasing the sports organization from full liability, would be reasonable. On the other hand, if the court determines the sports organization contributed to the third party's alcohol-related injury, fairness principles would warrant a different outcome under partial indemnification principles. Partial indemnification should be applied only after finding joint liability between the sports organization and concessionaire.[194] The sports organization and concessionaire's fault will be apportioned based on each party's attributed percentage of fault in causing the plaintiff's injury.

Partial indemnification is the most fair and just outcome in this context. This doctrine allows courts to fully adhere to express indemnification language, honoring the contracting parties' original intent, or allows courts to issue an alternative equitable remedy. In situations where full indemnification is unwarranted, unjust enrichment policy concerns stress applying partial indemnification in this context. Unjust enrichment dictates "each obligor should bear his part of the burden; and if one discharges the burden of another, without being reimbursed, the other has gained a financial advantage to which he is not equitably entitled."[195]

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[192] *Verni*, 903 A.2d at 491.

[193] Dole v. Dow Chem. Co., 282 N.E.2d 288, 290 (N.Y. 1972).

[194] *Id.* at 295.

[195] Robert A. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 UNIV. PENN L. REV. 130, 136 (1932).

Unjust enrichment occurs because the sports organization makes large profits from both fan attendance and alcohol sales. Essentially, a sports organization profits while escaping financial responsibility for breaching their duty of care. This creates a disincentive for sports organizations to increase security efforts to protect fans and third parties if they can simply contract away full liability for alcohol-related injuries. Reinforcing safety at live sporting events is accomplished by applying partial indemnification in this context. According to relevant case law and public policy concerning just compensation and accident prevention, partial indemnification is the appropriate remedy for adjudicating alcohol-fueled disputes involving indemnification clauses.

B. THE STATUTORY SOLUTION

Though *Dole*'s partial indemnification principles have been codified by statute, such widespread statutory practice is limited.[196] Thus, state legislatures should adopt statutes to ensure the uniform enforcement of partial indemnification principles in the sports and concessionaire context.

Partial indemnification principles are legislative in nature.[197] Justice Clark noted, "such a new public policy [of partial indemnification, or comparative indemnification in California] departing from intelligent notions of fairness may be warranted, but, if so, its establishment should be left for the Legislature."[198] The Legislature is best positioned to transition from an all-or-nothing indemnification approach to a codified partial indemnification regime.[199] A legislative act is both quicker to implement and more easily amended than altering common law principles and precedent.[200] Thus, state legislatures should adopt statutes encompassing partial indemnification, and should use these laws to resolve indemnification issues between

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[196] Am. Motorcycle Ass'n. v. Superior Court, 578 P.2d 899, 911 (Cal. 1978).

[197] *Id.* at 913.

[198] *Am. Motorcycle Ass'n*, 578 P.2d at 921 (Clark, J., dissenting).

[199] *See id.* at 924 (J. Clark, dissenting, argues the legislature is in the best position to effectuate the transition from "contributory to comparative or some other doctrine of negligence.").

[200] *See id.* at 915 (majority opinion).

concessionaires and sports organizations when alcohol-related injuries arise.

Considering the preference for legislative action, state legislatures can use the following statutory language as a model to draft their own statutes governing partial indemnification principles. The following proposal urges each state to adopt 'equitable indemnity.' Equitable indemnity mirrors partial indemnification in New York and comparative indemnification in California. This proposed law requires courts to analyze express indemnity clauses within contracts in accordance with uniform equitable principles.[201] States are also encouraged to adopt a special provision, as enumerated in subsection (1), to govern indemnification disputes between sports organizations and concessionaires if an alcohol-related third-party injury occurs. The statute proposes:

> **§ 1. Equitable Indemnity Among Joint Tortfeasors**[202]
>
> (a) *Effect of equitable indemnity among joint tortfeasors*. When two or more parties to a contract expressly agree to full indemnification upon the occurrence of an injury to a third party, full indemnification may be set aside, and instead, distribution of the fault between the joint tortfeasing parties may be distributed based on each party's equitable share of the damages.
>
> *(1) Sports Organizations.* Where a sports organization enters into an express indemnification agreement with a concessionaire, or other service provider, liability for injury of a subsequent third party will be adjudged according to each party's respective breach of general duty owed to that third party and the principles enumerated in section (a).

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[201] Prince v. Pac. Gas & Elec. Co., 90 Cal Rptr. 3d 732, 737 (2009).

[202] The following statutory language has not been adopted by any states, but instead serves as a model for state legislatures to draft future laws in accordance with the foregoing principles. As mentioned, the doctrine of 'equitable indemnity' is merely identical to New York's 'partial indemnification' and California's 'comparative indemnification,' but has been given a different name so as not to be confused with those state statutes.

(b) *Release of Liability*. In the event that full indemnification is warranted, and a party to an express indemnification agreement is found not to have contributed to a third party's injury, release of all liability for the innocent party is granted.

If adopted, courts can use these statutes to adjudicate indemnification disputes between sports organizations, concessionaires, and third parties in alcohol-fueled violence scenarios. Though the proposed statutory language in (a)(1) is limited to disputes involving sports organizations and concessionaires, the language in section (a) can be universally applied where two parties have contributed to a single injury. Therefore, if a state lacks a professional sports team, such as North Dakota, Hawaii, and South Carolina, it can still adopt the equitable indemnity doctrine and apply it to other incidents. Furthermore, this proposed legislation is functional in the collegiate athletics context. Many large athletic departments employ concessionaires to facilitate food and beverage services at their stadiums on gameday. [203] Thus, equitable indemnification principles could serve to settle potential disputes at collegiate venues. Equitable indemnification legislation provides reasonable solutions for stakeholders in the professional sports context and beyond. Legislative action codifying "equitable indemnity among joint tortfeasors" would be an effective way to ensure victims are compensated and responsible parties are liable, despite the presence of express contractual indemnity provisions.

C. PUBLIC POLICY CONSIDERATIONS

The proposed legislation aligns with well-recognized public policy considerations governing indemnification clause enforceability. Several states have recognized the potential negative effects indemnification clauses may have in protecting

[203] Sunnucks, *supra* note 17.

the public.[204] Thus, state legislatures have enacted statutes selectively precluding indemnity for a party's own negligence.[205]

As a public policy matter, nearly one-half of states recognize indemnification provisions in construction contracts as void.[206] These provisions most commonly appear in contracts between general contractors and subcontractors.[207] According to a New York statute:

> A covenant, promise, agreement or understanding…in connection with …a contract or agreement relative to the construction, alteration, repair or maintenance of a building…purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee…is against public policy and is void and unenforceable.[208]

This law voids an indemnification clause where the party seeking indemnification was negligent.[209] The New York legislature noted the statute's purpose was to prevent coercion by requiring parties to assume liability for others' negligence.[210] This statute was intended to allocate responsibility in joint fault cases, which directly aligns with the proposed equitable indemnity legislation above.[211]

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[204] *See* FOUNDATION OF THE AMERICAN SUBCONTRACTORS ASSOCIATION, INC, ANTI-INDEMNITY STATUTES IN THE 50 STATES: 2020, 1—8 (2020).

[205] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22 cmt. f (AM. LAW INST. 2000).

[206] FOUNDATION OF THE AMERICAN SUBCONTRACTORS ASSOCIATION, INC., *supra* note 204.

[207] *See, e.g.*, *Premium Food and Beverage, Catering, and Concessions Agreement*, *supra* note 84.

[208] N.Y. GEN. OBLIG. LAW § 5-322.1 (McKinney 2019).

[209] Castrogiovanni v. Corp. Prop. Invs., 714 N.Y.S.2d 332, 333 (App. Div. 2000).

[210] Westport Ins. Co. v. Altertec Energy Conservation, 921 N.Y.S.2d 90, 93 (App. Div. 2011).

[211] Onondaga Cnty. v. Penetryn Sys., Inc., 446 N.Y.S.2d 693, 694 (App. Div. 1981).

The construction context is directly analogous to the sports organization and concessionaire context. Sports organizations, like general contractors, contract with concessionaires.[212] Concessionaires, like subcontractors, are generally required to indemnify the other party for injuries arising from the bargained-for services.[213] If an incident occurs, the concessionaire or subcontractor assumes liability instead of the sports organization or general contractor.[214] A general contractor, like a sports organization, usually retains control over the workplace and contributes to the workplace environment and services.[215] The New York legislature, and many other state legislatures, realized this practice was unjust given the contribution these general contractors may have in creating injuries.[216] These construction situations pose similar issues as do sports organizations' contributions to alcohol-related third party injuries. Sports organizations seeking indemnification for their potential role in creating an injury is coercive. Thus, state legislatures should feel justified in adopting statutes apportioning fault based on contribution to alcohol-related injuries in the sports concessionaire context.

Indemnification provisions between 'masters and servants' are another area of concern for state legislatures. About one-fourth of state legislatures have adopted statutes prohibiting mandatory acceptance of indemnification provisions for injuries as a hiring condition.[217] In Arizona, it is illegal for any person or company to require its servants, as a service condition, to release them from liability for personal injuries arising from the professional relationship.[218] Any such agreement, if made, is void in violation of public policy.[219] The legislature recognized the trend of moving away from the "common-law action of

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[212] *See, e.g.*, *Premium Food and Beverage, Catering, and Concessions Agreement*, *supra* note 84.

[213] *See id.*

[214] *See id.*

[215] *See id.*

[216] *See Onondaga Cnty.*, 446 N.Y.S.2d at 694.

[217] FOUNDATION OF THE AMERICAN SUBCONTRACTORS ASSOCIATION, INC., *supra* note 204; *see* e.g. N.Y. GEN. OBLIG. LAW § 5-322.1 (McKinney 2019).

[218] ARIZ. REV. STAT. ANN. § 18-3 (2020).

[219] *Id.*

negligence and the rules governing it as between master and servant."[220] Instead, parties must bear the burden of fault in creating the injury.[221] Otherwise, the responsible party would be unjustly enriched. This places extreme burden on the servants and risks under-compensation for the injured plaintiff. Legislatures recognized these public policy concerns and implemented legislation addressing indemnification provisions in the employment context.[222]

The relationship between a sports organization and a concessionaire is like a master-servant relationship. Essentially, the 'master' sports organization retains the concessionaire to 'serve' food and beverages at the team's venue. Concessionaires are often forced to sign an indemnification clause limiting the sports organizations' liability as a service condition.[223] A result where an alcohol-related injury arises, and a sports organization is fully exculpated, would run counter to public policy. The sports organizations should bear some responsibility for creating the injury if such fault is found.[224]

Public policy considerations should play a vital role in assessing whether indemnification clauses are enforceable between sports organizations and concessionaires. The main goal in resolving these alcohol-related disputes should be compensating victims and correctly apportioning fault among the parties who created the injury. State legislatures are justified in adopting an equitable indemnity approach for joint tortfeasors in the sports context because most legislatures in other states have codified these principles in analogous situations. Allowing sports organizations to insulate themselves from alcohol-related liability runs counter to public policy. Thus, state courts and legislatures have a duty to recognize the unjust nature of indemnification clauses in this context, and work to restructure the law in this area.

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[220] Oatman United Gold Mining Co.v. Pebley, 250 P. 255, 256 (Ariz. 1926).

[221] *Id.*

[222] Daniel v. Magma Copper Co., 620 P.2d 699, 702 (Ariz. Ct. App. 1980).

[223] *See generally* Sample v. Eaton, 302 P.2d 431, 434 (Cal. Dist. Ct. App. 1956) (quoting Winn v. Holmes 299 P.2d 994, 996 (Cal. Dist. Ct. App. 1956)).

[224] *Daniel*, 620 P.2d at 701.

CONCLUSION

Alcohol consumption at live sporting events is commonplace today. The ability to purchase and consume alcohol at these events, however, can place others in danger. Unbeknownst to third parties, sports organizations regularly contract with concessionaires to provide alcohol at their venues, but escape liability for injuries resulting from alcohol distribution through express indemnification clauses. While full indemnification may be warranted in some situations, sports organizations often breach their duty of care in failing to mitigate the risks an intoxicated fan poses to others. This failure qualifies sports organizations as a joint tortfeasor in this context. Allowing sports organizations to contract away full liability when they may have contributed to an alcohol-related third-party injury is inequitable and unjust.

Courts should resolve these alcohol-related disputes by applying the proposed equitable indemnity principles. Equitable indemnity considers a party's responsibility in causing a plaintiff's injury. Then, fault is apportioned based on each party's culpable contribution to the injury, regardless of an express indemnity clause between the contracting parties. Equitable indemnity can be most effectively and uniformly applied if state legislatures adopt statutes codifying these principles. Equitable indemnity assures entities responsible for alcohol-related injuries will be held accountable. In addition, these principles further public policy goals like compensating injured victims, and incentivizing sports organizations and concessionaires to engage in safe practices at sports venues. Sports fans should know proper safety measures are in place when they attend a sporting event. A different result would deter eager fans from attending games, which would negatively affect sports organizations, concessionaires, and the sports industry as a whole. Thus, equitable indemnity provides a fair solution to settle alcohol-related injury disputes while improving the fan experience at live sporting events.

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NO LAUGHING MATTER: ENDING COPYRIGHT PROTECTION FOR JOKES

KEATON BROWN[∞]

INTRODUCTION

Copyright law plays a fundamental role in protecting artists' creative expression. However, all forms of creative expression are not protected equally.[1] Under current copyright law, comedic works receive minimal protection and comedians struggle to protect their intellectual property.[2] As a result, joke infringement is difficult to prevent.[3] In recent years, social media has made joke theft easier and widespread.[4] Additionally, greater confusion surrounding the use of another comedian's material leads to a decrease in joke production.[5]

This Note argues the best way to incentivize high-quality comedy is to eliminate copyright protection for jokes. Copyright law protection for jokes fails to serve any meaningful purpose. Razor-thin protections do not aid comedians or courts; they only

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[∞] J.D., Class of 2020, Sandra Day O'Connor College of Law at Arizona State University.

[1] *See* Allen D. Madison, *The Uncopyrightability of Jokes*, 35 SAN DIEGO L. REV. 111, 112 (1998).

[2] *See* Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 332 (2011).

[3] *See* Dotan Oliar & Christopher Sprigman, *There's no Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-up Comedy*, 94 VA. L. REV. 1787, 1798—801 (2008).

[4] *See* Jennifer L. Kostyu, *Copyright Infringement on the Internet: Determining the Liability of Internet Service Providers*, 48 CATH. UNIV. L. REV. 1237, 1238 (1999) ("Creators of original works face a greater risk of violation of their intellectual property rights because of the ease with which their copyrighted material may be used in an unauthorized manner compared to publishing through traditional mediums.").

[5] *See id.* at 1240—41.

cause confusion. Instead of supplementing this confusion with more law, the best solution is to eliminate copyright protections for comedic works. This Note discusses the reasons copyright fails to adequately protect jokes. Next, the Note discusses how social norms influence comedy production and the effects of the modern internet comedian. This Note argues the absence of copyright protection will encourage creating more comedic works. Finally, this Note will discuss the mechanisms comedians can use to monetize their efforts.

I. JOKE THEFT IN *KASEBERG V. CONAN*

Robert Kaseberg is a freelance writer and comedian who has written more than 1,000 jokes for late-night talk-show host Jay Leno.[6] His material has appeared in *The New York Times* and *The Washington Post*.[7] In 2015, Mr. Kaseberg wrote several jokes based on recent news stories and posted them on Twitter and his personal blog.[8] Later that night, Conan O'Brien used almost identical jokes in his nightly monologue on the popular TBS talk-show, *Late Night with Conan O'Brien*.[9] Mr. O'Brien had not contacted Mr. Kaseberg or obtained permission to use the jokes.[10] Mr. Kaseberg sued for copyright infringement.[11]

The lawsuit centered around four jokes.[12] Mr. Kaseberg's first joke read: "A Delta flight this week took off from Cleveland to New York with just two passengers. And they fought over control of the armrest the entire flight."[13] This joke was posted to Mr. Kaseberg's personal blog on January 14, 2015 at 4:14 P.M.[14] The same day, Mr. O'Brien featured the following joke in his

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[6] Eriq Gardner, *Conan O'Brien Headed to Trial Over Claims of Stealing Jokes*, HOLLYWOOD REP. (May 15, 2017, 6:22 AM), https://perma.cc/6MMW-ULFQ.

[7] *Id.*

[8] Laura Bradley, *Conan O'Brien's Joke-Theft Trial: Everything You Need to Know*, VANITY FAIR (April 17, 2019), https://perma.cc/FMP2-MBNY.

[9] Gardner, *supra* note 6.

[10] *See* Bradley, *supra* note 8.

[11] *Id.*; Complaint ¶ 26, Kaseberg v. Conaco, L.L.C., 260 F. Supp. 3d 1229 (S.D. Cal. 2018) (No. 15-CV-01637-JLS-DHB), 2015 WL 4497791.

[12] Bradley, *supra* note 8; *see* Complaint, *supra* note 11.

[13] Complaint, *supra* note 11, ¶ 15.

[14] Bradley, *supra* note 8.

nightly monologue: "On Monday, a Delta flight from Cleveland to New York took off with just two passengers. Yet, somehow, they spent the whole flight fighting over the armrest."[15]

The second joke was published on Mr. Kaseberg's blog and Twitter account on February 3, 2015.[16] Mr. Kaseberg's version reads: "Tom Brady, said he wants to give his MVP truck to the man who won the game for the Patriots. So enjoy that truck, Pete Carroll."[17] The next night, Mr. O'Brien stated, "Tom Brady said he wants to give the truck he was given as the Super Bowl M.V.P. to the guy who won the Super Bowl for the Patriots. So Brady is giving his truck to Seahawks' Coach Pete Carroll."[18]

Mr. Kaseberg's third joke was posted on February 17, 2015.[19] It read: "The Washington Monument is 10 inches shorter than previously thought. You know the winter has been cold when a monument suffers from shrinkage."[20] Mr. O'Brien's version aired the same night, reading, "Surveyors announced that the Washington Monument is 10 inches shorter than what's been recorded. Of course, the monument is blaming the shrinkage on the cold weather."[21] The final joke referred to Caitlyn Jenner's gender reassignment and potential changes to a street named after Bruce Jenner.[22]

Mr. Kaseberg named Mr. O'Brien, Conaco, TBS, Time Warner and several producers as defendants in the suit.[23] He claimed Mr. O'Brien and the *Late Night with Conan O'Brien* production staff copied the jokes and committed copyright infringement.[24] Mr. Kaseberg demanded Mr. O'Brien pay all profits earned from the jokes' use, which he claimed exceeded $600,000.[25] He also asked for $30,000 for attorney's fees and $150,000 in statutory damages for willful infringement.[26]

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[15] *Id.*
[16] Complaint, *supra* note 11, ¶ 16.
[17] *Id.*
[18] *See* Bradley, *supra* note 8.
[19] Complaint, *supra* note 11, ¶ 18.
[20] *Id.*
[21] Bradley, *supra* note 8.
[22] *Id.*
[23] *Id.*
[24] Complaint, *supra* note 11, ¶ 26.
[25] *Id.* at ¶ B.
[26] *Id.* ¶¶ C–D.

Mr. O'Brien argued the jokes were not copyrightable.[27] Additionally, Mr. O'Brien claimed he did not commit infringement because the jokes were not substantially similar.[28] He also relied on independent creation and fair use defenses.[29]

The case was disputed for nearly four years and was set for trial in May 2019.[30] The parties settled in early May 2019 for an undisclosed amount.[31] When asked about the settlement, Mr. O'Brien responded:

> This saga ended with [Mr. Kaseberg] and I deciding to resolve our dispute amicably. I stand by every word I have written here, but I decided to forgo a potentially farcical and expensive jury trial in federal court over five jokes that don't even make sense anymore.[32]

He later added, "Four years and countless legal bills have been plenty."[33]

This is not the first occasion Mr. O'Brien has shared infringing jokes based on the news.[34] In 1995, Mr. O'Brien told a joke about Dan Quayle.[35] The joke was also used by rival late-

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[27] Answer to Complaint at 5, Kaseberg v. Conaco, L.L.C., 260 F. Supp. 3d 1229 (S.D. Cal. 2018) (No. 15-CV-01637-JLS-DHB).

[28] *Id.*

[29] *Id.* at 5; *see also* Bradley, *supra* note 8, (describing a memorandum released by Conanco stating that "Kaseberg's jokes are negligible and trivial variations on unprotectable, ideas, preexisting works, or public domain works, such that they do not contain the requisite amount of creative input to qualify for copyright protection.").

[30] Pretrial and Trial Scheduling Order at 2, Kaseberg v. Conaco, L.L.C., 260 F. Supp. 3d 1229 (S.D. Cal. 2018) (No. 15-CV-01637-JLS-DHB).

[31] Order Approving Joint Stipulation of Dismissal with Prejudice, Kaseberg v. Conaco, L.L.C., 260 F. Supp. 3d 1229 (S.D. Cal. 2018) (No. 15-CV-01637-JLS-DHB).

[32] Bryan Alexander, *Conan O'Brien Explains Why He Settled 'My Stupid Lawsuit' Over Alleged Joke-Stealing*, USA TODAY (May 9, 2019, 7:05 PM), https://perma.cc/PN3M-PTZF.

[33] *Id.*

[34] *Id.*

[35] *Id.*

night hosts Jay Leno and David Letterman.[36] Mr. O'Brien has noted social media is bound to increase the odds of overlap.[37] He commented, "[w]ith over 321 million monthly users on Twitter, and seemingly 60% of them budding comedy writers, the creation of the same jokes based on the day's news is reaching staggering numbers."[38]

Although the Kaseberg dispute settled, it raises several interesting questions including how jokes fit into copyright law. Moreover, the dispute highlighted how social media and the Internet affect copyright law.

II. THE COPYRIGHTABILITY OF JOKES

In general, jokes are creative expressions protected by copyright law.[39] Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[40] Congress has passed several copyright laws pursuant to this constitutional authority. Today, copyright protections are given to "original works of authorship, fixed in any tangible medium of expressions."[41] A copyrightable work must satisfy two requirements: originality and fixation.[42]

First, a work must be original.[43] Original means "the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."[44] In *Borrow-Giles Lithographic Co. v. Sarony*, the United States Supreme Court had to decide whether a photograph was original.[45] The Court held a work was original if

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *See* Rosenblatt, *supra* note 2, at 332.

[40] U.S. CONST. art. I, § 8, cl. 8.

[41] 17 U.S.C. § 102(a).

[42] *See id.*

[43] *Id.*

[44] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 449 U.S. 340, 345 (1991).

[45] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59 (1884).

it represented the author's choices.[46] In *Bleistein v. Donaldson Lithographing Co.*, the Supreme Court noted the minimally creative requirement is a low bar, and courts should not determine a work's artistic merit.[47] As a result, a joke not copied from another source and exhibiting a minimal degree of creativity will be copyrightable.[48]

Fixation is the second requirement for copyright protection.[49] Fixation means a work "is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration."[50] Thus, a work is only copyrightable if it is captured in some form preserving the work for more than a brief moment.[51] Mere performance or verbal expression is not enough to show fixation.[52] However, writing a joke on paper, saving it in an electronic medium, such as a computer file, or posting to a website would satisfy the fixation requirement.[53] A live stand-up performance's contemporaneous recording would also satisfy the fixation requirement.[54]

A work is generally entitled to copyright protection when both the originality and fixation requirements are satisfied.[55] Registering the copyright federally is not required but is highly

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[46] *Id.* at 58 ("[T]he constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.").

[47] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations . . .").

[48] Feist Publ'ns, Inc., 449 U.S. at 345.

[49] 17 U.S.C. § 102(a).

[50] 17 U.S.C. § 101.

[51] *See* H.R. Rep. No. 94-1476, at 53 (1976) ("[T]he definition of fixation would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the memory of a computer.").

[52] *See* § 102(a).

[53] *See* § 101.

[54] *See* § 102(a) (stating that fixation occurs at the moment the work is captured in a tangible medium of expression); *see also* MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 50 (Lexis Nexis, 6th ed. 2014) (providing a brief description of the fixation requirement).

[55] *See* 17 U.S.C. § 102(a) (1976).

recommended.[56] The author receives several rights once a valid copyright is created.[57] These rights include public performance, reproducing and distributing copies, preparing derivative works, public display, and selling the work.[58] These rights are exclusive, meaning another individual may not exercise these rights without the author's permission.[59] These rights extend for a limited time, generally seventy years after a known author's death.[60] Once the limited time frame expires, the work falls into the public domain and may be used freely by the public.[61]

A. LIMITS ON THE COPYRIGHTABILITY OF JOKES

Although copyright laws generally prohibit the unauthorized use of a work, several exceptions and defenses permit others to avoid these prohibitions.[62]

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[56] Although not required, registration is beneficial for a number of reasons. First, registration is a prerequisite to bring a suit for infringement. Second, registration also acts as *prima facie* evidence of validity. Third, registration allows for Statutory damages and attorney's fees. Fourth, registration acts as a notice feature, and aids in stopping infringement early. *See* MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW, 285 (Lexis Nexis, 6th ed. 2014).

[57] *See* 17 U.S.C. § 106 (2002).

[58] *Id.*

[59] *Id.* There are several exceptions to these exclusive rights and under certain defenses, such as fair use, a non-author may permissibly use the work without the permission of the author. *See* 17 U.S.C. § 106 (1976).

[60] *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998). The copyright term will depend on a number of factors including the year the work was created, whether the work was published, whether the work is a "work made for hire," who the author is and whether the work was properly renewed. 70 years after death of the author is the term limit for works created today by a known author but this might not be true of every work created depending on the factors mentioned above.

[61] ALFRED C. YEN & JOSEPH P. LIU, COPYRIGHT LAW ESSENTIAL CASES AND MATERIALS 202 (3rd ed. 2016).

[62] 17 U.S.C. § 107.

1. *MERGER DOCTRINE*

The merger doctrine is an important exception to copyright law. Ideas and facts alone are not copyrightable.[63] The idea-expression dichotomy limits copyright by protecting an author's original presentation but not the underlying idea.[64] For example, if a comedian wrote an original joke about Abraham Lincoln's height, the joke might be protectable. No one else could use the joke. However, the fact Abraham Lincoln was six feet, four inches tall is not protectable. Therefore, another person could use the same fact in their own original joke.

Copyright law exists to incentivize creating new works.[65] Authors often rely on their predecessors' work to create new works.[66] Authors often combine old ideas or rearrange existing thoughts into a new expression or form.[67] The idea-expression dichotomy provides a balance between protecting authors' works and allowing access to the information and materials needed to create new works.[68]

The distinction between ideas and expression is simple in theory but difficult to apply. When does an idea become expression, and when does an expression become an idea? The idea-expression dichotomy functions along a spectrum.[69] Pure ideas exist on one end of the spectrum.[70] The exact expression of those ideas exists on the other end.[71] The use of the idea with some similar or partial use of the expression exists in the middle.[72] Disputes often arise when attempting to draw a line on this

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[63] 17 U.S.C. § 102(b) (1976).

[64] *Id. See also* Leslie A. Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, 47 U. MIAMI L. REV. 1221, 1222 (1993).

[65] Kurtz, *supra* note 64, at 1223.

[66] *Id.*

[67] *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966-67 (1990) (Creating new works is "more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea . . . . [Authors] all engage in the process of adapting, transforming and recombining what is already 'out there' in some form. This is not parasitism: it is essence of authorship.").

[68] *See* Kurtz, *supra* note 64, at 1223.

[69] Marshall A. Leaffer, UNDERSTANDING COPYRIGHT LAW 84 (Lexis Nexis, 6th ed. 2014).

[70] *Id.*

[71] *Id.*

[72] *See id.*

spectrum, distinguishing permissible use of ideas from the infringement of an expression.[73]

In 1879, the United States Supreme Court was presented with the idea-expression conflict.[74] In *Baker v. Selden*, accountant Charles Selden created accounting and bookkeeping forms for an accounting system he devised.[75] The defendant Baker took this idea and produced his own form using a nearly identical system.[76] The Court held the form was not protectable.[77]

In *Baker*, the expression, the accounting forms, merged with the unprotected idea, the method of accounting.[78] The expression was then held unprotectable.[79] The Court reasoned the forms could not be protected because the accounting system required the accounting form.[80] If protection was granted for the form, the public use of the idea would be limited.[81] Thus, when an idea and an expression cannot be separated, the expression will lose its copyright protection.[82]

The idea-expression dichotomy is troublesome for comedians. Usually, the idea behind the joke causes people to laugh, not the expression.[83] Comedians may use another comedian's joke and rearrange it into a similar but original joke. The comedian only uses the idea, and, therefore, no infringement occurs. If a comedian writes a unique joke which can only be told one way, the joke likely merges with the idea and loses protection. Additionally, determining which elements of a joke are expression and which are ideas is difficult.

For example, in *Kaseberg*, it is difficult to determine which parts of the jokes were Mr. Kaseberg's ideas and which were his expressions. Mr. O'Brien did not retell the jokes

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[73] *Id.*

[74] Baker v. Selden, 101 U.S. 99, 99-100 (1880), *superseded by statute*, 17 U.S.C. § 102.

[75] *Id.*

[76] *Id.* at 101.

[77] *Id.* at 107.

[78] *Id.* at 101.

[79] *Id.* at 107.

[80] *Id.* at 102.

[81] *Id.*

[82] *Id.* at 103.

[83] Oliar & Sprigman, *supra* note 3, at 1802.

verbatim, so the exact expressions were not copied.[84] Was Mr. Kaseberg's expression so close to the idea that the joke was never protectable? No clear answer exists, which is why comedians and courts struggle to apply copyright law to comedic works.[85]

The short phrase doctrine is a subsection of the merger doctrine.[86] The short phrase doctrine is the long-standing rule that simple works and short phrases are not copyrightable.[87] Short works are not protected because they do not meet the minimum level of authorship or creativity.[88] Additionally, the smaller a phrase, the more likely the phrase merges with the idea.[89] A small phrase contains less expression, and thus has fewer variations of expression.[90] For example, Nike's slogan "Just do it" is not copyrightable. Although it may be original and fixed, the short phrase doctrine denies copyright protection.

For many jokes, the short phrase doctrine limits copyright protection. Many jokes are intended to be short to enhance their accessibility and maintain audience attention.[91] However, if the joke is too short, it might be a short phrase and fail to gain protection.[92] For example, a joke written as a tweet

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[84] *See* Kaseberg v. Conaco, No. 15CV1637, 2015 WL 4497791, ¶ 15-21 (S.D.Cal. filed July 22, 2015). *See also supra* note 8 (providing specific phrasing of the jokes written by Kaseberg and told by O'Brien).

[85] *See, e.g.,* Kaseberg v. Conaco, 360 F. Supp. 3d 1026, 1030 (S.D. Cal. 2018).

[86] *See generally* Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575 (2005) (explaining that providing copyright protection to microworks, or short phrases, would make the merger doctrine unworkable).

[87] *See id.* at 578 (*citing* 37 C.F.R. § 202.1(a) (2004)).

[88] *See* Alan LaCerra, *You'll LOL @ This Tweet: Copyright Protection for Hashtag Gamers*, 45 FLA. ST. U.L. REV. 1241, 1252 (2018).

[89] *See id.* at 1255.

[90] See *id.*

[91] *See id.* at 1258.

[92] *See generally id.* at 1252. (Alan LaCerra describes the short phrase doctrine and the Copyright Office stance on short phases. Noting that titles or books or movies are short phrases. That when a short phrase refers to something else, it merges with the idea rather than form a new expression of the idea. However, short works like poems (haikus) are protectable because they do feature creative authorship. If a work is a short phrase, protection is still available through trademark law. LaCerra also states that the short phrase doctrine also serves to protect the public domain by denying protection for common short phrase.)

may be funny and creative, but a court might view it as too short to be copyrightable. Therefore, the short phrase doctrine may limit copyright protection for jokes.[93]

2. *SCÈNES À FAIRE*

Scènes à faire is another doctrine related to the idea-expression dichotomy.[94] Artistic works often use similar elements that are familiar to audiences. Elements such as theme, character traits, and common plots are tools authors rely on to ensure audiences relate and understand an artistic work. The *scènes à faire* doctrine prohibits copyright protection of these common literary elements because protecting them would hinder the creation of future works.[95] The doctrine prevents protecting "incidents, characters, or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic."[96] Examples of *scénes á faire* in comedy include jokes about spouses, kids, co-workers, and other familiar characters, or joke styles, such as "knock-knock" or "walk into a bar" jokes. Although a comedian's joke may be original, he cannot prevent another comedian from making jokes involving the same common characters, situations, or styles.[97] Such elements are indispensable for creating new works.[98]

In comedy, many jokes stem from the same situations or characters.[99] Protections for certain comedic works are limited because certain elements are *scènes à faire*.[100] Other comedians

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[93] *Id.* at 1252.

[94] *See* Leslie A. Kurtz, *Copyright: The Scenes A Faire Doctrine*, 41 FLA. L. REV. 79, 89-90 (1989).

[95] *Id.*

[96] Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (2d Cir. 1980).

[97] *See* Gaiman v. McFarlane, 360 F.3d 644, 660 (7th Cir. 2003) (stating "[i]t would be difficult to write successful works of fiction without negotiating for dozens or hundreds of copyright licenses, even though such stereotyped characters are products not of the creative imagination but of simple observation of the human comedy.").

[98] *Id*.

[99] *Id*.

[100] *See* Idema v. Dreamworks, Inc., 162 F.Supp.2d 1129, 1178 (C.D. Cal. 2001) (stating "[w]here a copyrighted work is composed largely of 'unprotectable' elements, or elements 'limited' by 'merger,'

can use those elements in their own version of the same joke.[101] For example, Mr. Kaseberg's first disputed joke involved two airplane passenger's fighting over an armrest.[102] Fighting over an armrest is not a new idea. Many people have experienced or can recognize this situation. An airplane is a common place to fight over an arm rest. Airplane passengers are common characters in a joke or story. None of these elements belong to Mr. Kaseberg because they are examples of *scènes à faire*. Mere use of these elements cannot establish copyright infringement.

3. *INDEPENDENT CREATION*

A third potential limitation of joke writers' rights is the independent creation defense.[103] Copyright's originality requirement is not a novel requirement.[104] A novel work is a new creation.[105] An original work is an independent, non-copied creation.[106] If two authors create identical works, but neither author copied the other, then there is no infringement.[107] Although the works are identical, both have a valid copyright.

Frequently, comedians independently create highly similar jokes.[108] Independent creation often occurs when jokes reference popular news stories. For example, in 2006, several comedians made similar jokes regarding a proposal to build a wall along the United States and Mexico border.[109] Ari Shaffir stated in 2004:

'*scenes a faire,*' and/or other limiting doctrines, it receives a 'thin' rather than a 'broad' scope of protection.").

[101] *Id*. at 1179 (stating "[w]hat is required is not just 'similarity,' but '*substantial'* similarity,' and it must be measured at the level of the concrete 'elements' of each work, rather than at the level of the basic 'idea,' or 'story,' that it conveys.").

[102] *See* Kaseberg v. Conaco, LLC, 260 F. Supp. 3d 1229, at 1233 (S.D. Cal. 2017).

[103] Allison S. Brehm, *What's the Use? A Primer on the Defense of Independent Creation to Combat Allegations of Idea Theft*, 1 ARIZ. ST. SPORTS & ENT. L.J. 94, 97 (2011).

[104] *See* H.R. REP. NO. 94-1476, at 51 (1976).

[105] *See* Baker v. Selden, 101 U.S. 99, 102 (1879).

[106] *See* Alfred Bell & Co. v. Catalina Fine Arts, Inc., 191 F.2d 49, 54 (2d Cir. 1951).

[107] *See* Baker v. Selden, 101 U.S. at 100.

[108] *See* Oliar & Sprigman, *supra* note 3, at 1802.

[109] *Id.* at 1804.

> [Governor Schwarzenegger] wants to build a new wall all down the California-Mexico border, like a twelve-foot high brick wall, it's like three feet deep, so no Mexicans get in. But I'm like "Dude, Arnold, um, who do you thinks going to build that wall?"[110]

Other comedians, like Carlos Mencia and George Lopez, referenced the same news story and told similar jokes:

> Carlos Mencia: Um, I propose that we kick all the illegal aliens out of this country, then we build a super fence so they can't get back in. And I went, um, "Who's gonna build it?"[111]

> George Lopez: The Republican answer to illegal immigration is they want to build a wall 700 miles long and twenty feet wide, okay, but "Who you gonna get to build the wall?"[112]

How these comedians developed their material is unclear, but it is hard to disprove independent creation. Comedians plausibly develop similar yet independent jokes, especially if the jokes are simple and based on widespread news.

In *Kaseberg*, the jokes were based on relevant news stories.[113] Mr. O'Brien argued he and his writers independently created the jokes.[114] This may have been true. Many late-night shows base monologues on relevant news. Further, a limited number of jokes can be made about a news story. In an age of social media, internet comedians are constantly posting witty comments about the news. Because many internet comedians exist, jokes are bound to overlap and be similar.[115]

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[110] *Id.* (quoting deadfrogcomedy, *Whose Joke Is It? Carlos Mencia? D.L. Hughley? George Lopez?*, YOUTUBE (Feb. 19, 2007), http://www.youtube.com/watch?v=kPuu_VE7KOA at 0:14-0:27 (Last visited Nov. 8, 2019).

[111] *Id.*

[112] *Id.*

[113] Kaseberg, LLC, 260 F. Supp. 3d at 1242.

[114] *Id.* at 1241.

[115] *See* Alexander, *supra* note 33.

4. *FAIR USE*

The most common defense in copyright infringement claims is fair use.[116] Fair use allows non-copyright holders the right to reasonably use a copyrighted work in specific instances.[117] For example, a book critic might need to use a portion of a book to provide context to the audience.[118]

Fair use gives courts an equitable alternative when rigid application of copyright statutes would undermine promoting creation.[119] Several commonly-touted policy justifications for the fair use doctrine exist, including promoting free speech and subsequent authors' expression, promoting ongoing progress of authorship, and promoting furthering research and learning.[120]

Fair use was developed in 1841 when the Circuit Court of Massachusetts decided *Folsom v. Marsh.*[121] In *Folsom*, the defendant used 353 pages of George Washington's unpublished writings in his publication.[122] The court held the use was infringement.[123] The court established four factors for analyzing valid uses of another's work.[124] The court considered: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market or value of the

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[116] *Copyright Infringement*, DIGITAL MEDIA LAW PROJECT, http://www.dmlp.org/legal-guide/copyright-infringement (last visited Sept. 7, 2020).

[117] Rich Stim, *What Is Fair Use?*, STANFORD UNIV. LIBR., https://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/(last visited Sept. 7, 2020).

[118] *See, e.g.*, Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1264 (11th Cir. 2001) (stating that use of characters from the book "Gone with the Wind" was fair use because the use of the characters was needed to effectively criticize the book).

[119] *See* Iowa State Univ. Rsch. Found., Inc. v. Am. Broad. Cos., Inc., 621 F.2d 57, 60 (2d. Cir. 1980).

[120] Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2544 (2009).

[121] Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

[122] *Id.* at 345.

[123] *Id.* at 349.

[124] *Id.* at 348—49.

copyrighted work.[125] The first and fourth factors have had the greatest effect on cases' outcomes.[126] Fair use was further defined and codified by Congress in 1976.[127]

In *Kaseberg*, Mr. O'Brien argued his use of Mr. Kaseberg's jokes was fair use.[128] The issue was never decided because the case settled before trial.[129] If the case had gone to trial, the court would have analyzed the four *Folsom* factors to determine whether Mr. O'Brien had a valid fair use defense.

When evaluating the purpose and character of the use, a court examines the way the infringed work was used in the new work.[130] A court will consider whether the infringed work was transformed into a new work and whether the work was for commercial or nonprofit educational use.[131] In *Kaseberg*, Mr. O'Brien did not transform the joke into something new and the joke was for commercial use.[132] The court would likely view this factor in favor of Mr. Kaseberg.

When considering the nature of the copyrighted work, a court recognizes certain works, like scientific articles and historical works, as more valuable to the public.[133] The fair use doctrine favors greater access to works that contribute to society.[134] In *Kaseberg*, a joke about two airplane passengers was minimally informative and minimally valuable. Thus, this factor weighs against fair use and favors Mr. Kaseberg.

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[125] Along with the four factors for determining fair use, Congress has named several uses that are often considered fair use. These uses include criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. 17 U.S.C. § 107 (1976); *see also* Rosemont Enters., Inc. v. Random House., Inc., 266 F.2d 303, 306 (2d Cir. 1966); Leaffer, *supra* note 54, at 501-02.

[126] Leaffer, *supra* note 54.

[127] *See* 17 U.S.C. § 107 (1976).

[128] Answer to Comp. at 6, Kaseberg v. Conaco, LLC, 260 F. Supp. 3d 1229 (S.D. Cal. 2017) (No. 15-CV-01637-JLS-DHB).

[129] Order Approving Joint Stipulation of Dismissal with Prejudice, Kaseberg v. Conaco, LLC, 260 F. Supp. 3d 1229 (S.D. Cal. 2017) (No. 15-CV-01637-JLS-DHB).

[130] Leaffer, *supra* note 54, at 503.

[131] *Id.*

[132] Kaseberg, 260 F. Supp. 3d at 1246—47.

[133] Leaffer, *supra* note 54, at 505.

[134] *Id.*

When evaluating the amount and substantiality of the portion used in relation to the copyrighted work as a whole, courts try to determine whether the alleged infringer used more than necessary to accomplish a fair use purpose.[135] For example, book critics might use a quote from a book to make a specific point. Using a small portion of the book would likely be permissible. However, completely reproducing an entire chapter from the book likely would exceed what is needed for criticism. In *Kaseberg*, the jokes were similar but not verbatim.[136] A court may side with either party but would likely favor Mr. Kaseberg because a large portion of each joke was replicated.

Finally, courts must determine whether the infringer's use would cause harm to the value or market for the infringed work.[137] This is arguably the most important factor because it most closely affects the financial incentive an author might have for creating the work.[138] If fair use harms the value of the infringed work, it is likely to hinder further creation.[139] In *Kaseberg*, Mr. Kaseberg would have to show a market existed for his tweet and that the value was harmed by Mr. O'Brien's use. This factor is fact-intensive.[140] A court could find this factor favors either party. Looking at the four factors in *Kaseberg*, a fair use defense would likely be denied because most factors favor Mr. Kaseberg.[141]

Today, most original jokes are copyrightable.[142] However, the practical scope of protection is exceedingly thin because of merger, *scènes à faire*, independent creation, and fair use. Moreover, each of these doctrines are highly subjective and fact-intensive, making predictions about disputed protection difficult. Increasing legal uncertainty likewise increases potential litigation and transaction costs. Therefore, the benefits of thin copyright protection for jokes is outweighed by the increased costs of determining and enforcing those rights.

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[135] *Id.* at 507.

[136] Kaseberg, 260 F.Supp. 3d at 1236.

[137] Leaffer, *supra* note 54, at 508.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] The analysis above is given as an example to illustrate the fair use factors. Fair use was never decided in this case. Because of the fact intensive nature of fair use determinations, it is possible that a court could determine that Conan's use of Kaseberg's jokes constituted fair use.

[142] Kaseberg, 260 F.Supp. 3d at 1245.

B. TRADITIONAL COPYRIGHT POLICY JUSTIFICATIONS DO NOT APPLY TO JOKES

Copyright protection provides authors a limited monopoly for their works.[143] Copyright laws seek to incentivize creating new works by providing an economic benefit to authors.[144] Unlike physical property, intellectual property is non-rivalrous and non-appropriable.[145] Non-rivalrous means a good is not diminished by its use or consumption.[146] For example, an apple is a rivalrous good. Once it is consumed, it is gone and cannot be used again. A movie, on the other hand, is a non-rivalrous good. Once a movie is produced and distributed, one viewer's enjoyment does not diminish the viewing experience of another audience member. The film can be shown again and again, without being diminished or consumed. Similarly, a joke can be told again and again, without being consumed or diminished.[147]

A non-appropriable good is a good that is difficult to exclude others from using, such as a lighthouse.[148] One ship owner may pay to build a lighthouse, but once it is built and operating, it

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[143] Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1503 (2020).

[144] U.S. COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 30, (2019), https://www.copyright.gov/policy/moralrights/full-report.pdf.

[145] Leaffer, *supra* note 54, at 23.

[146] *See* Robert Cooter & Thomas Ulen, *Law and Economics*, 114 (6th ed. 2012).

[147] Some might argue that a joke is diminished when it is used or told. A joke's value or hilarity is most effective when the audience is first exposed to the joke. Any subsequent interaction with the same joke by the same audience member may not have the same effect as the first interaction. In their book *The Humor Code*, Peter McGraw and Joel Warner explain that a joke is funny when "something seems wrong, unsettling, or threatening (a kind of violation), but simultaneously seems okay, acceptable, or safe." When an audience interacts with a joke a second or third time, that joke loses its unsettling or threatening effect, and thus becomes boring, or too safe. *See* Joe Berkowitz, *This is Why You're Not Funny: A Professor's Scientific Approach to Dissecting Humor*, FAST COMPANY (Apr. 8, 2014), https://perma.cc/C9H7-S8PG.

[148] Cooter & Ulen, *supra* note 146, at 114.

is difficult to exclude other ships from also using it.[149] Similarly, as in *Kaseberg*, anyone with access to a page where one posts jokes may benefit from it.

Copyrights exist in part to prevent free riders.[150] Free riders are consumers who do not pay for consumption but wait for another to bear the costs.[151] In the lighthouse example, if the lighthouse operator required a payment before turning on its light, everyone would wait for another person to pay. Once the first person pays, the lighthouse operator would be forced to turn on the lighthouse. However, those individuals who did not pay could still use the lighthouse, even though they did not make payments to the operator. Absent a control method for delivering the goods to certain customers, paying customers provide a free ride for everyone else.[152]

Because of these characteristics, a market failure in producing intellectual property exists. Absent copyright protections, many authors would not create new works.[153] Instead, they would wait for others to expend their time and money to produce new works. After the works are created, free riders would use the works without having to invest their own time or money. For example, J.D. Salinger and Margaret Michell took ten years to write *Catcher in the Rye* and *Gone with the Wind* respectively.[154] However, without copyright protection, anyone could copy those books quickly and compete with, or out-compete, the original authors. In theory, Mr. Salinger and Ms. Michell could only sell a handful of copies before free riders could make their own copies and saturate the market. Authors would struggle to make enough money to support their ten-year efforts. As a result, a suboptimal level of new works would be produced and the goal of promoting "the [p]rogress of [s]cience and the

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[149] *Id*.

[150] Peter S. Menell, *Rise of the API Copyright Dead?: An Updated Epitaph for Copyright Protection of Network and Functional Features of Computer Software,* 31 HARV. J.L. & TECH. 305, 334 (2018).

[151] Cooter & Ulen, *supra* note 146, at 103.

[152] *Id.* at 104.

[153] Laura A. Heymann, *A Tale of (At Least) Two Authors: Focusing Copyright Law on Process Over Product*, 34 WM. & MARY FACULTY PUBLICATIONS 1009—10 (2009).

[154] *Infographic: How Long Did Famous Novels Take to Write?,* ELECTRIC LITERATURE (Sept. 8, 2016), https://perma.cc/D8S8-QC9E.

useful [a]rts" would be frustrated.[155] For this reason, copyright law grants authors a limited monopoly for their works.

Conversely, if the author's monopoly was absolute, then diminished access to those works would also frustrate the progress of science and useful arts. A work inaccessible to the public provides no benefit to the public.[156] Essentially, an inaccessible work is the same as a nonexistent work. For this reason, the U.S. Constitution grants authors exclusive rights "for limited [t]imes"[157] and sets forth other limitations on the rights during the copyright term. Generally, a copyright protects works for a known author's life, plus seventy years after the author dies.[158] Critics debate and disagree about the optimal duration for copyright protection.[159] Regardless, copyright protections eventually terminate, thereby providing public access to the works.[160]

1. *COMEDY AND THE NEGATIVE SPACE*

Not every creative work needs a monopoly. Comedic works are not necessarily reliant on a limited monopoly.[161] Comedic works exist in a "negative space."[162] A negative space is defined as "encompassing any 'substantial area of creativity' in which intellectual property laws do not penetrate or provide only very limited propertization."[163] In negative spaces, creation continues or thrives despite little to no intellectual property protection.[164] Examples of creation within a negative space include fashion, cuisine, magic tricks, and sports moves.[165] These

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[155] U.S. CONST. art. I, § 8, cl. 8.

[156] Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 2 (1995).

[157] U.S. CONST. art. I, § 8, cl. 8.

[158] *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 302).

[159] *See generally* Arlen W. Langvardt, *The Beat Should Not Go On: Resisting Early Calls for Further Extensions of Copyright Duration*, 112 PENN ST. L. REV. 783 (2008).

[160] *Id.* at 785.

[161] Oliar & Sprigman, *supra* note 3, at 1790.

[162] Rosenblatt, *supra* note 2, at 319—20.

[163] *Id.* at 322.

[164] *Id.* at 319.

[165] *Id.* at 319—20.

areas have little protection for creators.[166] However, professionals continue to create and profit from their works in these areas.

Within the negative space, comedy is prone to intellectual property forbearance.[167] Intellectual property forbearance occurs when traditional intellectual property protection is available to creators, but creators commonly opt out of protection or choose not to pursue infringers.[168]

Comedians may choose to forgo protection because reinvestment in creation might be more beneficial than protection or enforcement.[169] Many comedians and writers may decide the cost of vindicating their rights exceeds the benefit and that their time would be better spent writing new jokes.[170]

Bringing an infringement claim can be expensive.[171] Copyright law is litigated in federal court and requires a certain degree of specialized knowledge.[172] The lawyers a comedian could hire are limited.[173] If a comedian does hire a lawyer, it may cost between $150 and $1,000 per hour.[174] However, jokes' typical market value is between $50 to $200.[175] It is better for a comedian to write new material and not lose money enforcing rights in a joke which may not be relevant or funny later.[176]

Additionally, before a copyright infringement suit can be filed, the author must register the work with the United States Copyright Office.[177] To register, the author must pay a registration fee between $35 and $85, depending on the application method.[178] When each joke might only earn the comedian up to $200,

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[166] *Id.* at 319.
[167] *Id.* at 332.
[168] *Id.* at 330.
[169] *Id.* at 351.
[170] *Id.*
[171] Oliar & Sprigman, *supra* note 3, at 1799.
[172] *See id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *See id.* at 1800.
[177] 17 U.S.C. § 411 (2008); Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, L.L.C., 139 S. Ct. 881, 887 (2019).
[178] Although a writer can combine several jokes into a single book or document and register a collection of jokes under the same registration fee, this requires a lot of up-front work. *Office Fees,* U.S. Copyright Office, https://perma.cc/HC9S-MPEF; Oliar & Sprigman, *supra* note 3, at 1800.

registration cost, attorney's fees, and time involved exceeds the asset's value.[179] The comedian would benefit from reinvesting the time and money into a new joke.[180]

Even if a comedian brings a suit and wins, he may not recover a judgement against the infringer. The average comedian makes roughly $40,000 a year and has few assets.[181] Therefore, if the infringer is another comedian, a judgment in favor of the creator might not result in a payment. Mr. O'Brien is a rare example of a comedian who can afford to pay, which may be the reason Mr. Kaseberg brought the suit; he likely knew it would be worth his time and money.

Second, intellectual property forbearance might occur when the incentive to create is not connected to exclusivity.[182] For some creators, public recognition rather than financial gain is motivation to create.[183] For example, the *Tonight Show with Jimmy Fallon* frequently runs a bit called "Hashtags."[184] In the week leading up to the bit, Jimmy Fallon selects a hashtag and asks Twitter users to provide their best story or joke using the hashtag.[185] For instance, in preparation for Halloween, Mr. Fallon introduced the hashtag "#MyWorstCostume."[186] The audience was given a few days to post on Twitter about their worst costume.[187] Mr. Fallon selected the funniest posts and read them during the show.[188] For example, viewer Jodie Colombo responded, "My grandmother wrapped my cousin up in tinfoil for

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[179] *See* Oliar & Sprigman, *supra* note 3, at 1799.

[180] *See* Rosenblatt, supra note 2, at 352.

[181] PAYSCALE, https://perma.cc/QK63-6FZJ (last visited Jan. 23, 2020); *see also* Oliar & Sprigman, *supra* note 3, at 1800.

[182] *See* Rosenblatt, *supra* note 2, at 342.

[183] *Id.* at 343.

[184] *See* NAT'L BROAD. CO., https://www.nbc.com/the-tonight-show/exclusives/hashtags (Aug. 29, 2020, 12:42 AM).

[185] *See* Jimmy Fallon (@jimmyfallon), TWITTER (Oct. 21, 2019, 1:47 PM), https://twitter.com/jimmyfallon/status/1186383409968566274.

[186] The Tonight Show Starring Jimmy Fallon, *Hashtags: #MyWorstCostume*, YOUTUBE (Oct. 23, 2019), https://www.youtube.com/watch?v=N9pchm3ATjw.

[187] Dustin Nelson, *Fallon Cracked Up Over People's Terrible Costume Stories*, THRILLIST (Oct. 23, 2019), https://www.thrillist.com/news/nation/jimmy-fallon-hashtags-my-worst-halloween.

[188] *See id.*

Halloween and said he was a 'Hershey's Kiss.' Everyone thought he was leftovers. #MyWorstCostume."[189] For some, having a joke read by Jimmy Fallon on national television is reward enough. It is a win-win: the contributor is excited to have his joke on national television, and *The Tonight Show* benefits from an entertaining bit which generates thousands of dollars for the show.[190]

For comedians, branding and name recognition can also be appealing, especially if they are new and trying to build a reputation.[191] The benefits of gaining recognition as a good comedian and writer can be more advantageous than immediate financial gain. Many internet comedians do not create content for direct financial gain; they use the internet and social media platforms to establish and maintain a fan base throughout the world.[192]

Finally, creators may thrive in the negative space because they capitalize on first-mover advantages.[193] A first-mover advantage occurs when an author or creator can create enough benefit or revenue from the introduction of a new product so it is not harmed by later copyists.[194] These advantages often exist when a product or idea is relatively inexpensive to develop or create, the reputational advantage outweighs the harms from imitators, and the product will become obsolete before it is copied.[195] Comedians often benefit from first-mover advantages.

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[189] *Hashtags: #MyWorstCostume*, *supra* note 186.

[190] *The Tonight Show* generates its revenue from commercial advertising. A commercial spot during a prime time can cost an advertiser between $50,000 and $80,000. *The Tonight Show* generated $113.4 million a year in ad revenue, not considering the revenue they generate from YouTube and other media sites. *See* Kimberly Gedeon, *Money Made at Midnight! The Business of Late Night Talk Shows… By the Numbers*, MADAMENOIRE (Apr. 7, 2014), https://perma.cc/Q362-WPSL.

[191] *See* Benjamin Lindsay, *How to Become a Standup Comedian*, BACKSTAGE (Jan. 8, 2018, last updated Aug. 27, 2019), https://perma.cc/89SE-KCUS (noting new comedians must work hard to establish a reputation and build a name).

[192] *See* Erik Deckers, *Personal Branding for a New Comedian*, PERSONAL BRANDING BLOG (June 2, 2012), https://perma.cc/F54J-UKS4 (recommending that young comedians use Twitter to practice their ability to deliver quick punchlines and build an audience).

[193] *See* Rosenblatt, *supra* note 2, at 347.

[194] *See id.*

[195] *See id.*

Jokes are usually funny the first time you hear them or while they are relevant. However, hearing an old joke does not have the same effect as hearing an original joke. If a comedian is the first to tell a joke, he will reap the benefits of being the first-mover and will build a reputation as an original comedian. Even if others steal the joke, audiences will recognize the first comedian as the creator and will discredit the second. Additionally, jokes based on the news are usually only relevant if the news story is relevant. By the time a joke is stolen and used, the news's relevance has changed and the joke's effectiveness has diminished.

2. *THE POWER OF NORMS IN COMEDY*

Copyright law generally fails to protect comedians. Despite this failure, comedians continue to write new jokes, and thrive doing so.[196] Social norms may substitute for, and are often stronger than, copyright protection.[197]

In *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, Dotan Oliar and Christopher Sprigman report interviews with comedians and writers.[198] In the interviews, they identify three sets of social norms which help regulate comedy infringement.[199] The three norms are: (1) norms against appropriation; (2) norms regarding authorship; and (3) norms that limit ownership.[200]

Norms against appropriation is the most beneficial.[201] A strict injunction against joke stealing exists within the comedy community.[202] If a comedian is thought to be stealing jokes, the originator may ask them to stop using the material.[203] If the alleged thief continues to use the joke, more severe actions are taken.[204] Other comedians might attack the thief's professional

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[196] Oliar & Sprigman, *supra* note 3, at 1790.
[197] *Id.*
[198] *Id*.
[199] *Id.*
[200] *See id* at 1812, 1825, and 1828.
[201] *Id.* at 1812.
[202] *Id.*
[203] *Id.* at 1814.
[204] *Id.* at 1815.

reputation, or they might refuse to work with the comedian.[205] For stand-up comedians, comedy club owners might refuse to book the thief at future shows.[206]

Under copyright law, only expression is protected; the underlying idea is not.[207] However, under the first social norm, both the expression and idea are protected.[208] Complete protection lasts indefinitely.[209] Additionally, under this norm, the first comedian to use a joke has priority, regardless of when it was created or whether the creation was independent.[210]

The second set of norms are norms regarding authorship and joke transfers.[211] Under this norm, the comedian who devises the joke's premise receives exclusive use of the entire joke.[212] Unlike copyright law, where two comedians who work together might be joint authors, the comedian who comes up with the joke's premise informally owns the whole joke, even if the punchline was contributed by another comedian.[213]

The final set of norms are norms limiting ownership.[214] Although each comedian has exclusive rights to his jokes and the ideas behind them, a comedian may receive forgiveness for occasional use of another's jokes.[215] This would be comparable to the fair use doctrine in copyright law.[216] This norm is only permitted for new comedians who may not understand the norms, or are still trying to find their style.[217] Because they are new, their threat to other comedians is minimal.[218] If a well-known comedian uses another's joke, he may correct the error by paying the owner a fee, comparable to a compulsory license.[219]

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[205] *See generally id.* at 1815—21.

[206] *See generally id.*

[207] *Id.* at 1790.

[208] *Id.*

[209] *Id.* at 1823—24.

[210] *Id.* at 1826.

[211] *Id.* at 1825.

[212] *Id.*

[213] *See Id.* (noting this norm can be set aside if there is a separate agreement to share or give the joke to the creator of the punchline.).

[214] *Id.* at 1828.

[215] *Id.* at 1829.

[216] *Id.* at 1829.

[217] *Id.*

[218] *Id.*

[219] Robin Williams had been known to send checks in the mail when confronted about use of another comedian's material. See *id.* at 1830.

Even though copyright protections may fail to stop infringement, norms fill the gap and provide the needed protection for serious comedians and writers. However, the norms' effectiveness may diminish as social media creation and consumption replaces more traditional forms of comedy creation.

II. SOCIAL MEDIA HAS CHANGED HOW JOKES ARE CREATED, DISTRIBUTED, AND CONSUMED

The ability to disseminate information, including copyrighted works, has grown tremendously because of the Internet. The Internet's use for sharing jokes is two-fold. First, the Internet provides a new medium to share jokes and generate revenue. Every individual with access to a computer or smartphone can share their comedic works with anyone in the world. If comedians are talented enough, they can generate revenue through advertising. For example, if a comedian becomes popular on a social media site, a company will reach out to the comedian. The company might offer to pay the comedian in exchange for the comedian's endorsement or a product mention in a social media post.[220] The amount the company is willing to pay often depends on the comedian's subscriber or follower numbers.[221] Those with more followers receive bigger payouts.[222] Currently, a sponsored tweet will generate about two dollars for every 1,000 followers the user has.[223] The arrangement's value does not come from a particular joke's hilarity but the followers' relationship and goodwill. The company is paying for access to an audience. A single joke on Twitter earns nothing, but a good joke builds the Twitter user's reputation. The better the reputation, the more followers the user acquires, leading to larger payouts from sponsors.

Unfortunately, copyright infringement is now easier to commit and harder to manage because of the Internet. The Internet's speed and breadth allows users to share a funny

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[220] *Influencer Marketing Pricing: How Much Does it Cost in 2020*, WEBFX (last visited Jan 23, 2020), https://perma.cc/JLN6-J6R2.

[221] *Id.*

[222] *Id.*

[223] *Id.*

comment to millions of people in seconds.[224] Every person who sees the shared comment also has the option to share the comment, which disseminates the content at an unprecedented pace. Features like "share" or "retweet" make copyright infringement possible with a click.[225] While quickly sharing content may be convenient, it makes tracking copyright infringement challenging. In seconds, a single work may be infringed by millions of individuals. Even if the author knows the infringers' identities, the mere number of infringers may make enforcement too burdensome. Although the internet provides many benefits for comedians, copyright laws have failed to adapt, offsetting the benefits with unbridled infringement.

III. THE END OF COPYRIGHT FOR JOKES

Copyright law fails to adequately protect comedic works. In response, some argue copyright law should change to provide greater protection for jokes.[226] Some argue existing law should be clarified and revised.[227] Others advocate for the creation of new

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[224] Ali Siddiqui, *What Happens in a Single Minute on the Internet?*, DIGITAL INFORMATION WORLD (Apr. 2, 2019, 5:44 AM), https://www.digitalinformationworld.com/2019/04/what-happens-online-in-60-seconds.html.

[225] *Terms of Service*, TWITTER: *Terms and Services*, https://twitter.com/en/tos (last visited Jan. 23, 2020) (stating that "[b]y submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display, and distribute such Content in any and all media or distribution methods now known or later developed… This license authorizes us to make your Content available to the rest of the world and to let others do the same." Although creators still retain the copyright, there is a license for Twitter and all other Twitter users to use your content as they see fit).

[226] LaCerra, *supra* note 88, at 272.

[227] Hani Gazal, *"I Used to [Steal Jokes]. I Still Do, but I Used to, Too": A New Test for Providing Copyright Protection to Stand-Up Comedians*, 45 AIPLA Q. J. 759, 781 (2017).

databases and mechanisms facilitating joke sharing.[228] However, eliminating copyright protections for jokes is a better solution.

No copyright protection would be beneficial for several reasons. First, jokes already exist in a negative space and function without protections.[229] Second, courts would be relieved of difficult and burdensome copyright claims. Third, the lack of protection would actually promote more works and encourage higher quality jokes. Fourth, the law of ideas may act as a monetization tool for writers. Finally, the current Internet compensation model would be unaffected by the lack of protection.

A. THE NEGATIVE SPACE NEGATES THE NEED FOR COPYRIGHT PROTECTION

As aforementioned, comedic works exist in a negative space.[230] In the absence of legal protection, creation still occurs. Excluding jokes from copyright protection does not hinder creation. Rather, the public would benefit from greater access and use of creative material. The comedy industry has long operated without meaningful copyright protection.[231] Social norms develop overtime and serve as an effective means of governing comedic works.[232] In the absence of formal protections, social norms will continue to provide needed protection for jokes. Additionally, social norms are easily adaptable to a rapidly changing technological world. Formal copyright laws developed by Congress lag behind the changing environment. However, social norms can adapt faster to changing circumstances, making small changes as the comedy community deems necessary. Eliminating copyright protection for jokes would not limit joke creation because social norms would continue to govern joke protection.

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[228] Trevor M. Gates, *Providing Adequate Protection for Comedians' Intellectual Creations: Examining Intellectual Property norms and "Negative Spaces"*, 93 ORE. L. REV. 801, 819—20 (2015).

[229] *Id.* at 803.

[230] *Id.*

[231] Gates, *supra* note 228, at 816.

[232] *Id.*

B. NO COPYRIGHT MEANS RELIEF FOR COURTS

Eliminating copyright protection for jokes will also relieve courts from adjudicating difficult cases. *Kaseberg* took more than four years and 250 motions to settle the use of four jokes. If an infringement lawsuit was not an option, neither Mr. O'Brien nor Mr. Kaseberg would worry about lost time or money. The clarity of eliminating copyright for jokes will reduce transaction and litigation costs.[233]

C. NO COPYRIGHT ENCOURAGES MORE COMEDIC WORKS

Lack of protection for jokes incentivizes creating more comedic works and entertaining performances. If every comedian knows his joke is subject to copying after its first presentation to the public, comedians will continually write new material to remain relevant and groundbreaking. This will result in more comedic works.

Additionally, comedians will likely shift to more creative and unique jokes. Like the early days of radio and Vaudeville, a comedian will emphasize the joke's performance over its writing.[234] If anyone could easily use any comedic work, comedians will have to distinguish themselves through their performance, selection, or material presentation. One can steal a joke, but presenting it in the same manner or style as another comedian is more difficult.

For comedians like Mr. Kaseberg, who do not perform their jokes, but post them online, the focus would be on their selection and style. The internet comedian would become like a

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[233] Eliminating copyright protection for jokes would not eliminate litigation altogether. There would still be issues involving the definition of a "joke" and whether a work was a joke. However, in many cases, such as *Kaseberg*, this would be easy to determine. Additionally, many comedians would be discouraged from even litigating this issue because of the ligation costs.

[234] During the Vaudeville era, comedians would share or re-use the same joke. There was less emphasis on the written joke itself, but on the delivery and performance of the joke. Two comedians would present the same joke but have varying reactions based on the way they delivered the joke. A comedian's fame came not from the joke but from their ability to present the joke in a comedic manner. *See* Oliar & Sprigman, *supra* note 3, at 1845.

chef with a cookbook. Although a recipe is not copyrightable, thousands of cookbooks are produced every year.[235] The chef's reputation and their recipe selection sets them apart from the rest. The same effect would occur with comedians and their jokes. Although the jokes would not be copyrightable, the comedian could earn a living based on their reputation for style and joke selection. Most people want to be entertained and will go to the source consistently providing comedy matching their tastes.[236] Value does not come from a single joke, but from the selection, style, and presentation of multiple jokes.

D. THE LAW OF IDEAS FOR UNPROTECTED JOKES

The law of ideas may help effectively monetize creation in the absence of copyright.[237] Unlike copyright, the law of ideas is based on contract law.[238] The law of ideas states an idea has value.[239] Because it has value, the idea may be the basis for contractual consideration, so long as it has not been disclosed to the other party.[240] Two or more parties may negotiate a deal where the idea will be shared in exchange for a price. Even though ideas are not copyright-protected, the idea's possessor may monetize and benefit from its discovery or formulation.[241] However, if the idea is disclosed before a contract is created, the idea is public knowledge and may be used by the other party without payment.[242]

To illustrate, if a writer has an idea for a new television show, the writer may go to a producer and offer to share the idea

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[235] Statistica Research Department, *Number of New Books and Editions Published in the United States in the Category "Cookery" from 2002 to 2013*, STATISTICA (Aug 5, 2014), https://perma.cc/ZW5J-3H6U.

[236] Gord Hatchkiss, *The Psychology of Entertainment: Our Need for Entertainment,* WORDPRESS (Jan. 19, 2010), https://outofmygord.com/2010/01/19/the-psychology-of-entertainment-our-need-for-entertainment/.

[237] Lionel S. Sobel, *The Law of Ideas, Revisited*, 1 UCLA. ENT. L. REV. 10, 33 (1994).

[238] Desny v. Wilder, 299 P.2d 257, 266 (Cal. 1956).

[239] *Id.* at 265.

[240] *Id.* at 266.

[241] *Id.*

[242] *Id.* at 270.

for a fee. The producer may need a new show, so the idea may be valuable to him. The writer agrees to share the idea with the producer but for an up-front fee. The producer agrees and pays to hear the idea. The writer does not own the idea because ideas are not copyrightable. However, the idea has potential value to the producer and serves as consideration for a contract.[243] The writer gets paid, and the producer gets a potential idea. In the event the idea is bad, the next time the producer pays for another idea from the writer, the price will go down because the writer's reputation was diminished by the initial bad idea.

Comedic writers trying to make a living can secure profit by contracting with studios, producers, publishers, or club owners to provide the unprotected jokes in exchange for a certain price. Once a contract is in place, the comedian will receive payment for their jokes, even though he would receive no copyright protection. A major driving force in these contracts is the comedian's reputation. If the comedian has a strong reputation, then the contracting party will be willing to pay higher fees for the comedian's ideas. If the reputation is weak, the fee will decrease because the contracting party is uncertain about the value of the comedian's idea.

Under the law of ideas, judicial proceedings will also be easier. The debate will shift to contract law and its application. Although contract law is never immune from litigation, it can often be more predictable. Instead of worrying about every Twitter-user suing a television show, a television producer will only have to worry about the parties with which they have contracted. Without a contract, no claim may be brought against the producer. Additionally, the idea exchange will be governed by a negotiated contract, which can be tailored to a specific situation to provide clarity. The law of ideas is an efficient way to monetize jokes without the confusion of copyright law.

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[243] *Id.* at 269.

E. CURRENT INTERNET COMPENSATION MODELS ARE UNAFFECTED

Finally, internet comedians like Mr. Kaseberg may continue to generate revenue from their social media sites, despite a lack of copyright protection. A social media comedian earns revenue based on their follower or subscriber numbers.[244] A joke online is valuable in generating followers but not direct revenue.[245] Removing copyright will not affect this dynamic. Even if a comedian has no joke protection, a funny joke will still generate followers. This will benefit the comedian when companies reach out for marketing. The comedian will still generate revenue based on reputation and followers, as he always has.

Although counterintuitive, eliminating copyright protection for jokes will result in a greater volume of quality jokes. Due to the negative space jokes will continue to thrive and comedians will be incentivized to create more jokes. Moreover, courts will be relieved of confusing copyright applications and comedians may receive financial gain based on the law of ideas.

CONCLUSION

Copyright law fails to protect jokes, yet jokes continue to thrive. Because of many non-monetary incentives, jokes are still created and shared with the public. If copyright protection for comedic works was eliminated, producers and studios would worry less about legal action over a few jokes. Existing social norms will help to limit joke-copying. Comedians will be forced to generate more jokes and place more emphasis on presentation and selection. The law of ideas may also help monetize unprotected jokes for writers. Finally, Twitter comedians may continue to create and share comedic material, and generate revenue from followers. Copyright protections are necessary for many works, but for jokes, the law fails to add clarity or value. As a result, copyright protections for jokes should be eliminated,

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[244] Kash Jones, *How Social Media is Changing Comedy*, BBC NEWS (Apr. 15, 2015), https://www.bbc.com/news/entertainment-arts-46871021.

[245] *Id.*

which in turn, will lead to higher quality comedy and entertainment.

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