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1541 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-3146; jsel@law.harvard.edu
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Submissions: The *Harvard Journal of Sports and Entertainment Law* welcomes articles from professors, practitioners, and students of the sports and entertainment industries, as well as other related disciplines. Submissions should not exceed 25,000 words, including footnotes. All manuscripts should be submitted in English with both text and footnotes typed and double spaced. Footnotes must conform with *The Bluebook: A Uniform System of Citation* (21st ed.), and authors should be prepared to supply any cited sources upon request. All manuscripts submitted become the property of the JSEL and will not be returned to the author. The JSEL strongly prefers electronic submissions through the ExpressO online submission system at http://www.law.bepress.com/expresso. Submissions may also be sent via email to jselsubmissions@gmail.com or in hard copy to the address above. In addition to the manuscript, authors must include an abstract of not more than 250 words, as well as a cover letter and resume or CV. Authors also must ensure that their submissions include a direct e-mail address and phone number at which they can be reached throughout the review period.

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Preface to Volume 13, Issue 2

Dear Readers,

I am Professor Peter Carfagna '79, the Harvard Law School Faculty Advisor to the *Harvard Journal of Sports and Entertainment Law* (JSEL). On the heels of another terrific year for JSEL, I am overwhelmingly proud to author the preface to the Summer Issue of Volume 13.

Volume 13 was the first Volume of JSEL to come out after the passing of legendary Harvard Law Professor Paul C. Weiler, who pioneered the Sports Law Program at Harvard Law School. He was a dear friend of mine and I miss him tremendously. Professor Weiler's memory lives on in the classroom, in the pages of this Journal, and in the outstanding energy of the Harvard Sports Law Program.

In the Winter Issue, JSEL published four superb articles and a student-written book review:

- Professor Maureen A. Weston's article, *The Anxious Athlete: Mental Health and Sports' Duty and Advantage to Protect*, explores an increasingly significant issue in sports: the mental health of athletes. Professor Weston's son Cedric tragically passed away last year, and JSEL dedicated the Winter Issue to Cedric's memory. We also hosted Professor Weston at Harvard Law School this spring, alongside Coach Kevin Rhoads and student-athlete Chloë Royston of the Harvard Golf team, to discuss this topic. Professor Weston's article was the foreword to the Winter Issue.
- Professor Jorge L. Contreras's article, *Science Fiction and the Law: A New Wigmorian Bibliography*, puts a modern spin on Dean John Henry Wigmore's 1908 bibliography of novels that lawyers should read. In the piece, Professor Contreras lists a set of science fiction works with which lawyers should be familiar.
- Professor Brian L. Frye's article, *How to Sell NFTs Without Really Trying*, introduces readers to the relatively new phenomenon of non-fungible tokens. Professor Frye's humorous piece is a timely contribution on a quickly developing subject that is of particular interest to JSEL's readers.
- Professor Roy S. Gutterman's article, *Liable, Naaaht: The Mockumentary: Litigation, Liability and the First Amendment in the*

Works of Sacha Baron Cohen, delves into the First Amendment issues surrounding the work of Sacha Baron Cohen. Professor Gutterman's work adds an important scholarly perspective to an ongoing conversation about the legal status of mockumentaries.

- JSEL Supervising Print Editor Alexander Amir ended the Winter Issue with a fantastic book review of Professors Mitchell N. Berman and Richard D. Friedman's new textbook *The Jurisprudence of Sport: Sports and Games as Legal Systems*. Alexander's careful reading of this recent work illuminates its best qualities.

In this Summer Issue, JSEL published an essay and four more great articles:

- Professor Irene Calboli and Ph.D. candidate Vera Sevastianova's essay, *Fashion in the Times of War: The Recent Exodus of Luxury Brands from Russia and What It Means for Trademark Law*, chronicles the impact of the ongoing Russo-Ukrainian conflict on luxury brands. The authors bring their intellectual property law expertise to bear on a difficult subject, and their piece is the foreword to the Summer Issue.
- Professor William Berry III's article, *Superstars, Superteams, and the Future of Player Movement*, takes a look at an evolving trend in professional sports: star athletes moving quickly from team to team. Professor Berry suggests a framework within which to think about this trend.
- Chui Ling Guo and Professor Jack Anderson's article, *The Credibility of the Court of Arbitration for Sport*, critically analyzes one of the most important arbitral tribunals in the world of sports. The authors consider various criticisms of the Court of Arbitration for Sport, adding to the debate in a meaningful way.
- Professor Stacey Lantagne's article, *Of Disaster Girl and Everydays: How NFTs Invite Challenging Copyright Assumptions Around Creator Support*, continues the conversation about NFTs after Professor Frye's piece in the Winter Issue. Professor Lantagne approaches NFTs from a copyright law angle, giving due consideration to the interests of the subjects of popular memes.
- Professor Brian Porto's article, *Time to* Tinker*: A New Standard for Protecting the First Amendment Rights of College Athletes*, discusses free speech in college athletics amid a time of rapid change at the National Collegiate Athletic Association. Professor Porto's piece proposes an extension of the Supreme Court's school speech jurisprudence to protect student-athletes.

On top of all this, the JSEL Online team worked hard over the course of the year to publish a significant amount of pathbreaking scholarship, including a special online issue on the Supreme Court's decision in *NCAA v. Alston*.

I thank the student editors who spent their time getting this Volume ready. In particular, I would like to thank Eli Nachmany '22 and Erin Savoie '22 for their diligence and excellence as Editors-in-Chief. I am also grateful to other graduating members of JSEL's Executive Board: Amanda Bello '22 (Online Content Chair – Entertainment), Alex Blutman '22 (Managing Editor), John Ellis '22 (Executive Editor of Submissions), Larson Ishii '22 (Managing Editor), Kit Metoyer '22 (Executive Editor of Production), Cara Mund '22 (Executive Editor of Operations), Will Walker '22 (Special Projects Coordinator), and Chris Zheng '22 (Executive Editor of Online Content). Finally, I am pleased to welcome the incoming JSEL Masthead for Volume 14, including our new Editor-in-Chief Connor Oniki.

After another wonderful year, I look forward to next year's volume!

—Peter A. Carfagna

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Fashion in the Times of War: The Recent Exodus of Luxury Brands from Russia and What It Means for Trademark Law

Irene Calboli* and Vera Sevastianova**

In February 2022, Russia infamously invaded Ukraine, starting an unprovoked war. As a result, many foreign companies left their Russia-based operations, including most luxury fashion houses.[1] In this Foreword, we elaborate on the possible issues that these companies may face regarding the enforcement of their IP rights, particularly trademark rights, in Russia following their departure and resulting from the sanctions imposed by Western countries against Russia.

Besides the desire to take a stand against the war, luxury fashion houses (and other Western companies) decided to leave Russia because of the growing logistical issues they faced as a result of Western sanctions against the

* Professor of Law, Texas A&M University Law School; 2022 Hanken-Fulbright Distinguished Chair in Business and Economics, Hanken School of Economics; Academic Fellow, School of Law, University of Geneva.

** Ph.D. Candidate, Hanken School of Economics. Any errors in translation or other errors pertaining to sources in Russian are those of the authors. This Foreword was written in May 2022. Between then and the date of publication, the list of applications for signs identical or similar to famous Western marks filed with the IP Office of Russia (Rospatent) has grown. At the date of publication of this Foreword, these applications are still being examined by Rospatent.

[1] *500 Companies Have Withdrawn from Russia – But Some Remain,* YALE SCH. OF MGMT. (July 13, 2022), https://som.yale.edu/story/2022/over-400-companies-have-withdrawn-russia-some-remain [https://perma.cc/S9TQ-5Y6B] (listing, amongst the companies leaving the Russian market, the following luxury fashion houses: Rolex, Kering (including Gucci, Saint Laurant, and Bottega Veneta amongst other brands), LVMH (including Louis Vuitton, Dior, Tiffany, Bulgari, Givenchy, Tag Heuer, Loewe, Céline, and Kenzo amongst other brands), Chanel, Richemont (including Cartier, Jaeger-LeCoultre, and Van Cleef & Arpels amongst other brands), Hermès, Swatch (Omega, Tissot, Longines), Burberry, Prada, and Moncler).

country. Notably, it had become very difficult, if not impossible, to import luxury goods to sell to consumers in Russia.[2] Moreover, luxury fashion houses depended on payments in foreign currencies for their sales in Russia, and Western sanctions had blocked these payments.[3] While closing their operations, however, most companies specified that their departure from Russia was only "temporary" and that they were "keeping options open for return" once the war ended.[4]

Of course, departing Russia was a difficult business decision. Luxury fashion houses spent the past few decades establishing their operations in the country, including protecting their intellectual property (IP) rights.[5] Notably, almost all famous luxury marks are registered in Russia today, and some of these marks have also been included in the Russian Reputable Trademarks Register—a registry listing all marks that have a "reputation" and enjoy enhanced legal protection.[6] Moreover, many famous luxury logos and products enjoy copyright and industrial design protection in Russia.[7]

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[2] *Luxury Brands Halt Sales in Russia, Citing Concern Over "Current Situation"*, FASHION L. (Mar. 5, 2022), https://www.thefashionlaw.com/luxury-brands-halt-operations-in-russia-citing-concern-over-current-situation [https://perma.cc/CA64-9SJ8].

[3] *Id.*

[4] *500 Companies Have Withdrawn from Russia – But Some Remain*, *supra* note 1.

[5] *See generally* Evgeny Alexandrov & Vladimir Trey, *Russia's Fight Against Fakes, Imitations and Replicas*, WORLD TRADEMARK REV. (June 29, 2018), https://www.worldtrademarkreview.com/brand-management/russias-fight-against-fakes-imitations-and-replicas [https://perma.cc/9AKM-H3NH].

[6] RUSSIAN REPUTABLE TRADEMARKS REGISTER, https://fips.ru/registers-web/action?acName=ClickRegister&regName=WKTM [https://perma.cc/X94F-RQAU] (last visited July 14, 2022) [hereinafter Register]. For example, the mark "Chanel" is included in the Register for cosmetics, perfumery, female handbags, and clothing. REGISTRATION NO. 136, https://fips.ru/registers-doc-view/fips_servlet?DB=WKTM&DocNumber=136 [https://perma.cc/BYW3-WP6M]. The mark "Cartier" is included for timepieces and jewelry. REGISTRATION NOS. 95 AND 96, https://fips.ru/registers-doc-view/fips_servlet?DB=WKTM&DocNumber=95 [https://perma.cc/UZN2-MMHT] and https://fips.ru/registers-doc-view/fips_servlet?DB=WKTM&DocNumber=96 [https://perma.cc/WGE9-642W]. The mark "Tiffany" is included for precious metals and jewelry. REGISTRATION NO. 56, https://fips.ru/registers-doc-view/fips_servlet?DB=WKTM&DocNumber=56 [https://perma.cc/4JL9-RTEL].

[7] Russia is a member of the Berne Convention for the Protection of Literary and Artistic Works, which grants copyright protection in the territory to all members (including Russia). *See* Berne Convention art. 3(1), Sept. 9, 1886, WORLD INTELL. PROP. ORG., https://wipolex.wipo.int/en/text/283698. Russia is also a member of the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which provide that their members should protect industrial designs. *See* Paris Con-

However, the recent events have taken a sour turn for these companies. Besides leaving their operations in the country, luxury fashion houses (and Western companies in general) are now at risk to lose their IP rights in Russia altogether.[8] Notably, as mentioned by news outlets, the Russian government has threatened several measures against the IP rights held by entities from "unfriendly" countries in retaliation against Western sanctions. To date, these threats have included not granting copyright protection to foreign films;[9] introducing compulsory software licenses;[10] not collecting royalties for foreign right holders;[11] prolonging the term of license agreements;[12]

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vention art. 5quinquies, Mar. 20, 1883, WORLD INTELL. PROP. ORG., https://wipolex.wipo.int/en/text/288514; TRIPS art. 25, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/31bis_trips_01_e.htm. Russian copyright and industrial design protection is regulated in Russia by the Civil Code (Part 4). *See* Civil Code of the Russian Federation, CONSULTANTPLUS, http://www.consultant.ru/document/cons_doc_LAW_64629 [https://perma.cc/WSE4-GUGC]. For examples of registered foreign industrial designs in Russia, see REGISTRATION NO. 79266 (Bulgari) https://new.fips.ru/registers-doc-view/fips_servlet?DB=RUDE&DocNumber=79266 [https://perma.cc/VWS2-YQE8]; REGISTRATION NO. 118567 (Cartier) https://new.fips.ru/registers-doc-view/fips_servlet?DB=RUDE&DocNumber=118567 [https://perma.cc/968E-XDGV]; REGISTRATION NO. 118263 (Van Cleef & Arpels), https://new.fips.ru/registers-doc-view/fips_servlet?DB=RUDE&DocNumber=118263 [https://perma.cc/WN6E-QKW2]; REGISTRATION NO. 95473 (Louis Vuitton), https://new.fips.ru/registers-doc-view/fips_servlet?DB=RUDE&DocNumber=95473 [https://perma.cc/S8J4-XZBN].

[8] This topic has been discussed extensively in the news in the past few months. *See, e.g.*, *How Russia Is Using Intellectual Property as a War Tactic*, FASHION L. (Mar. 18, 2022), https://www.thefashionlaw.com/how-russia-is-using-intellectual-property-as-a-war-tactic [https://perma.cc/EDQ7-5RXZ]. In this Foreword, we address luxury fashion houses, but the same observations apply to other Western companies, such as restaurants, retailers, and so forth.

[9] Novaya Gazeta, *Medinsky Proposed to Ignore Copyright When Showing Foreign Films on Televisio*n (Mar. 24, 2022), https://novayagazeta.ru/articles/2022/03/24/medinskii-predlozhil-ignorirovat-avtorskie-prava-pri-pokaze-zarubezhnykh-filmov-po-televideniiu-news (reporting the suggestion from Vladimir Medinsky, the Russian former minister of culture and now a negotiator with Ukraine).

[10] Marina Tyunyayeva, *Government Does Not Abolish Liability for Pirate Software from Unfriendly Countries*, VEDOMOSTI (Mar. 11, 2022), https://www.vedomosti.ru/technology/articles/2022/03/11/913009-otvetstvennost-piratskii-soft.

[11] Valeria Lebedeva & Darya Andrianova, *Author's Separation*, KOMMERSANT (Mar. 23, 2022), https://www.kommersant.ru/doc/5270797.

[12] Maksim Varaksin, *Agreements Will Not Be Allowed to be Executed Due to Sanctions*, PRAVO.RU (Mar. 24, 2022), https://pravo.ru/story/239959.

and, in general, seizing and nationalizing IP assets held by "unfriendly" countries' IP holders.[13]

Even though these threats aim largely at rallying public support against the West, it is possible that Russia would follow through on them. In particular, shortly after the announcement of Western sanctions, Russia implemented a 0% payment system instead of the required "adequate remuneration" for patent compulsory licenses[14] and considered a list of products for which IP enforcement may be ignored.[15] In early March 2022, the rising "IP war" launched against Western companies struck its first victim: Peppa Pig, a famous children's cartoon.[16] The Commercial Court of the Kirov Region of Russia denied a claim for trademark and copyright infringement in a case involving the cartoon because the plaintiff was from the United Kingdom—one of the countries that sanctioned Russia (though the lawsuit was filed in 2021).[17] Because of its blunt disregard of established IP principles the decision was widely criticized, however, not only internationally but also

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[13] Yekaterina Vinogradova et al., *How the Authorities Decided to Manage the Property of Companies Leaving Russia*, RBC (Mar. 9, 2022), https://www.rbc.ru/economics/09/03/2022/6228acf99a79477828ae9aba.

[14] Nikolay Bogdanov, *Russian Federation: Russia Does Not Abolish Intellectual Property Rights*, MONDAQ (Mar. 18, 2022), https://www.mondaq.com/russianfederation/patent/1173396/russia-does-not-abolish-intellectual-property-rights [https://perma.cc/DS52-3GE3] (reporting that, in March 2022, the Russian government issued a compulsory license and, at the same time, amended the Methods for Determining a Remuneration so that for patent holders "from countries that commit unfriendly acts against Russia," "the remuneration is 0% of the revenues"). This amendment represents a violation of both art. 1360 of the Civil Code of the Russian Federation and art. 31 of TRIPS, which provide for the payment of an adequate remuneration in the case of a compulsory patent license. *See* Civil Code of the Russian Federation art. 1360, CONSULTANTPLUS, http://www.consultant.ru/document/cons_doc_LAW_64629; TRIPS art. 31, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/31bis_trips_01_e.htm [https://perma.cc/L5BK-JYEA].

[15] [Federal Law no. 46-FZ art. 18(13)] Mar. 8, 2022, CONSULTANTPLUS, http://www.consultant.ru/document/cons_doc_LAW_411095.

[16] Judgment of the Commercial Court of the Kirov Region of Mar. 3, 2022, case no. A28-11930/2021, Register of Commercial Cases of the Russian Federation, https://kad.arbitr.ru/Card/a45fa186-05bb-43b5-87d9-1f0d3b640142.

[17] *Id.* The court found that the plaintiff had abused its rights and violated art. 10 of the Civil Code of the Russian Federation and found "no reason to satisfy the claim" of trademark and copyright infringement. The court specifically referred to the presidential decree of February 2022, stating "[o]n the application of special economic measures in connection with the unfriendly actions of the United States of America and the foreign states and international organizations that joined them." *See* Presidential Decree no. 79 (Feb. 28, 2022), CONSULTANTPLUS, http://www.consultant.ru/document/cons_doc_LAW_410417.

by Russian lawyers.[18] In June 2022, the Second Commercial Appeal Court ultimately reversed the decision of the lower court,[19] yet this cannot guarantee that other Russian courts would not follow the approach of the first "Peppa Pig" court.

At the time of writing, perhaps the most pressing issue regarding the protection of trademarks in Russia is whether luxury fashion houses risk losing their mark rights due to their decision to suspend their operations, even though temporarily. Ultimately, trademark protection is based upon the use of the mark in commerce, and, without such use, a mark is deemed abandoned and protection ends. Generally, a term of non-use for no less than three years, five years in many countries, is necessary as evidence of such abandonment.[20] Yet, as mentioned, luxury fashion houses never stated their intention to leave Russia indefinitely, and Russian consumers continue to use the products that they purchased before the war displaying their marks.[21] In particular, trademark revocation under the Russian Civil Code requires no genuine use of a mark for three years.[22] In addition, an action for the revocation of a registered mark requires a separate proceeding with a compulsory pre-trial stage.[23] Still, no one knows how long the conflict will continue and Russian courts have highlighted the non-use argument, along with other reasons, in instances in which they found abuse of rights by trademark trolls or other unfairly behaving entities.[24] In this respect, they could again use the non-use argument against foreign trademark holders and

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[18] Anastasiya Gavrilyuk & Yekaterina Volkova, *Peppa Pig Is Not of the Right Citizenship*, KOMMERSANT (Mar. 14, 2022), https://www.kommersant.ru/doc/5252458.

[19] Judgment of the Second Commercial Appeal Court of June 27, 2022, case no. A28-11930/2021, Register of Commercial Cases of the Russian Federation, http://kad.arbitr.ru/A28-11930-2021/1058674. The court concluded that the foreign entity had all rights to submit a lawsuit to the Russian court and satisfied the plaintiff's claims, though reducing the requested compensation for the infringements.

[20] Paris Convention art. 5, Mar. 20, 1883, WORLD INTELL. PROP. ORG., https://wipolex.wipo.int/en/text/288514. TRIPS art. 19, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/31bis_trips_01_e.htm [https://perma.cc/PXP8-D347].

[21] *500 Companies Have Withdrawn from Russia – But Some Remain*, *supra* note 1.

[22] Civil Code of the Russian Federation art. 1486, CONSULTANTPLUS, http://www.consultant.ru/document/cons_doc_LAW_64629.

[23] *Id.*

[24] *See, e.g.,* Judgment of the Intellectual Property Court of Aug. 27, 2021, case no. A33-4702/2018, Register of Commercial Cases of the Russian Federation, https://kad.arbitr.ru/Card/9530ccd0-e77b-483e-8839-a57ad6516e26; Judgment of the Intellectual Property Court of May 19, 2021, case no. A41-105281/2019, Register of Commercial Cases of the Russian Federation, https://kad.arbitr.ru/Card/00f0e994-2f76-4e3e-b129-e018262f8ecd.

dismiss their claim of infringement under the lens of the "unfriendly" status and abuse of rights by the right holders as they recently did in the Peppa Pig case.[25]

An additional issue facing luxury fashion houses is the recent flurry of applications submitted to the Russian IP Office (Rospatent) for signs identical or similar to their registered marks.[26] Notably, shortly after their withdrawal from Russia, the Russian authorities announced that the country may seize foreign IP assets. At the same time, several applications including names such as Chanel, Givenchy, Christian Dior, and Giorgio Armani, amongst others, were submitted to Rospatent by applicants unrelated to the luxury fashion houses.[27] While surges in applications for sensational events are frequent—as for example in the case of the COVID-19 pandemic[28]—such a flurry of applications for signs identical or similar to existing famous marks by unrelated parties is unprecedented in Russia (and elsewhere).

Based on Russian law, Rospatent should reject these applications directly or following the opposition of luxury fashion houses.[29] In particular, Russia is a member of the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which, together with the Russian Civil Code,[30] provide a series of absolute and relative grounds that may af-

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[25] *See supra* note 16.

[26] *See Companies Fear Trademark Squatting, Nationalization in Russia*, FASHION L. (Mar. 28, 2022), https://www.thefashionlaw.com/luxury-brands-fear-trademark-nationalization-in-russia [https://perma.cc/9M8B-W5Q8].

[27] For example, Russian entity Smart Beauty LLC submitted trademark applications for brands such as Chanel, Christian Dior, and Givenchy, covering such goods as cosmetics and perfumery. See the following applications: no. 2022716514 (Chanel), no. 2022716533 (Christian Dior), no. 2022716528 (Givenchy). One of the shareholders of Smart Beauty LLC, Vadim Ryabchenko, also filed applications for Lacoste (no. 2022716597) and Hugo Boss (no. 2022716603). Mr. Ryabchenko is also a shareholder of Biotechfarm-M LLC, which filed applications for Reebok (no. 2022716612), Puma (no. 2022717060), Adidas (no. 2022717061), and Nike (no. 2022717063), amongst others. The applications can be viewed by typing application numbers into the Russian Trademark Applications Register at https://fips.ru/registers-web/action?acName=clickRegister&regName=RUTMAP.

[28] *See* Irene Calboli, *Trademarking "COVID" and "Coronavirus" in the United States: An Empirical Review of the Applications Filed in 2020,* 16 J. INTELL. PROP. L. & PRAC. 473 (2021).

[29] Rospatent conducts ex officio examination on both absolute and relative grounds, but at the examination stage, right holders can still file "soft" oppositions based on the same grounds. *See* Civil Code of the Russian Federation, art. 1493(1), CONSULTANTPLUS, http://www.consultant.ru/document/cons_doc_LAW_64629.

[30] *See* Civil Code of the Russian Federation, art. 1483, CONSULTANTPLUS, http://www.consultant.ru/document/cons_doc_LAW_64629.

fect the validity of trademark applications. Notably, relative grounds refer to conflicts between a new application and previous identical or similar applications or registration for identical or similar products.[31] Moreover, as mentioned, reputed marks enjoy higher protection in Russia, including with respect to signs that are used for dissimilar goods or services, so long as consumers will "associate such a use with the reputable mark's right holder and if such a use may negatively affect legal interests of the right holder."[32] Based on these grounds, Rospatent should reject all the recent applications because they clearly conflict with existing prior rights.

Moreover, under Russian law, a mark cannot be registered if it is capable of misleading consumers regarding the origin or quality of the products or their manufacturer.[33] In its guidelines, Rospatent elaborated on this ground for refusal by giving an example of imitations of famous names to designate goods or services.[34] Over a decade ago, the then-Russian Higher Commercial Court applied this rule regarding the use of the name Vacheron Constantin. The court based its ruling, *inter alia*, on the principles of unfair competition as per article 10bis of the Paris Convention and the abuse of rights provision in the Russian Civil Code.[35] Because the luxury marks at issue have decades of history and influence in Russia, any unrelated application should be found to be misleading and in violation of this rule by Rospatent.[36]

Another obvious observation is that these applications were filed in bad faith by entities which are well aware of, and specifically intended to take

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[31] *Id.* at art. 1483(6).

[32] *Id.* at art. 1508.

[33] *Id.* at art. 1483(3)(1).

[34] *See* Guidelines to Conduct Administrative Procedures and Actions within the State Service of State Registration of a Trademark, Service Mark, Collective Mark and Issuance of Certificates for a Trademark, Service Mark, Collective Mark, Duplicates Thereof, Federal Institute of Industrial Property, https://new.fips.ru/documents/guidelines/rucov-tz.pdf.

[35] Judgment of Higher Commercial Court , case no. A40-73286/2010, Register of Commercial Cases of the Russian Federation, (Apr. 24, 2012), https://kad.arbitr.ru/Card/bc336e13-08b4-41e0-b5d3-ff4c2ef5c7ce.

[36] At the time of writing, according to sources in the Russian trademark attorneys' community, Rospatent has not (yet) followed the "unfriendly" country reasoning in its examination practices, even though it is unclear how these practices may evolve. In addition, on April 1, 2022, Rospatent issued a statement underlining that any application would undergo a formal and substantive examination and that the existence of earlier identical or similar reputable trademarks remain an obstacle for registration. *See Position of the Rospatent on Examining Applications with Signs That Are Confusingly Similar to Trademarks of Foreign Applicants*, ROSPATENT (Apr. 1, 2022), https://rospatent.gov.ru/ru/news/poziciya-rospatenta-01042022.

unfair advantage of, the fame and reputation of the existing Western marks.[37] Yet, as in all members of the Paris Convention and TRIPS, Russian trademark law expressly prohibits applications filed in bad faith and provides that, should an application filed in bad faith be registered, the registration can be canceled upon request of an interested party.[38]

That said, however, it is possible that Rospatent would accept these applications. Likewise, it is possible that Russian courts will continue to use the "unfriendly" countries narrative against claims of trademark infringement by foreign IP holders. Should this be the case, Russian consumers could see a growing number of unauthorized and infringing products made available on the Russian market. Of course, this "illicit trade" would harm not only the legitimate trademark holders, but also Russian consumers. In particular, should Russia really stop enforcing and nationalize foreign trademarks, will Russian consumers accept products carrying famous luxury marks made by different entities in Russia? What would be the impact of the rise of this "illicit trade" on the Russian economy and society? Of course, these authors hope this will remain a hypothetical question, yet it is still unclear what the future will bring in this respect.

Rather than becoming a pirate society, Russian distributors may prefer to turn to parallel imports—unauthorized imports of genuine products sold by their parties—to import into Russia's original luxury goods market.[39] Before the onset of the war, parallel imports amounted to trademark infringement under Russian law.[40] Yet, these imports will soon become legal in Russia.[41] Moreover, a 2018 judgment by the Russian Constitutional

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[37] *See, e.g.*, *supra* note 27.

[38] According to art. 1512(2)(6) of the Civil Code of the Russian Federation, Rospatent can invalidate the registered trademark if the rights holder's actions in obtaining trademark rights are "in a due manner" found to constitute bad faith. *See* CONSULTANTPLUS, http://www.consultant.ru/document/cons_doc_LAW_64629. For instance, bad faith can be established in the case of challenging the Rospatent decision on refusing to invalidate a trademark. *See* Resolution of the Supreme Court of the Russian Federation no. 10, CONSULTANTPLUS, (Apr. 23, 2019), http://www.consultant.ru/document/cons_doc_LAW_323470.

[39] Unlike other measures adopted by Russia, this shift would not be a violation of international IP law. *See* TRIPS, art. 6, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/31bis_trips_01_e.htm. *See, e.g.*, IRENE CALBOLI & SHUBHA GHOSH, EXHAUSTING INTELLECTUAL PROPERTY RIGHTS: A COMPARATIVE LAW AND POLICY ANALYSIS (Cambridge Univ. Press 2018).

[40] Civil Code of the Russian Federation, art. 1487, CONSULTANTPLUS, http://www.consultant.ru/document/cons_doc_LAW_64629.

[41] At the time of writing, the Russian Parliament's lower chamber is reported to have approved parallel imports into the country. *Viacheslav Volodin: Legalization of Parallel Imports Will Help Stabilize Prices for Goods Imported into the Country*, STATE

Court[42] already clarified that IP holders could demand the destruction of parallel imports only in cases of defective quality, to preserve safety or health, or to protect the environment and cultural items. The Constitutional Court also made it clear that parallel imports cannot be considered an infringement in instances of abuse of rights by trademark holders (which could include following anti-Russia sanctions under the newly adopted decrees). Finally, Russia is a member of the Eurasian Economic Union (EAEU), along with Belarus, Kazakhstan, Kyrgyzstan, and Armenia, which practice regional trademark exhaustion. Parallel imports from countries within the EAEU are already allowed under Russian law.[43]

Finally, in light of some recent videos released by the Kremlin, it is possible that the Russian government may decide to adopt a different strategy against foreign products. In particular, it is possible that part of the official Russian narrative may turn to an open boycott of luxury foreign goods altogether with open calls to the Russian consumers to purge the Russian market from Western luxury goods by increasingly associating these products with negative characteristics. For example, in a recent video widely broadcasted across the Internet, President Vladimir Putin contrasted those companies that continue working in Russia "despite shameless pressure from the US and its vassals" with entities that "hastened to earn illusory dividends by participating in the anti-Russia campaign."[44] In his speech, the Russian President sent a clear signal about the latter for the

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DUMA (June 21, 2022), http://duma.gov.ru/news/54670. This change from the past position is aimed at allowing parallel imports of products from a special list of approved goods that includes brands like "HERMES" and "YVES SAINT LAURANT." See Federal Law no. 46-FZ art. 18(1)(13) and 18(3), Mar. 8, 2022, CONSULTANTPLUS, http://www.consultant.ru/document/cons_doc_LAW_411095. Government's Decree no. 506, Mar. 29, 2022, CONSULTANTPLUS, https://www.consultant.ru/document/cons_doc_LAW_413173. Order of the Ministry of Industry and Trade no. 1532, Apr. 19, 2022, CONSULTANTPLUS, https://www.consultant.ru/document/cons_doc_LAW_416496/343227a0f7231f293415124c9c5b7237496b9008.

[42] Resolution of the Constitutional Court of the Russian Federation no. 8-Ï, CONSULTANTPLUS, (Feb. 13, 2018,) http://www.consultant.ru/document/cons_doc_LAW_290909.

[43] *See* JEROME H. REICHMAN ET AL., THE WTO COMPATIBILITY OF A DIFFERENTIATED INTERNATIONAL EXHAUSTION REGIME PROPOSED BY THE EURASIAN ECONOMIC COMMUNITY (Research Paper Series, Skolkovo-HSE International Laboratory for Law & Development, 2014) (on file with author).

[44] *See Meeting on Socio-Economic Support for Regions,* KREMLIN (Mar. 16, 2022), http://kremlin.ru/events/president/news/67996.

Russian people, adding that these entities "cowardly betrayed their partners" in Russia.[45]

In summary, it remains hard to predict what will happen to trademark rights in Russia and if, and to what extent, Russia will decide to enforce the rights of foreign luxury fashion houses, and Western companies in general. Hence, this uncertainty raises the following questions: should Russia decide to disregard established and internationally harmonized trademark principles, what remedies, if any, would foreign trademark holders have to defend their rights in Russia? In particular, even if the current events have highlighted the fast rise of a Russia that could easily put aside the rule of law, could the international framework of IP protection offer foreign trademark holders relevant instruments to prevent abuses against their legitimate trademark rights in Russia? Unfortunately, at least for the time being, there does not seem to be a satisfactory answer to these questions.

Still, despite bombastic public statements and even a national bill to withdrawal from it,[46] Russia remains a member of the World Trade Organization and, as such, is theoretically obliged to follow the principles provided in TRIPS, including trademark protection, based upon the principle of national treatment or non-discrimination against foreign entities.[47] Any violation of these standards would represent a violation of TRIPS, which could lead to a claim and a proceeding in front of the dispute settlement mechanism of the WTO.[48] Yet, while possible, such proceedings would be lengthy and would not bring an immediate solution to trademark owners. Moreover, a WTO dispute could only be raised by states (*e.g.*, the EU or the U.S.), which again would not bring immediate relief to trademark owners.[49] Accordingly, a WTO proceeding would not expeditiously resolve any of the issues that could arise should Russian courts decide to widely disregard claims of trademark (and other IP rights) infringement brought by foreigners from "unfriendly" countries or should Rospatent accept the currently pending applications despite the existence of earlier rights because these rights belong to entities which do not have a presence in the country, albeit temporarily. Foreign companies could fight for their recognition in Russian

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[45] *Id*.

[46] Bill no. 91393-8, Legislative Support System of the Russian Federation, https://sozd.duma.gov.ru/bill/91393-8.

[47] TRIPS, art. 3, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/31bis_trips_01_e.htm [https://perma.cc/CFE6-VSZ2].

[48] *Id*. at art. 64.

[49] *See*, *e.g., The Process – Stages in a Typical WTO Dispute Settlement Case*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm [https://perma.cc/6484-43JD].

courts, but again, the outcome of litigation would be highly unpredictable considering the increasingly political approach that the Russian government is taking against entities from "unfriendly" countries.

In conclusion, the recent war against Ukraine is the unfortunate confirmation of the madness of war under all perspectives. IP and trademark law are certainly subjects of much lesser concern compared to the loss of lives, destruction of cities, and refugee crisis. Still, the potential disregard for IP rights by Russia is an additional demonstration of the dangers of not respecting established legal norms. Luxury fashion houses, and most Western companies, did not have much choice and were forced to leave Russia. Their temporary departure does not violate any legal principle under IP law. Now these companies find themselves entangled in an IP war in which the Russian authorities seem to flagrantly disregard national and international IP law. Yet, this outcome is not unavoidable. These authors are hopeful that Russian IP judges, Rospatent's trademark examiners, and Russian IP experts in general would follow the existing legal principles, and unlike the Peppa Pig court, continue to uphold the international obligations to which Russia has committed. This course of action is in the best interest of all: Russia, the international community, and the rule of law.

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Superstars, Superteams, and the Future of Player Movement

William W. Berry III*

ABSTRACT

Disgruntled stars have existed since the dawn of professional sports. Historically, though, top athletes had little recourse other than holdouts, which typically did not achieve an improvement in salary or circumstance.

Beginning with The Decision, LeBron James charted a new path for stars in the National Basketball Association (NBA)—creating "super-teams" through moves in free agency. To be sure, the two most recent NBA dynasties—the Miami Heat and the Golden State Warriors—assembled their championship rosters through decisions of free agents to combine their talents. Part of the strategy has been to agree to shorter contracts such that the flexibility exists to switch teams. These moves have resulted in players eschewing the higher pay of staying with their current teams under the Bird Rule.

During the past three years, this phenomenon has reached a new level, with players under contract using their star power to make lateral moves to form super-teams prior to free agency. Anthony Davis successfully forced a trade from the New Orleans Pelicans to the Los Angeles Lakers, resulting in a championship for the Lakers. James Harden accomplished the same move last year, forcing a trade from the Houston Rockets to the Brooklyn Nets, with similar championship aspirations. While teams might trade disgruntled players, the ability of a superstar to force a trade has rarely happened, as teams are reluctant to give up their best player.

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* Associate Dean for Research and Montague Professor of Law, University of Mississippi. Many thanks to Erin Savoie, Eli Nachmany, and the rest of the JSEL editorial team for their excellent work on the article.

On the heels of the success of NBA stars forcing trades to build super-teams, National Football League (NFL) quarterbacks have tried the same approach during the past two years. Initially, they were less successful.

These attempts of star players to switch teams raises questions as to whether such trade demands will become the norm, the degree to which players can grab this kind of power within the confines of the current collective bargaining agreements, and whether such movements are desirable.

In light of these questions, this Article explores the benefits of the creation of a more open free market for pro athletes to allow for increased movement between teams. Specifically, the Article suggests that players should explore the concept of opt-out provisions in future collective bargaining agreements to allow for more free movement and competition in the market.

Part One of the Article explores the common myths of the single team star who spends an entire career with one franchise. In Part Two, the Article describes the recent super-team phenomenon. Part Three advances the central argument of the Article, making the case for an expansion of player rights in free agency through collective bargaining and opt-out contract provisions. It also concludes the Article by explaining the value of increased player movement in professional sports.

INTRODUCTION

From a labor and employment law perspective, the story of professional sports in the United States has been a slow but steady movement toward athlete free agency.[1] The evolution has, to be sure, been uneven, and restrictions still remain.[2] And the path has varied across the three major team sports of baseball, football, and basketball.[3] Nonetheless, the landscape has shifted significantly since the early years of professional sports.[4]

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[1] *See generally* PAUL C. WEILER, ET AL., SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS (6th ed. 2020).

[2] First-round draftees in the NFL get four-year contracts with a fifth-year team options, while picks from the second through seventh rounds get four-year contracts; NBA rookie contracts last two years, with team options for a third and fourth years; MLB rookie contracts are six years. *See* NAT'L FOOTBALL LEAGUE & NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT 27 (March 15, 2020), available at https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf [https://perma.cc/UF4B-8CAL]; NAT'L BASKETBALL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT 265 (Jan. 19, 2017), available at https://nbpa.com/cba [https://perma.cc/S5QA-LZRC]; MLB COLLECTIVE BARGAINING AGREEMENT 92 (December 1, 2016), available at https://www.mlbplayers.com/cba. This article cites the previous MLB collective bargaining agreement. At the time of writing, MLB and its players union recently agreed to a new collective bargaining agreement. See Mark Feinsand, *MLB, MLBPA Agree to New CBA; Season to Start April 7*, MLB (Mar. 10, 2022), https://www.mlb.com/news/mlb-mlbpa-agree-to-cba [https://perma.cc/AM5R-DGF7].

[3] The big three sports in the United States outpace all other sports in annual revenue, with Premier League Soccer, Indian Premier League Cricket, and the National Hockey League a step behind. *See*, *e.g.*, Bradley Geiser, *America Only Has 4 of the Most Profitable Sports Leagues in the World*, SPORTSCASTING (April 11, 2020), https://www.sportscasting.com/america-only-has-4-of-the-most-profitable-sports-leagues-in-the-world/ [https://perma.cc/R9QT-NWCJ]. Indeed, in 2021, NFL football accounted for 75 of the top 100 most viewed live television broadcasts. Anthony Crupi, *NFL Games Account for 75 of the 100 Most-Watched Broadcasts of 2021*, SPORTICO (Jan. 7, 2022), https://www.sportico.com/business/media/2022/nfl-games-account-for-75-of-the-100-most-watched-broadcasts-of-2021-1234657845/ [https://perma.cc/89QY-AXJ8]. Baseball players receive free agency after six years, but are eligible for arbitration after three. *See* MLB COLLECTIVE BARGAINING AGREEMENT, *supra* note 2, at 18, 92. Football players become free agents after four years unless the team exercises a fifth-year option. *See* NFL COLLECTIVE BARGAINING AGREEMENT, *supra* note 2, at 27. Basketball players become free agents after two years unless the team exercises its third-year option. *See* NBA COLLECTIVE BARGAINING AGREEMENT, *supra* note 2, at 265. The team can also exercise a fourth-year option, keeping the player from free agency until after his fourth year. *Id.*

[4] The decline of baseball's reserve clause is perhaps most emblematic of this change. *See*, *e.g.*, Jeff Martindale & Carolyn Lehr, *Two Strikes: A History and Analysis*

In baseball, antitrust challenges failed, but labor arbitration opened the door to free agency.[5] In football, antitrust challenges preceded by union decertification carried the day.[6] And in basketball, an antitrust challenge led to a negotiated settlement establishing free agency.[7]

And yet, there are restrictions at play in each sport. In baseball, players must wait six years for free agency, although they can enter salary arbitration after three years.[8] In football, free agency is generally available after four years.[9] And in basketball, free agency becomes available after four years, but can be two years if the team does not exercise its option on the rookie contract.[10]

In recent years, however, the players have begun to exercise greater control over player movement and team-building.[11] Beginning with The Decision,[12] LeBron James charted a new path for stars in the National Basketball Association (NBA) showing how to create a "super-team" through

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of Major League Baseball, Its Antitrust Exemption, and the Reserve Clause, 7 J. LEGAL ASPECTS SPORT 174 (1997); Stew Thornley, *The Demise of the Reserve Clause: The Players' Path to Freedom*, 35 BASEBALL RSCH. J. 115 (2006).

[5] Flood v. Kuhn, 407 U.S. 258 (1972) (upholding baseball's antitrust exemption from the Court's prior decisions in *Federal Baseball Club v. National League*, 259 U.S. 200 (1922) and *Toolson v. New York Yankees, Inc.*, 346 U. S. 356 (1953)); Kansas City Royals v. Major League Baseball Players Ass'n, 532 F.2d 615 (8th Cir. 1976) (upholding the arbitrator's decision in National and American Professional Baseball Clubs v. Major League Baseball Players Association, 66 Lab. Arb. Rep. (BNA) 101 (1976)).

[6] McNeil v. Nat'l Football League, Civ. No. 4-90-476, 1992 WL 315292 (D. Minn. Sept. 10, 1992) (finding that Plan B free agency violated the Sherman Act); White v. NFL, 836 F. Supp. 1458 (D. Minn. 1993) (upholding the class action settlement resulting from limits on free agency).

[7] Robertson v. Nat'l Basketball Ass'n, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977) (upholding the class action settlement that established free agency).

[8] MLB COLLECTIVE BARGAINING AGREEMENT, *supra* note 2, at 18, 92.

[9] NFL COLLECTIVE BARGAINING AGREEMENT, *supra* note 2, at 27.

[10] NBA COLLECTIVE BARGAINING AGREEMENT, *supra* note 2, at 265.

[11] Historically, control of a roster had been under the exclusive purview of the general manager or similar senior club executives.

[12] The Decision was a television special in which LeBron James announced his decision of where he would sign as a free agent, choosing to join the Miami Heat and leave his home state Cleveland Cavaliers. *See*, *e.g.*, *Looking Back at LeBron's Decision 10 Years Later*, SPORTS ILLUSTRATED (July 8, 2020), https://www.si.com/nba/2020/07/08/lebron-james-miami-heat-decision-10-years-later [https://perma.cc/NQ4B-7MGE] (discussing the impact and theatrics of The Decision).

player-coordinated moves in free agency.[13] To be sure, the two most recent NBA dynasties—the Miami Heat and the Golden State Warriors—assembled their championship rosters through superstar free agents deciding to combine their talents.[14] Part of the strategy has been to agree to shorter contracts such that the flexibility exists to switch teams.[15] These moves have resulted in players eschewing the higher pay of staying with their current team under the Bird Rule.[16]

During the past three years, this phenomenon has reached a new level, with players under contract using their star power to make lateral moves to form super-teams prior to free agency by demanding trades. Anthony Davis successfully forced a trade from the New Orleans Pelicans to the Los Angeles

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[13] As discussed *infra* in Part I, this strategy involves timing one's contract expiration with other players to join as free agents on a new team. This also requires some level of team complicity as well in order to have the salary cap space to accommodate multiple maximum contracts.

[14] In James' case, free agent James joined with Miami Heat star Dwyane Wade and free agent Chris Bosh to form a super-team that made four consecutive NBA finals and won championships in 2012 and 2013. *See NBA & ABA Champions*, BASKETBALL-REFERENCE, available at https://www.basketball-reference.com/playoffs/ [https://perma.cc/4FFJ-KEJ4] (last visited July 3, 2022). To be fair, the Warriors had already assembled a championship team, winning the NBA championship in 2015 and setting the NBA record for wins in 2015-16 before losing in the finals. *See id.*; *Top Moments: Warriors Set Record with 73-Win Season*, NBA (Sept. 14, 2021, 9:56 AM), https://www.nba.com/news/history-top-moments-warriors-win-record-73-games [https://perma.cc/ANE5-5YJY]. Adding Kevin Durant as a free agent led to two more championships in 2017 and 2018 and a third finals appearance in 2019 which the Warriors lost after Durant and another star player, Klay Thompson, were injured. *See id.; James Picks Heat; Cavs Owner Erupts*, ESPN (July 8, 2010), https://www.espn.com/nba/news/story?id=5365165 [https://perma.cc/77JT-63AD]; *Top Moments: Kevin Durant Signs with Warriors in 2016*, NBA (Sept. 14, 2021, 9:56 AM), https://www.nba.com/news/history-top-moments-kevin-durant-joins-warriors [https://perma.cc/PP8L-FEY8].

[15] The uneven raises of the salary cap over time also play a role here. *See*, *e.g.*, Rob Mahoney, *NBA Free Agency: The Thought Behind the One-Year Deal Trend*, SPORTS ILLUSTRATED (July 12, 2018), https://www.si.com/nba/2018/07/12/nba-free-agency-kevin-durant-demarcus-cousins-deandre-jordan-one-year-deal-trend [https://perma.cc/6WTQ-554H].

[16] The Bird rule, named for Boston Celtics star Larry Bird, allows a team to sign its own player for a higher amount than other clubs can sign him in free agency, even if the amount exceeds the salary cap. NBA COLLECTIVE BARGAINING AGREEMENT, *supra* note 2, at 35-43, 184, 198-99. The idea behind the rule is to discourage star players from switching teams.

Lakers, resulting in an NBA championship for the Lakers.[17] James Harden accomplished the same move last year, forcing a trade from the Houston Rockets to the Brooklyn Nets, with similar championship aspirations.[18] While teams have sometimes traded disgruntled players, the ability of a franchise-player superstar to force a trade to a strong team in order to win a championship has rarely happened, as teams are reluctant to give up their best player or help another team build a dynasty.[19]

On the heels of the success of NBA stars forcing trades to build super-teams, National Football League (NFL) quarterbacks tried the same approach during the summer of the 2021 NFL offseason. Houston Texans quarterback Deshaun Watson and Seattle Seahawks quarterback Russell Wilson both allegedly attempted to force trades, but were unsuccessful in the summer of 2021.[20] The litmus test, though, for this approach perhaps was Green Bay Packers quarterback Aaron Rodgers, the winner of the Most Valuable Player (MVP) award for the 2020 season.[21] Rodgers went as far as to suggest that he would rather retire than play another season with the Packers before caving just before the team required its players to report for the 2021 season.[22]

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[17] *Kerr: Forced Trade by Davis 'Bad for the League'*, ESPN (July 24, 2019), https://www.espn.com/nba/story/_/id/27250922/kerr-forced-trade-davis-bad-league [https://perma.cc/7UR8-DPTP].

[18] Farbod Esnaashari, *The 2-Month Trade Request: How James Harden Forced His Way Out of Houston*, BLEACHER REPORT (Mar. 3, 2021), https://bleacherreport.com/articles/2934230-the-2-month-trade-request-how-james-harden-forced-his-way-out-of-houston [https://perma.cc/BQ4H-7H7Z].

[19] The inability of football players to replicate what Davis and Harden have done underscores this point. *See* discussion *infra* Part II.

[20] Watson's attempt to force a trade was complicated by a series of accusations of sexual assault that emerged in the summer of 2021 and 22 civil lawsuits subsequently filed. *See* Aaron Reiss, *Timeline of Deshaun Watson Sexual Assault Lawsuits: Trade Won't Happen Before Deadline*, THE ATHLETIC (June 27, 2022), https://theathletic.com/2496073/2021/10/26/timeline-of-deshaun-watson-sexual-assault-lawsuits-lawyer-for-texans-owner-tried-to-broker-mediation/ [https://perma.cc/A9SB-ASEK]. He ended up sitting out the 2021 season. *Id.* Gene Chamberlain, *Russell Wilson Explanation Misses the Mark*, SPORTS ILLUSTRATED (June 12, 2021), https://www.si.com/nfl/bears/news/russell-wilson-does-revisionist-history-on-bears-trade-attempt [https://perma.cc/QHJ2-9RLE].

[21] Nick Shook, *Packers QB Aaron Rodgers Named 2020 AP NFL Most Valuable Player*, NFL (Feb. 6, 2021), https://www.nfl.com/news/packers-qb-aaron-rodgers-named-2020-ap-nfl-most-valuable-player [https://perma.cc/5U4U-VJEU].

[22] *See, e.g.*, Mike Tanier, *With a Little Leverage but a Lot to Say, Aaron Rodgers Returns*, N.Y. TIMES (July 29, 2021), https://www.nytimes.com/2021/07/29/sports/football/aaron-rodgers-press-conference.html [https://perma.cc/H4GU-WUG6]; Vinnie Iyer, *Aaron Rodgers' Holdout Timeline: Key Dates, Fines to Know on Packers'*

Interestingly, Watson and Wilson were both traded in the 2022 offseason. But their situations were far different from Davis and Harden in the NBA. Watson's situation was complicated by ongoing allegations of sexual assault and a possible NFL suspension. Wilson's situation related in part to a determination that his health and age had diminished his abilities while his desire to pass the ball extensively contradicted the team's run-based offensive philosophy.

These attempts of star players to switch teams raises questions as to whether such trade demands will become the norm, the degree to which players can grab this kind of power within the confines of the current collective bargaining agreements, and whether such movements are desirable.

In light of these questions, this Article assesses the benefits of the creation of a more open free market for pro athletes to allow for increased movement between teams. Specifically, the Article suggests that players should explore the concept of opt-out provisions in future collective bargaining agreements to allow for more free movement and competition in the market, as outside of the NBA, forcing trades is not a successful strategy.

Part One of the Article explores the common myth of the single team star who spends an entire career with one franchise. In Part Two, the Article describes the recent super-team phenomenon. Part Three advances the central argument of the Article, making the case for an expansion of player rights in free agency through collective bargaining and opt-out contract provisions while suggesting the limitations of the forced-trade strategy. It then concludes the Article by explaining the value of increased player movement in professional sports.

I. THE MYTH OF THE SINGLE TEAM STAR

Historically, athletes spent their career with the same team. Fans love the nostalgia of the old players who are synonymous with their teams. One might think of Larry Bird's Celtics, Magic Johnson's Lakers, and Michael Jordan's Bulls; Johnny Unitas's Colts, Roger Staubach's Cowboys, and Terry Bradshaw's Steelers; Joe DiMaggio's Yankees, Ernie Banks' Cubs, and Sandy Koufax's Dodgers. The home town hero mythology embraces the idea of the hero always playing for the home town team[23] and never becoming a free

Offseason Calendar, SPORTING NEWS https://www.sportingnews.com/us/nfl/news/aaron-rodgers-holdout-fines-packers/1db9kfevg9fhb10lfj73124ktp [https://perma.cc/4WRS-XCCH] (last visited July 4, 2022).

[23] Players in the baseball Hall of Fame are enshrined on a plaque where the player is wearing the team hat in Cooperstown, with the implicit presumption that players spend their career with one team. *See Plaque Gallery*, NAT'L BASEBALL HALL

agent.[24] Indeed, for some fans, nothing is more crushing than their favorite player being traded or leaving as a free agent, especially late in his career.[25]

One part of the argument in favor of baseball's reserve system[26] related to the paternalistic idea that player movement would destroy professional sports, as the appeal to fans was the connection to particular players.[27] If the players changed too often and players switched teams, the argument went, fan loyalty and interest would diminish.[28]

Reality, however, has debunked this concern. With the expansion of free agency in baseball, basketball, and football over the past thirty years, the player that spends his career with a single franchise is rare. But this pattern of athletes switching teams has not diminished the popularity of the sports. If anything, it has increased fan interest.[29]

A. Home Town Hero vs. Fantasy Star

One lens through which to view the transition to the modern conception of sports is the transition from the home town hero to the fantasy star. Fan interest no longer focuses purely on the home town team. And the mod-

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OF FAME, https://baseballhall.org/discover/museum/plaque-gallery [https://perma.cc/FYG9-TVNT] (last visited July 4, 2022).

[24] Cal Ripken perhaps best embodies this idea in having set the record for most consecutive games played at 2,632. *See* Sarah Langs et al., 8 Amazing Facts about Ripken's Streak, MLB (Sept. 6, 2020), https://www.mlb.com/news/amazing-facts-about-cal-ripken-jr-s-games-played-streak [https://perma.cc/D9DH-J3V4].

[25] Boston Red Sox fans in particular know this story, with the trade of Babe Ruth to the Yankees, anecdotally creating the "Curse of the Bambino," a superstition used to explain its eighty-six-year championship drought that finally ended in 2004. *See*, *e.g.*, Anthony Castrovince, *The Curse of the Bambino Explained*, MLB (last visited Dec. 25, 2021), https://www.mlb.com/news/curse-of-the-bambino [https://perma.cc/R8PT-CPF5]; DAN SHAUGHNESSY, THE CURSE OF THE BAMBINO (1990); BILL SIMMONS, NOW I CAN DIE IN PEACE (2005). This often does not end well for the player (for example, Joe Montana and Michael Jordan), but Tom Brady seems to have reversed this trend with a championship quarterbacking his new team. *See*, *e.g.*, Scott Smith, *Champs! Bucs Win Super Bowl LV*, BUCCANEERS (Feb. 8, 2021, 9:20 AM), https://www.buccaneers.com/news/bucs-win-super-bowl-55-chiefs-31-9-final-score-champions [https://perma.cc/H37A-6LEG].

[26] *See*, *e.g.*, Kansas City Royals v. Major League Baseball Players Ass'n, 532 F.2d 615 (8th Cir. 1976).

[27] *See* sources *supra* note 4.

[28] *Id.* Interestingly, many who oppose paying college athletes make similar arguments about athlete compensation. *See*, *e.g.*, Alston v. NCAA, 141 S. Ct. 2141 (2021).

[29] *See*, *e.g.*, *In Depth: Topics A to Z: Sports*, GALLUP, https://news.gallup.com/poll/4735/sports.aspx [https://perma.cc/PD7V-KKEJ] (last visited July 4, 2022).

ern expansion of free agency leads to the expectation that players will not spend their entire careers with the same team.[30]

Player movement has not ruined professional sports. Instead, it has created a season outside of the season during which there is keen fan interest[31] in which players a franchise will retain, trade, release, and obtain through off-season transactions.[32] If anything, the move toward free agency has magnified interest in professional sports because it has generated a steady stream of news and commentary throughout much of the year, expanding far beyond the length of the season.[33]

Fan interest has also expanded beyond individual teams as a result of the growth of fantasy sports. Many fans have become far more interested in individual players as members of their fantasy roster, or the roster against which they are competing, as opposed to the degree to which a player can be the iconic representative of their home town team.[34]

In the context of fantasy sports, one cheers for or against individuals, as opposed to teams.[35] This interest in the game cuts against the traditional

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[30] Some companies will replace fans' purchased jerseys if players switch teams within 90 days. *See*, *e.g.*, *Jersey Assurance*, FANATICS, https://www.fanatics.com/jersey-assurance/x-2132+z-932267037-343285709 [https://perma.cc/7ZMZ-CUVS] (last visited July 4, 2022). Indeed, it is rare for even star players to spend their career with the same team.

[31] This interest mirrors the interest in college football recruiting and helps make professional sports into full-year sports news topics, going far beyond the season.

[32] Termed the "hot stove" season, the offseason can sometimes generate more interest from fans than the season itself does, particularly for fans of perennially bad teams looking for hope for a reversal of fortunes in the upcoming season.

[33] College football is currently enjoying a similar off-season spike in fan interest with the rise of the transfer portal, a free agency of sorts. The proliferation of sports media has accompanied this trend, with ESPN growing to prominence over the past four decades. Phil Rosenthal, *How ESPN — Now 40 Years Old — Changed the Sports World, from Your Growing Cable Bill and Round-the-Clock Programming to the Glut of Bowl Games*, CHI. TRIBUNE (Sept. 8, 2019), https://www.chicagotribune.com/sports/breaking/ct-cb-espn-40th-anniversary-changed-sports-20190906-ogxokpxed jgwdekdlmgudb6myq-story.html [https://perma.cc/Z7PY-7L3B].

[34] *See*, *e.g.*, Ed Dixon, *Study: Fantasy Sports Market to Grow 9.5% to US $22.3bn in 2021*, SP (Sept. 1, 2021), https://www.sportspromedia.com/news/fantasy-sports-global-market-value-2021-nfl-mlb-nba/ [https://perma.cc/MHP6-2UW4]; *The Lucrative and Growing Fantasy Football Industry*, SPORTS MGMT. DEGREE HUB, https://www.sportsmanagementdegreehub.com/fantasy-football-industry/ [https://perma.cc/Y2SB-JWRR] (last visited July 4, 2022).

[35] *See*, *e.g.*, Chris Isidore, *Fantasy Sports: What Is It, Anyway?*, CNN MONEY (Oct. 6, 2015, 5:13 PM), https://money.cnn.com/2015/10/06/news/companies/fantasy-sports-101/index.html [https://perma.cc/ZZ33-L9RG].

model of fans cheering for their home town team.[36] While, in some ways, this could be a discouraging trend, the practical effect is that it drives fan interest into every minute of every game irrespective of the score.[37] While a conventional fan may turn their attention away from the game when it is clear that the home town team has secured victory or is destined to lose, the fantasy fan remains focused, as late game plays can affect the outcome of their fantasy game.[38]

The broadening of the fan base—from those interested in their home teams and games that affect their home teams in the standings to a wide range of fans interested in both teams and individual outcomes—has made the home town hero less of an ideal of professional sports. And the reality of free agency has made such home town stars who spend their entire careers with one team largely extinct.

B. Parity vs. Dynasty

A second myth drives objections to super-teams—the need for parity in professional sports. Former NFL Commissioner Pete Rozelle famously argued that "balance" among teams was the key to the success of the NFL, and justified both free agency restrictions and the hard salary cap.[39] While it

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[36] *See*, *e.g.*, Blake Snow, *How Fantasy Sports Have Changed How We Cheer*, KSL (Aug. 31, 2011, 10:47 AM), https://www.ksl.com/article/17049422/how-fantasy-sports-have-changed-how-we-cheer [https://perma.cc/NFG8-Y6UZ].

[37] Some have argued that fantasy sports have the dark side of dehumanizing players. *See*, *e.g.*, Eric Allen Hall, *The Dark Side of Fantasy Football*, WASH. POST (Sept. 10, 2017, 6:00 AM), https://www.washingtonpost.com/news/made-by-history/wp/2017/09/10/the-dark-side-of-fantasy-football/ [https://perma.cc/YY9V-Y35S]. This is particularly true for daily fantasy sports, a gambling offshoot that allows fan owners to assemble a new roster each day. *See*, *e.g.*, Brent Schrotenboer, *Leagues See Real Benefits in Daily Fantasy Sports*, USA TODAY (Jan. 1, 2015), https://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/ [https://perma.cc/PKR9-67ET].

[38] In garbage time, the part of the game after the result has been decided but there is still a part of the game left to play, fantasy sports participants have an incentive to watch in a way that traditional fans do not. *See* Scott Spratt, *Defining "Garbage Time" for Fantasy Production*, PRO FOOTBALL FOCUS (Aug. 23, 2017), https://www.pff.com/news/fantasy-football-defining-garbage-time-for-fantasy-production.

[39] Pete Rozelle, *Is It 'Parity'? 'Mediocrity'? Pete Rozelle Says No*, N.Y. TIMES (Jan. 3, 1982), https://www.nytimes.com/1982/01/03/sports/is-it-parity-mediocrity-pete-rozelle-says-no.html [https://perma.cc/99UB-55ZC]. *See also* Anthony Crupi, *NFL's Overtime Spree Underscores Parity's Impact on Television Ratings*, YAHOO! (Oct. 19, 2021), https://www.yahoo.com/now/nfl-overtime-spree-underscores-parity-214813408.html [https://perma.cc/U7ZQ-WKPG].

is true that the annual hope that this will be the year one's team makes the playoffs or wins the championship underlies much fan interest in sports, the presence of a dynasty—a team that competes for championships over several years—can likewise galvanize fan interest.[40]

In some ways, the presence of a dynasty may attract even more fan interest than parity would. The dynasty raises the question of how long a team can stay on top—how many championships can it win before another team dethrones it? This phenomenon draws the interest of both bandwagon fans[41]—those who join on because it is fun to cheer for a winner—and those who relish cheering against the dominant team.[42]

Rather than a unique matchup appearing in the late playoff and championship rounds of competition, repetition of the same teams playing each year can be a recipe for fan interest.[43] Michael Jordan's Chicago Bulls teams provide an obvious example.[44] For a number of years, the Detroit Pistons defeated the Bulls and ended their season in the playoffs.[45] Eventually, the

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[40] *See*, *e.g.*, Tim Cato, *NBA Finals Television Ratings Up from 2016 Even with Blowouts*, SB NATION (June 5, 2017), https://www.sbnation.com/2017/6/5/15740976/nba-finals-television-ratings-warriors-cavaliers [https://perma.cc/EQ4C-EJZ6]; *see also* JORDAN FINCI, THE IMPACT OF SUPERTEAMS AND PARITY ON THE NBA (Univ. of Or., Senior Honors Thesis, Dec. 2017), available at https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/24005/Final%20Thesis-Finci.pdf?sequence=1&isAllowed=y [https://perma.cc/KX26-BFY7] (arguing that superteams do not have a negative effect on fan interest).

[41] *See*, *e.g.*, Tony Santorsa, *Dallas Cowboys and the 16 Biggest Bandwagon Fanbases in the NFL Today*, BLEACHER REPORT (June 9, 2011), https://bleacherreport.com/articles/728759-16-biggest-bandwagon-fanbases-in-the-nfl-today [https://perma.cc/9TQL-FWXB].

[42] *See*, *e.g.*, Callum Ng, *Dear Bandwagon Fan: You Are the Worst—Signed, Big Fan*, OLYMPIC (Nov. 12, 2014), https://olympic.ca/2014/11/12/dear-bandwagon-fan-you-are-the-worst-signed-big-fan/ [https://perma.cc/59KH-N6JE]. The continued popularity of men's professional tennis also underscores this point; three dominant players—Roger Federer, Rafael Nadal, and Novak Djokovic—have won the vast majority of major titles over the past two decades, a fact that has increased fan interest, not diminished it. *See* Tumaini Carayol, *How Will Tennis Survive Without Its Superstars?*, THE RINGER (Sept. 5, 2019, 8:26 AM), https://www.theringer.com/2019/9/5/20850223/tennis-superstars-roger-federer-rafael-nadal-novak-djokovic-serena-williams [https://perma.cc/6SUL-R4CA].

[43] Giancarlo Ferrari-King, *10 Things That Happen After a Team Wins a Championship*, BLEACHER REPORT (Nov. 8, 2015), https://bleacherreport.com/articles/2585616-10-things-that-happen-after-a-team-wins-a-championship [https://perma.cc/XG8W-G3ZR].

[44] *See generally* NETFLIX, THE LAST DANCE (2020).

[45] The Pistons knocked the Bulls out of the playoffs in 1988, 1989, and 1990. *See NBA & ABA Playoff Series History*, BASKETBALL-REFERENCE, https://

Bulls gained a measure of revenge and defeated the Pistons in 1991 before winning the championship.[46] The Bulls made two separate runs to three championships, with six in eight years, and it did not diminish interest in the NBA.[47] To the contrary, their dynasty drew increased fan interest from both those celebrating their wins and those hoping to see another team knock them off.[48]

The same point can be made by examining fan response to the Patriots dynasty in which Tom Brady and Bill Belichick won six Super Bowls over a seventeen-year period.[49] The NFL's popularity has not diminished over that period; to the contrary, it has significantly increased.[50]

To the extent that player movement generates dynasties, this is a positive development, not a negative one, at least with respect to the economic health of the sport. Dynasties generate fan interest from everyone, not just fans of the team and fans of its rivals.

C. Socialist Paternalism vs. Capitalist Free Markets

Paternalistic arguments against player movement and expansion of free agency also advance a corporate, anti-competitive approach to the market for

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www.basketball-reference.com/playoffs/series.html (last visited July 4, 2022). The Pistons coined their defense against Michael Jordan the "Jordan Rules." *See*, *e.g.*, Drew Sharp, *The Best of the Pistons-Bulls Rivalry*, DETROIT FREE PRESS, Dec. 25, 2007.

[46] *See NBA & ABA Playoff Series History*, *supra* note 45.

[47] *See id. See generally* THE LAST DANCE, *supra* note 44.

[48] *See*, *e.g.*, Scott D. Pierce, *Jazz-Bulls Are Still on Top of NBA Finals TV Ratings*, DESERET NEWS (July 6, 2007), https://www.deseret.com/2007/7/6/20028317/scott-d-pierce-jazz-bulls-are-still-on-top-of-nba-finals-tv-ratings [https://perma.cc/8YB2-6ZHL]; Kyle Dalton, *1998 NBA Finals Game 6 Is the Most-Watched Game in NBA History*, SPORTSCASTING (May 20, 2020), https://www.sportscasting.com/1998-nba-finals-game-6-is-the-most-watched-game-in-nba-history/ [https://perma.cc/V5YM-JFGQ].

[49] *See NFL History - Super Bowl Winners*, ESPN http://www.espn.com/nfl/superbowl/history/winners [https://perma.cc/3L2P-Z6WG] (last visited July 4, 2022).

[50] *See*, *e.g.*, Chad Finn, *In the World of TV Ratings, the NFL in a League of Its Own*, BOSTON (Oct. 23, 2021), https://www.boston.com/sports/nfl/2021/10/23/nfl-tv-ratings-2021-season-chad-finn-sports-media-column/ [https://perma.cc/B4PU-ET42]. The Patriots are also apparently popular in China. Aimee Lewis, *How New England Patriots Had a 'Monumental' Year in China*, CNN (Apr. 16, 2019, 7:13 AM), https://www.cnn.com/2019/04/02/sport/new-england-patriots-china-social-media-spt-intl/index.html [https://perma.cc/8DVD-WPAK].

professional athletes.[51] Salary caps and other forms of limiting free market competition are more apt to mirror a socialist approach to professional sports as opposed to a capitalistic one.

Billionaire owners fight hard against free markets for professional athlete services. The draft, the salary cap, and other player movement restrictions all help owners to achieve at least some of this aim.[52]

The entry into the league begins with a draft, with the worst teams getting the best players.[53] To impose a similar approach in other industries would be laughable. Imagine the top law students in a law school class being required to work for the least successful law firms after being drafted by them. This might promote parity among law firms and balance the relative strength of firms, especially if continued for a number of years, but it is an approach contrary to a capitalistic ethic of rewarding the highest achievers.

This draft approach, despite the millions of dollars that accompany it, contradicts capitalism. In all three major sports, there is a rookie cap or draft limit, such that the amount of money one receives is limited by where one is drafted. An open market would produce wildly different results.[54]

The salary cap likewise undermines capitalist values in the name of fair competition. This plays out in different ways across the three major sports.

MLB does not have a salary cap, but imposes a luxury tax on teams that exceed a certain level of total compensation for their payroll in a given year.[55] This results in economic redistribution from the wealthy teams to the less wealthy teams.[56] Baseball has perhaps the most capitalistic model, with teams otherwise not required to share revenue as they are in the NFL.[57]

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[51] *See generally* Jonathan B. Goldberg, *Player Mobility in Professional Sports: From the Reserve System to Free Agency*, 15 SPORTS L.J. 21 (2008).

[52] It is worth noting that all of these devices violate antitrust law, but the owners are able to use the shield of the non-statutory labor exemption to avoid liability. *See, e.g.*, Clarett v. NFL, 369 F. 3d 124 (2d Cir. 2004).

[53] *See generally supra* notes 8, 9, and 10.

[54] College sports has an open market, but imposes its own caps on compensation—tuition, room, board, books, cost of attendance, and other education-related costs. *See* NCAA v. Alston, 141 S. Ct. 2141 (2021).

[55] *See generally* MLB COLLECTIVE BARGAINING AGREEMENT, *supra* note 2.

[56] *Id.* The luxury tax in 2021 applied to teams with payrolls above $210 million, with the tax increasing from 20% to 32% at payrolls $230 million-to-$250 million, and to 62.5% for payrolls above $250 million. *See 2021 Luxury Tax Payrolls*, WTOP NEWS (Mar. 13, 2022, 8:04 PM), https://wtop.com/sports/2022/03/2021-luxury-tax-payrolls/ [https://perma.cc/5YUU-8A6W].

[57] *See generally* MLB COLLECTIVE BARGAINING AGREEMENT, *supra* note 2.

The NFL has a hard salary cap, which means that teams cannot have total salaries in excess of the cap.[58] The absence of guaranteed contracts makes the cap easy to adhere to in the sense that teams can always cut players as needed.[59] The answer for player agents and teams has been to negotiate contracts with guaranteed signing bonuses paid up front, and per league rules, carry out the bonus equally over the years of the contract.[60] This leads to many restructuring efforts and extensions of contracts to delay the inevitable salary cap hit for as long as possible. This also means that teams can accumulate quite a bit of "dead" cap money for players who are no longer on the team, but whose prior bonuses still count against the cap.[61] Interestingly, the NFL itself has a socialist model in that it engages in almost complete revenue sharing among its teams.

The NBA has a soft cap and a luxury tax.[62] The soft cap limits how much teams can pay free agents, and defines maximum contracts for teams.[63] The Bird Rule, which allows teams to pay more than the market for their own free agents, makes the cap vary slightly from team to team, as the excess money paid in order to retain one's own player does not all count against the cap.[64] The luxury tax, like in MLB, taxes teams that exceed a total compensation level.[65] The tax also has a balloon provision, imposed against teams that exceed the luxury tax for multiple years.[66]

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[58] *See generally* NFL Collective Bargaining Agreement, *supra* note 2.

[59] *See generally id.*

[60] *See*, *e.g.*, Andrew Brandt, *Business of Football: Understanding the Salary Cap, Dead Money, and Impact of 2021 Decrease*, Sports Illustrated (Mar. 2, 2021), https://www.si.com/nfl/2021/03/02/business-of-football-understanding-the-salary-cap-dead-money [https://perma.cc/K94G-24S3].

[61] The recent trade between the Rams and the Lions of their quarterbacks—Jared Goff for Matthew Stafford—was particularly noteworthy in this regard, with Goff costing the Rams a $22.2 million dead money cap hit and Stafford costing the Lions a $17.8 million dead money cap hit in 2021. Tyler J. Davis, *Here's the Detroit Lions' Possible Escape Hatch if the Jared Goff Trade Doesn't Work Out*, Detroit Free Press (Jan. 31, 2021, 3:47 AM), https://www.freep.com/story/sports/nfl/lions/2021/01/30/detroit-lions-jared-goff-contract-matthew-stafford-trade/4329399001/ [https://perma.cc/V6LB-593B].

[62] *See generally* NBA Collective Bargaining Agreement, supra note 2.

[63] *See generally id.*

[64] *See generally id.*; *see supra* note 16.

[65] *See generally* NBA Collective Bargaining Agreement, *supra* note 2. The NBA luxury tax threshold for the 2021-22 season was $136,606,000. Luke Adams, *NBA Salary Cap for 2022-23 Projected to Be $121 Million*, YardBarker (Feb. 4, 2022), https://www.yardbarker.com/nba/articles/nba_salary_cap_for_2022_23_projected_to_be_121_million/s1_14822_37170275 [https://perma.cc/9ZAE-YNGY].

[66] Repeat luxury tax offenders pay an increased penalty. *See generally* NBA Collective Bargaining Agreement, *supra* note 2; Yossi Gozlan, *2021-22 Season Will*

Together, the draft and the salary cap theoretically promote parity, but it is not clear that they enhance the overall financial growth of the leagues. To be sure, they restrict the income of the players at the collectively bargained rate. In the three leagues, this value hovers around fifty percent of the revenue received annually.[67]

What is not clear is whether the leagues could make even more money by creating a freer market for athletes. The limit would be what the fans and the television networks were willing to pay, not an arbitrary limit imposed by billionaire owners.[68] With no salary cap and a completely free market, some team owners might be willing to spend much more than they currently do on players.[69]

Public opinion can also support limits on athlete compensation. The same people who are willing to spend hundreds of dollars to attend sporting events or watch thousands of hours of commercials during live telecasts often do not favor the idea of athletes making millions of dollars.[70] The idea of receiving compensation for playing a game offends some who argue that playing a sport is not working for a living.[71]

Changing the narrative here is important, as the time commitment of being a professional athlete far exceeds many other professions. The constant pressure to perform at an elite level with thousands of people watching in person comes with an unusual level of pressure. The culture of the sports

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Have the Largest Luxury Tax Payments Ever, HOOPS HYPE (Aug. 27, 2021), https://hoopshype.com/lists/nba-2021-22-season-largest-luxury-tax-payments-ever/ [https://perma.cc/X857-D3G2]; Luke Adams, *Hoops Rumors Glossary: Luxury Tax Penalties*, HOOPS RUMORS (Mar. 20, 2020), https://www.hoopsrumors.com/2020/03/hoops-rumors-glossary-luxury-tax-penalties-2.html [https://perma.cc/V2LL-YQGU].

[67] *See generally supra* notes 8, 9, and 10.

[68] To be fair, such limits are the product of collective bargaining, but those arrangements allow for anti-competitive rules, drafts, and caps. *See Dodgers Hit with Giant Luxury Tax Bill for Leading MLB Payroll in 2021*, SPORTS ILLUSTRATED, https://www.si.com/mlb/dodgers/news/dodgers-hit-with-giant-luxury-tax-bill-for-leading-mlb-in-payroll-in-2021 [https://perma.cc/Q33M-ELNC].

[69] The Golden State Warriors are a prime example of this, being willing to spend more in luxury tax than their payroll, perhaps for several more years. *See* Gozlan, *supra* note 66.

[70] *See*, *e.g.*, Mike Florio, *Why Don't Fans Support Players Who Want More?*, NBC SPORTS: PROFOOTBALLTALK (June 17, 2018, 12:47 PM), https://profootballtalk.nbcsports.com/2018/06/17/why-dont-fans-support-players-who-want-more/ [https://perma.cc/UCP9-7HV9].

[71] This argument has also been made about other kinds of entertainers. *See*, *e.g.*, Dire Straits, *Money for Nothing*, YOUTUBE (released in 1985, uploaded Feb. 23, 2010), available at https://www.youtube.com/watch?v=WTP2RUD_cL0.

talk world adds to this stress, as every play can be put under a microscope, replayed millions of times, and discussed over and over again.

Athletes, though, are the entertainers. Fans certainly do not attend games to see owners. People do not watch games to see corporate executives. As with other performers in the marketplace, such as authors, musicians, and artists, the market should define how much athletes are paid, not paternalistic limits imposed by owners. In sum, changing the narrative has the potential to reverse the power of billionaires and restore the power over professional sports to the people: the fans.

II. The Rise of the Super-Team[72]

Historically, general managers and team executives have built pro sports dynasties through shrewd drafting, trades, and free agent acquisitions. The more recent trend, however, is athletes exerting influence, taking control, and ultimately operating in the role of the general manager without the formal title.

A. The Tool of Free Agency

1. LeBron James

What was different about the LeBron James decision to leave the Cleveland Cavaliers and join the Miami Heat as a free agent was the manner in which he made that decision.[73] James not only interviewed his potential suitors but also contacted a fellow free agent, Chris Bosh, and a potential future teammate, Dwyane Wade, to plan for a team together.[74] While

[72] To be sure, there have been historical examples of super-teams—the Boston Celtics of the 1960s; the New York Yankees of the 1930s, 40s, and 50s; and the New England Patriots of the modern era. Chris Mueller, *The Greatest Sports Dynasties of All Time*, YardBarker (Oct. 23, 2021), https://www.yardbarker.com/general_sports/articles/the_greatest_sports_dynasties_of_all_time/s1__26756621 [https://perma.cc/BV6Z-YYBS]. But these teams have been built by general managers, not athletes.

[73] ESPN, *{FULL} LeBron James' 'The Decision' (7/8/2010) — ESPN Archives*, YouTube (uploaded June 11, 2018, aired July 8, 2010), available at https://www.youtube.com/watch?v=afpgnb_9bA4; Anthony Chiang, *ESPN Reveals New Details from LeBron James' "The Decision"*, Miami Herald (June 24, 2020).

[74] Brian Windhorst, *Three Days in July: The High-Stakes Maneuvers that Assembled LeBron, Wade, and Bosh*, ESPN (June 29, 2020), https://www.espn.com/nba/story/_/id/29375065/the-decision-high-stakes-maneuvers-lebron-james-dwyane-wade-chris-bosh [https://perma.cc/PLZ6-2CB8]; Bryan Curtis, *"The Decision" Reloaded: How*

Miami Heat general manager Pat Riley may have played a role behind the scenes in enabling the cap space to allow Miami to sign both James and Bosh, the players were the driving force in putting together their team.[75] James and Wade further recruited other veteran players as well, several of whom were willing to receive reduced compensation in exchange for the chance to be on a team with such a high possibility of winning the NBA championship.[76]

The experiment was a success. The Heat made the NBA Finals for four consecutive years, winning the championship in the second and third years.[77]

2. Kevin Durant

Several years later, Kevin Durant chose to create a super-team by joining the Golden State Warriors as a free agent. The Warriors already had, by any estimation, an outstanding team, with a core of future NBA Hall of Famers in Stephen Curry, Klay Thompson, and Draymond Green. They had won the NBA championship in 2015,[78] and had lost 4-3 in the finals in 2016.[79] The 2016 team also set the all-time NBA record for victories in the regular season with 73, compiling a record of 73-9.[80]

LeBron James's Free-Agency Announcement Changed the NBA, THE RINGER (June 2, 2018), https://www.theringer.com/nba/2018/7/2/17524572/lebron-james-the-decision-miami-heat-2010 [https://perma.cc/L9FS-86T7].

[75] *See* Windhorst, *supra* note 74. Indeed, Wade also pitched the three players as a package to the Chicago Bulls. *Id.*

[76] Adam Davis, *Miami Heat: 10 Veterans Who May Sign for the League Minimum for a Chance at a Title*, BLEACHER REPORT (July 16, 2011), https://bleacherreport.com/articles/769672-miami-heat-10-veterans-that-may-sign-for-league-minimum-for-chance-at-a-title [https://perma.cc/4DH6-FHDL]; *2011/12 Miami Heat Salaries*, HOOPS HYPE, https://hoopshype.com/salaries/miami_heat/2011-2012/ [https://perma.cc/QG53-PCFV] (last visited July 5, 2022).

[77] *See NBA & ABA Playoff Series History*, *supra* note 45; *see* Windhorst, *supra* note 74.

[78] *See id.*

[79] *See id.* The Warriors arguably would have won without the suspension of Draymond Green for multiple games during the finals, but their loss was equally attributable to the heroics of LeBron James and Kyrie Irving. *Top Moments: Cavaliers End Cleveland's Long Championship Drought* NBA (Sept. 14, 2021), https://www.nba.com/news/history-top-moments-cavaliers-erase-3-1-deficit-2016-finals [https://perma.cc/FGW7-YLXT].

[80] *See 2015-16 Golden State Warriors Roster and Stats*, BASKETBALL-REFERENCE, https://www.basketball-reference.com/teams/GSW/2016.html [https://perma.cc/T5KW-KMHK] (last visited Apr. 17, 2022).

Adding Durant, though, took the Warriors to another level. They won the NBA championship in 2017 and 2018.[81] And they likely would have won a third consecutive title if both Durant and Thompson had not suffered serious injuries in the NBA Finals the next year.[82]

3. Tom Brady

Tom Brady is perhaps the most recent example of creating a super-team through free agency. After winning six Super Bowls with the New England Patriots,[83] Brady left New England as a free agent and signed with the Tampa Bay Buccaneers.[84] The Buccaneers already had a strong defense, but needed an offense that was more consistent and committed fewer turnovers.[85]

Brady also recruited several players to join him on the Buccaneers team, such as Antonio Brown and Leonard Fournette, improving the team significantly.[86] Notably, he convinced former New England tight end Rob Gronkowski to come out of retirement to play for the Buccaneers.[87]

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[81] *See NBA & ABA Playoff Series History*, *supra* note 45.

[82] They lost 4-2 in the NBA Finals to the Toronto Raptors. *See NBA & ABA Playoff Series History*, *supra* note 45. Durant tore his Achilles tendon and Thompson tore his anterior cruciate ligament. *See 2019 NBA Finals, Game 6: The Wrap,* NBA (June 14, 2019, 3:18 AM), https://www.nba.com/2019-finals-game6-the-wrap [https://perma.cc/M9GB-Q3GB].

[83] *See Super Bowl History*, PRO FOOTBALL-REFERENCE, https://www.pro-football-reference.com/super-bowl/ [https://perma.cc/KL9M-TC4F] (last visited Apr. 17, 2022).

[84] *See*, *e.g.*, Tom Fornelli, *Tom Brady Signs with Buccaneers: Why Tampa Bay Isn't Likely to Get Its Money's Worth from the Future Hall of Famer*, CBS SPORTS (Mar. 20, 2020), https://www.cbssports.com/nfl/news/tom-brady-signs-with-buccaneers-why-tampa-bay-isnt-likely-to-get-its-moneys-worth-from-future-hall-of-famer/ [https://perma.cc/9QK4-FQ3L].

[85] Indeed, the quarterback that Brady replaced, Jameis Winston, had thrown a league-leading 30 interceptions the season before Brady signed with the Buccaneers. *See Jameis Winston*, PRO FOOTBALL-REFERENCE, https://www.pro-football-reference.com/players/W/WinsJa00.htm [https://perma.cc/M37A-W637] (last visited Apr. 17, 2022).

[86] Michael David Smith, *Bruce Arians: Veteran Players Want to Play with Tom Brady*, NBC SPORTS (Sept. 30, 2021), https://profootballtalk.nbcsports.com/2021/09/30/bruce-arians-veteran-players-want-to-play-with-tom-brady/ [https://perma.cc/8FPX-XAM8].

[87] Isaiah Houde, *Rob Gronkowski Explains How Joining Tampa Bay Matched Hopes He Had*, PATRIOTSWIRE (Jan. 22, 2021, 7:30 AM), https://patriotswire.usatoday.com/2021/01/22/rob-gronkowski-explains-how-joining-tampa-bay-matched-his-expecations/ [https://perma.cc/8N2A-DJ3L]. Previously maligned but uber-tal-

Gronkowski played a key role in the Buccaneers' Super Bowl victory over the Kansas City Chiefs in Brady's first season with Tampa Bay.[88]

What makes Brady's signing with Tampa Bay a sign of a different kind of free agency is his role in recruiting others to join him. His decision in choosing Tampa Bay reflects a calculus that involved his ability to assemble key pieces of his new team, as opposed to leaving that role up to the team and hoping for the best with respect to his supporting cast.

B. Forcing Trades

It is one thing to leave for another team and co-ordinate with other free agents to build a strong team. It is another thing altogether to convince a team to trade you to another team when the trade is likely to result in the formation of a super-team.

In the history of professional sports, teams have traded their superstar athletes, sometimes for money[89] but usually for numerous draft picks. Conversely, teams that have perceived players as game-changing superstars have packaged extensive assets to gain the rights to such players.[90]

Usually, though, players demanding a trade have had difficulty convincing management to act upon their wishes, particularly when the player

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ented players Leonard Fournette and Antonio Brown also signed with the Buccaneers thanks to Brady's recruiting. Vinnie Iyer, *How Buccaneers Built a Super Bowl Roster for Tom Brady: Patience in Draft, Punch in Free Agency Pay off*, SPORTING NEWS, https://www.sportingnews.com/us/nfl/news/buccaneers-super-bowl-roster-tom-brady/72q5519y86ey1kxl287nter57 [https://perma.cc/56RT-KDEX] (last visited Apr. 17, 2022).

[88] *See Super Bowl History*, *supra* note 83; *Every Rob Gronkowski Catch from 2-TD Game, Super Bowl LV*, NFL, https://www.nfl.com/videos/every-rob-gronkowski-catch-from-2-td-game-super-bowl-lv [https://perma.cc/2T3U-JTKN] (last visited Apr. 17, 2022).

[89] *See supra* note 25; *see also* Finley v. Kuhn, 569 F.2d 527 (7th Cir. 1978) (upholding MLB Commissioner's decision to block the sale of Oakland Athletics players to the Boston Red Sox and New York Yankees).

[90] The two egregious examples are the Ricky Williams trade by the New Orleans Saints and the Herschel Walker trade by the Minnesota Vikings. *See* John Keim, *For Redskins, 1999 Ricky Williams Deal at NFL Draft Brought Too Few Wins*, ESPN (Apr. 21, 2020), https://www.espn.com/blog/nflnation/post/_/id/307342/for-redskins-1999-ricky-williams-deal-brought-hall-of-famer-too-few-wins [https://perma.cc/H42N-SW29]; Nick Allen, *Herschel Walker to the Minnesota Vikings: The Best Trade in NFL History*, BLEACHER REPORT (Mar. 16, 2009), https://bleacherreport.com/articles/140116-the-best-trade-in-nfl-history [https://perma.cc/NQH5-WHEG].

is a franchise-caliber star, i.e., the most important player on the team.[91] It is even less likely that the general manager will accommodate a player's desires when the likely result is the creation of a championship-caliber super-team for some other franchise.

And yet, two NBA players in the past two years—Anthony Davis and James Harden—have accomplished this feat. Taking notice, three similar NFL players—Deshaun Watson, Russell Wilson, and Aaron Rodgers— attempted a similar move during the summer of 2021. None accomplished results immediately, but Watson and Wilson were traded in the summer of 2022.

1. Anthony Davis

Anthony Davis was the center for the New Orleans Pelicans.[92] Davis is an accomplished player, having led the Kentucky Wildcats to a national championship.[93] Davis is seven feet tall and plays the game with the speed and agility of a guard, while also possessing the ability to shoot three-point shots.[94] His size, speed, and shooting ability make him quite difficult to defend.[95]

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[91] When it has worked, it has been during the NFL draft, before the player has ever joined the team. John Elway and Eli Manning both accomplished this kind of move. *See* Jim Saccomano, *Sacco Sez: Former Broncos Exec. John Beake Recalls the 1983 Draft and the Trade for John Elway*, BRONCOS (Apr. 24, 2021, 10:00 AM), https://www.denverbroncos.com/news/sacco-sez-former-broncos-exec-john-beake-recalls-the-1983-draft-and-the-trade-fo [https://perma.cc/RJ78-TKHT]; John Fennelly, *Giants Legend Eli Manning Finally Opens Up About 2004 Draft Day Trade*, GIANTS WIRE (Oct. 7, 2021, 10:55 AM), https://giantswire.usatoday.com/2021/10/07/new-york-giants-eli-manning-finally-opens-up-2004-draft-day-trade-los-angeles-chargers/ [https://perma.cc/MD8T-EPT8].

[92] *See Anthony Davis*, BASKETBALL-REFERENCE, https://www.basketball-reference.com/players/d/davisan02.html [https://perma.cc/DXT5-9AU2] (last visited Apr. 17, 2022).

[93] *Kentucky Holds Off Kansas to Win Eighth National Title*, ESPN (Apr. 2, 2012), https://www.espn.com/mens-college-basketball/recap?gameId=320930096 [https://perma.cc/ZPA4-Q9YZ].

[94] *See*, *e.g.*, Rob Mahoney, *Anthony Davis Is Coming for the Crown*, THE RINGER (Dec. 22, 2020), https://www.theringer.com/2020/12/22/22194796/anthony-davis-is-coming-for-the-crown; John Tjarks, *The Only Player Who Can Stop Anthony Davis is Himself*, THE RINGER (Sept. 22, 2020), https://www.theringer.com/2020/9/22/21450572/anthony-davis-lakers-nuggets [https://perma.cc/Z45Y-W2WF]; Justin Verrier, *Anthony Davis Wasn't Meant to be an Alpha—Just a Superstar*, THE RINGER (Oct. 6, 2020), https://www.theringer.com/2020/10/6/21502938/anthony-davis-lakers-lebron-james [https://perma.cc/T4PU-FU3U].

[95] *See id.*

He played for several years on the Pelicans, a perennial loser mostly because Davis' supporting cast was weak and Davis was an oft-injured player.[96] Davis wanted to play for the Los Angeles Lakers alongside LeBron James, perennially one of the top five players in the NBA.[97] Davis did not, however, want to wait two years until he became a free agent.[98] This was particularly true because of LeBron's advancing age and the theory that he only had a few years left before his skills inevitably began declining.[99]

To put pressure on the Pelicans, Davis sat out a number of games towards the end of the 2018 season.[100] At the urging of Davis' agent, the Pelicans finally caved to Davis' demand and traded him to the Lakers in exchange for a bounty of draft picks and players.[101] While the Pelicans arguably received adequate compensation for Davis, it is unlikely that they would have traded him without him expressing his unhappiness and deciding not to play.[102]

In the end, Davis' plan worked. The Lakers won the 2020 NBA championship, played in the infamous bubble created at the Disney resort in Orlando in response to the COVID-19 pandemic.[103] The Lakers did not repeat, however, largely because of injuries to LeBron James late in the 2021 season.[104] Had Davis waited for free agency, it is possible he never would have won a championship with LeBron James.

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[96] *See*, *e.g.*, William Guillory, *Injuries to Anthony Davis, Inconsistency Haunt Pelicans Once Again in 114-105 Loss to Thunder*, NOLA (Jan. 26, 2019), https://www.nola.com/sports/pelicans/article_bb9153bd-4f72-557d-96ab-f18494598912.html [https://perma.cc/B9BM-3W7P].

[97] Jordan Greer, *Anthony Davis' Trade Request Was an Absolute Mess—and It Gave the Lakers Star Everything He Wanted*, SPORTING NEWS (Oct. 11, 2020), https://www.sportingnews.com/us/nba/news/anthony-davis-lakers-trade-request/f4ldgseobwvg1a6zzj7ythw0l [https://perma.cc/TQS8-KVZB].

[98] *See id.*

[99] *See id.*

[100] *See id.*

[101] *See* S.L. Price, *The King Maker: Why Rich Paul Will Own the NBA Summer*, SPORTS ILLUSTRATED (June 12, 2019), https://www.si.com/nba/2019/06/12/rich-paul-klutch-sports-group-lakers-pelicans-lebron-james-anthony-davis [https://perma.cc/2QVM-XCM2].

[102] *See* Greer, *supra* note 97; Aaron Kellerstrauss, *The New Orleans Pelicans Won the Anthony Davis Trade*, FANSIDED, https://pelicandebrief.com/2020/02/25/new-orleans-pelicans-anthony-davis-trade/ [https://perma.cc/DY3Z-JU8S].

[103] *See NBA & ABA Playoff Series History*, *supra* note 45.

[104] *See Los Angeles Lakers*, BASKETBALL-REFERENCE, https://www.basketball-reference.com/teams/ [https://perma.cc/F4CH-JJVX] (last visited July 5, 2022).

2. James Harden

James Harden was a star player for the Houston Rockets. During his time there, Harden perennially led the Rockets deep into the playoffs. His unique style of monopolizing the ball and choosing to either shoot a three-pointer, drive to the basket for a layup or a foul, or kick out the ball to his teammates who would shoot three-pointers made the Rockets a high-scoring team that won many games. To help Harden win a championship, management brought in different star players, Chris Paul and then Russell Westbrook, but neither were able to help win the title.[105]

The general manager, Daryl Morey, left in the summer of 2019, as did the coach, Mike D'Antoni.[106] Seeing the roster was moving toward a rebuilding period, Harden decided to sit out training camp in the fall of 2019.[107] When he did decide to play, he made it clear that he was waiting for a trade, alienating his teammates and creating dissension on the team.[108] The pressure that Harden put on the team convinced the new general manager to trade him to his team of choice, the Brooklyn Nets, early in the 2019 season.[109] While many perceived Harden's behavior as ugly and unprofessional, this behavior was arguably necessary to achieve Harden's desired goal—a trade to the Nets.[110] The Rockets did not receive the largesse of picks and players for Harden that the Pelicans did for Davis, but nonetheless received a decent return for Harden.[111]

Harden's plan to win a championship did not work. Part of the problem was injuries to one of the Nets' three superstars, Kyrie Irving, who

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[105] *See Houston Rockets*, BASKETBALL-REFERENCE, https://www.basketball-reference.com/teams/HOU/ [https://perma.cc/6H8C-4WQS] (last visited July 5, 2022).

[106] Brian T. Smith, *Daryl Morey's Departure Now Makes Sense*, HOUSTON CHRONICLE (Oct. 28, 2020), https://www.houstonchronicle.com/texas-sports-nation/brian-t-smith/article/Smith-Morey-departure-Rockets-now-makes-sense-15681900.php [https://perma.cc/XV3Z-7Y8H]; Jasmyn Wimbish, *Mike D'Antoni Stepped Down As Rockets Coach During Flight Back to Houston from the Bubble, Per Report*, CBS SPORTS (Sept. 15, 2020), https://www.cbssports.com/nba/news/mike-dantoni-stepped-down-as-rockets-coach-during-flight-back-to-houston-from-nba-bubble-per-report/ [https://perma.cc/SW6J-K945].

[107] Tim McMahon, *Inside James Harden and the Houston Rockets' Breaking Point*, ESPN (Jan. 13, 2021), https://www.espn.com/nba/story/_/id/30528130/inside-james-harden-houston-rockets-breaking-point [https://perma.cc/RKQ7-R2J3].

[108] *See id.*

[109] *See id.*

[110] *See id.*

[111] *See id.*

missed significant parts of the 2021 playoffs.[112] Even so, the Nets narrowly lost to the eventual 2021 NBA champions, the Milwaukee Bucks, in Game 7 of the conference semifinals.[113] If the Nets could have survived the Bucks, an NBA championship seems like it would have been possible. The 2021-22 season could have provided another opportunity for Harden and the Nets, but Harden forced a subsequent trade to the Philadelphia 76ers, partially in response to Irving's inability to play home games because he was unwilling to get the COVID-19 vaccine.[114]

3. The NFL Movement (Watson, Wilson, Rodgers)

Unlike Harden and Davis, the NFL stars that attempted to force a trade in the summer of 2021 were initially unsuccessful. Two of the three were able to get traded in the offseason of 2022, with the third deciding he did not want to be traded after all.

It is not obvious why the NFL players struggled where the NBA players succeeded. Part of the difference may relate to the impact a single player can have on a basketball game as compared to a football game.[115] Part of the difference may also relate to the more complicated nature of the NFL game, at least for the quarterback position.

Deshaun Watson was a quarterback with the Houston Texans.[116] He was a star for Clemson University, leading them to a national championship

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[112] Irving faced a different set of challenges last season, being available only for road games as a result of his anti-vaccine stance. *See* Jeff Ziligitt, *Unvaccinated Kyrie Irving Makes Nets Season Debut on Road Against Pacers*, USA TODAY (Jan. 5, 2022), https://www.usatoday.com/story/sports/nba/nets/2022/01/05/nets-kyrie-irving-unvaccinated-covid-makes-season-debut/9108752002/ [https://perma.cc/NLE5-EDNM].

[113] Indeed, Kevin Durant's toe was on the three-point line, turning what would have been a game-winning last second three-point shot into a game-tying two-point shot. The Nets then lost in overtime. *See* Jacob Camenker, *Nets' Kevin Durant Blames His "Big-Ass Foot" for Game 7 Loss to Bucks*, SPORTING NEWS (June 20, 2021), https://www.sportingnews.com/us/nba/news/kevin-durant-big-ass-foot-nets-bucks/1au9or4z0d1kgz1vvpcmrcirm [https://perma.cc/5NRT-FDEP].

[114] *Nets Trade James Harden to Sixers for Ben Simmons*, NBA (Feb. 10, 2022), https://www.nba.com/news/nets-sixers-james-harden-ben-simmons-trade [https://perma.cc/KH2J-HAJY].

[115] With only five players on the court, the value of a single athlete can presumably be more than being one out of eleven. *See infra* Part III.C.

[116] *See Deshaun Watson*, PRO FOOTBALL-REFERENCE, https://www.pro-football-reference.com/players/W/WatsDe00.htm [https://perma.cc/9FX8-ML55] (last visited Apr. 17, 2022).

game win over Alabama.[117] His early NFL career has been successful as well in leading a Texans offense that can be prolific at times.[118] The inability of the Texans to succeed in the NFL playoffs, though, has contributed to Watson being disenchanted, and ultimately asking for a trade in the 2021 offseason.[119] Before his demands could gain traction, however, Watson began to face a different set of challenges. Over twenty women accused Watson of sexual assault.[120] As a result, teams that might have been interested in trading for Watson lost interest, at least for the summer of 2021.[121] Watson subsequently sat out the 2021 season, with it remaining unclear what kind of suspension the NFL might impose once it completes its investigation of the allegations against Watson.[122]

Late in the spring of 2022, two grand juries declined to proceed with any of the sexual assault cases against Watson.[123] This changed the public perception of Watson enough to regenerate interest in him. The Texans ultimately traded him to the Cleveland Browns, who signed Watson to a lucrative contract extension. Even without the sexual assault allegations, it is unlikely that the Texans would have made such a deal in the summer of 2021. It was only after the combination of Watson being unwilling to par-

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[117] *Deshaun Watson, Clemson Dethrone Alabama in Thrilling National Championship Game*, NBC SPORTS (Jan. 10, 2017), https://www.nbcsports.com/chicago/ncaa-talk/deshaun-watson-clemson-dethrone-alabama-thrilling-national-championship [https://perma.cc/8AWR-THUN].

[118] Matt Weston, *Pro Football Focus Has Deshaun Watson Ranked as a Top Five Quarterback*, SB NATION (July 31, 2021), https://www.battleredblog.com/2021/7/13/22575451/pro-football-focus-has-deshaun-watson-ranked-as-a-top-five-quarterback [https://perma.cc/MKL9-F8HF]; *Was Deshaun Watson's 2020 Season the Best by a Quarterback in More than a Decade?*, FOX SPORTS (Feb. 16, 2021), https://www.foxsports.com/stories/nfl/houston-texans-quarterback-deshaun-watson-was-the-nfls-best-quarterback-in-2020-pff-argues [https://perma.cc/X28P-6HHS].

[119] Sarah Barshop, *Deshaun Watson Has Asked Houston Texans to Trade Him, Sources Say*, ESPN (Jan. 28, 2021), https://www.espn.com/nfl/story/_/id/30794678/deshaun-watson-asked-houston-texans-trade-sources-say [https://perma.cc/W4FX-6AMS].

[120] Reiss, *supra* note 20.

[121] Kaelen Jones, *What Would a Trade for Deshaun Watson Even Look Like?*, THE RINGER (Jan. 18, 2021), https://www.theringer.com/nfl/2021/1/18/22232051/deshaun-watson-trade-nfl-historical-comparisons [https://perma.cc/W4FX-6AMS].

[122] Nora Princiotti, *The NFL Passes on Taking a Stance on Deshaun Watson*, THE RINGER (Oct. 27, 2021), https://www.theringer.com/nfl/2021/10/27/22749601/deshaun-watson-nfl-trade-deadline-roger-goodell [https://perma.cc/ZJU7-LAYQ].

[123] Brent Schrotenboer, *Second Grand Jury in Texas Declines to Indict Browns QB Deshaun Watson*, USA TODAY (Apr. 1, 2022, 12:53 PM), https://www.usatoday.com/story/sports/nfl/browns/2022/03/24/browns-quarterback-deshaun-watson-under-scrutiny-another-grand-jury/7157721001/ [https://perma.cc/U4CD-J2GM].

ticipate for a year and the ongoing criminal allegations that the Texans decided to move on from Watson despite his youth and talent.

Russell Wilson was a Super Bowl-winning[124] quarterback for the Seattle Seahawks and the face of the franchise.[125] Wilson began to complain, though, in the summer of 2021, intimating that he wanted certain changes to the Seahawks roster, or in the alternative, wanted to be traded.[126] Specifically, Wilson complained about the weakness of the offensive line and the number of hits and sacks he took in the 2020 season.[127] Further complicating the issue was Wilson's no trade clause, which gave him the power to veto a trade.[128] Wilson listed a handful of teams for which he was willing to play.[129] Despite Wilson's requests, the Seahawks refused to trade him, and he continued to be the starting quarterback for the Seahawks during the 2021 season.[130]

The 2021 season did not go as hoped for the Seahawks, and the team began to sour on him in the same way that he had soured on the team. First, Wilson suffered a finger injury that caused him to miss half of the season. Also, Wilson was not the same player that he had been either before or after the injury. In particular, his play after the injury led the team to conclude that his best days might be behind him. In addition, the team management and coaching has long favored a run-heavy offense with occasional passing. Wilson has long favored a more pass-heavy offense. In 2020, fans of Wilson's approach fashioned the phrase "Let Russ Cook," advocating a more aggressive pass offense with deep passes to star receivers D.K. Metcalf and

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[124] *See Super Bowl History*, *supra* note 83.

[125] *See Russell Wilson* PRO FOOTBALL-REFERENCE, https://www.pro-football-reference.com/players/W/WilsRu00.htm [https://perma.cc/D2CH-K7QT] (last visited Apr. 17, 2022).

[126] Gene Chamberlain, *Russell Wilson Explanation Misses the Mark*, SPORTS ILLUSTRATED (June 12, 2021), https://www.si.com/nfl/bears/news/russell-wilson-does-revisionist-history-on-bears-trade-attempt [https://perma.cc/FK4K-WVHU].

[127] *See id.*; Brendan Schulze, *What Russell Wilson's 4 "Approved" Trade Destinations Say about What He'd Want from a New Team*, SB NATION (Mar. 2, 2021), https://www.fieldgulls.com/2021/3/2/22308778/what-russell-wilson-four-approved-trade-destinations-say-about-what-he-would-want-seattle-seahawks.

[128] Brandon Gustafson, *Seahawks' Russell Wilson Addresses How No-Trade Clause Relates to His Future*, SEATTLE SPORTS 710 AM (Jan. 6, 2022, 3:32 PM), https://sports.mynorthwest.com/1551972/seahawks-russell-wilson-no-trade-clause-future/ [https://perma.cc/E2BT-8LQQ].

[129] Schulze, *supra* note 127. The teams were the Cowboys, the Saints, the Raiders, and the Bears. *Id.*

[130] Wilson did miss three games as a result of an injury to his throwing hand, but then assumed his role as starting quarterback upon his return.

Tyler Lockett.[131] This approach was successful during the first part of the 2020 season, but started to unravel late in the season, convincing the coaches that a more conservative, run-based offense would lead to more victories, especially against top teams.

The combination of the change in the team's perception of Wilson and of the growing divergence in philosophy led to the trade of Wilson to the Denver Broncos in the spring of 2022.[132] Unlike the Davis and Harden scenarios, it seems that the Seahawks traded Wilson not because they were forced to, but because they wanted to in light of their perceptions of their team's best interests.

Aaron Rodgers, the quarterback for the Green Bay Packers, also demanded a trade during the 2021 off-season.[133] Rodgers has previously led the Packers to a Super Bowl victory, and his success has continued in recent years.[134] In 2020, he led the Packers to the NFC championship game for the second year in a row, and was named the league's most valuable player.[135]

Rodgers' concerns began with the Packers' decision to draft Jordan Love, a quarterback, in the first round of the 2020 draft, presumably to be Rodgers eventual successor.[136] This decision perhaps sent a signal that Rodgers' days with the Packers might be numbered, and his career approaching its end.[137] Rodgers further cited the way in which he believed the organiza-

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[131] Billy Heyen, *'Let Russ Cook': Behind the Meme Defining Russell Wilson's Early-Season MVP Campaign*, SPORTING NEWS (Oct. 11, 2020), https://www.sportingnews.com/us/nfl/news/russell-wilson-let-russ-cook-meme/1lg4dtwcxqre51y27owlm7j1cp [https://perma.cc/LAM5-CM4U].

[132] Kevin Patra, *Broncos Acquiring Seahawks QB Russell Wilson in Trade Including Drew Lock, Multiple Picks, Players*, NFL (Mar. 8, 2022, 1:52 PM), https://www.nfl.com/news/broncos-acquiring-seahawks-qb-russell-wilson-in-trade-for-multiple-first-round-p [https://perma.cc/KD8Q-QB86].

[133] Joe Rivers, *Aaron Rodgers Timeline: A Series of Events That Led to Packers Rift, Ignited Trade Rumors*, SPORTING NEWS (June 17, 2021), https://www.sportingnews.com/us/nfl/news/aaron-rodgers-trade-timeline-packers/xrcz2aqqc3n41704v4u5dckph [https://perma.cc/NLA8-N4F9].

[134] *See Super Bowl History*, *supra* note 83.

[135] *See* Rivers, *supra* note 133.

[136] *See id.* In some ways, this draft pick mirrored the Packers drafting Rodgers while Brett Favre was still its star quarterback. Maggie Hendricks, *Is History Repeating Itself in Green Bay?*, KATV (May 1, 2021), https://katv.com/news/nation-world/is-history-repeating-itself-in-green-bay [https://perma.cc/QQA2-H4GE]. *But see* Bill Bender, *Why Aaron Rodgers-Jordan Love Drama Doesn't Compare to Favre-Rodgers in Green Bay*, SPORTING NEWS (April 24, 2020), https://www.sportingnews.com/us/nfl/news/aaron-rodgers-jordan-love-brett-favre-green-bay-packers-quarterback-drama/1oy72uxmg9trh1e635p4b4r8ni [https://perma.cc/Z826-FJ6N].

[137] *See* Rivers, *supra* note 133. Given Rodgers' age (37 in 2021), such an assumption was not so unrealistic.

tion had mistreated him, which included its decision not to solicit his input on personnel decisions.[138]

Going further than Wilson, Rodgers refused to report for minicamps all summer and pressured the Packers through the media to trade him.[139] The Packers responded by offering statements of support for Rodgers, while steadfastly refusing to trade him.[140] Despite the caliber of Rodgers' talent, he was unable to force the team to trade him. Throughout the entire summer of pressure imposed by Rodgers, the team remained steadfast. Rodgers ultimately caved in, ended his holdout, and reported for camp prior to the season.[141] He played quarterback for the Packers in the 2021 season.[142]

The Packers reportedly considered trading Rodgers after the 2021.[143] They instead decided to keep him, largely by offering him a new lucrative contract and convincing him to stay by patching up their prior differences. Ultimately, Rodgers decided he wanted to stay with the Packers.

III. Rethinking Player Movement

Given the obstacles to star players switching teams, the question becomes: what can the respective players associations and the athletes themselves do to enhance their ability to switch teams? There are two promising

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[138] *See id.*

[139] Bill Huber, *Report: Rodgers Will Skip Mandatory Minicamp*, Sports Illustrated (June 7, 2021), https://www.si.com/nfl/packers/news/rodgers-will-not-report-to-minicamp [https://perma.cc/32EW-6B4R]. Rodgers went to Hawaii instead. Jaclyn Hendricks, *Aaron Rodgers Lives It Up in Hawaii with Shailene Woodley, Miles Teller*, Page Six (May 26, 2021), https://pagesix.com/2021/05/26/aaron-rodgers-hits-hawaii-with-shailene-woodley-miles-teller/ [https://perma.cc/MS7Y-6ZM2].

[140] *See* Rivers, *supra* note 133.

[141] Jesse Pantuosco, *Aaron Rodgers Ends Holdout from Packers, Reports to Training Camp Tuesday*, Audacy (July 27, 2021, 10:35 AM), https://www.audacy.com/sports/nfl/aaron-rodgers-ends-holdout-reports-to-training-camp-tuesday [https://perma.cc/2C95-JZ5E].

[142] Despite another stellar season, Rodgers and the Packers lost in the playoffs prior to reaching the Super Bowl, this time to their arch-nemesis San Francisco 49ers. *See* Matt Maiocco, *What We Learned as 49ers Pull Off Miraculous Comeback vs. Packers*, NBC Sports (Jan. 22, 2022), https://www.nbcsports.com/bayarea/49ers/49ers-observations-packers-shocked-sf-pulls-miraculous-comeback [https://perma.cc/58QU-5EF3].

[143] Jacob Camenker, *Aaron Rodgers Contract Details: Why Packers QB May Have Played Last Game in Green Bay*, Sporting News (Jan. 23, 2022), https://www.sportingnews.com/us/nfl/news/aaron-rodgers-contract-details-packers/oszcukxe7v1k1lgs83rlflow5 [https://perma.cc/347J-ZGWE].

pathways to creating such opportunities—reform of free agency and contractual opt-outs.

A. Reforming Free Agency

Owners have traditionally opposed free agency, and even when they allow for its existence in collective bargaining, they seek to limit its extent. The primary incentive is to avoid costly bidding wars that drive up the salaries of free agents. In the NBA in particular, there is a long history of overpaying mediocre players because they were the best option in the market.[144] In the NFL, the owners collectively bargained for a "franchise tag" that allows the team to extend a player's contract for a year at a set price to delay the player's entry into free agency. And MLB just ended a labor dispute that, at its heart, stemmed from the decreased desire of owners to pay players large salaries in free agency.

Given that decreasing restrictions on free agency increase the costs of player salaries, league owners will not be eager to adjust the terms of free agency. As a result, players will have to collectively bargain for this right.

One problem that might dissuade players from pushing for increased movement and decreased restrictions on free agency is that many of the players might care more about securing a financial floor than about opening the market to a greater possible ceiling. The high level of turnover at the lower level of professional sports drives the concern of most players to the current contract, not the future one.[145]

And yet, opening up the market will ultimately raise compensation for everyone, as competition will drive player compensation, and player compensation will not be subject to artificial limits set by billionaire team owners. A main difference between the labor market in professional sports and other industries is the irreplaceability of the elite players. There are a limited number of athletes who can perform at the level required to succeed in the NFL, NBA, or MLB. As such, their leverage in the market should be greater than those in other fields in which the workers are more replaceable.

Unions must balance the goal of securing a minimum level of compensation and working conditions with the ability of individuals to negotiate salaries to a level that the market allows. Without unions, owners would be unable to use salary caps, impose player drafts, or place limits on free

[144] Indeed, the last negotiated NBA collective bargaining agreement included an amnesty provision that allowed teams to pay off such contracts and not count them against the salary cap.

[145] This is especially true in the NFL, where the average career is under four years.

agency.[146] The extent to which the players give up the open market that would otherwise be available in exchange for collectively bargained benefits should make sense. In other words, the collective bargaining agreement must give an advantage to the collective bargainers. For some superstar athletes, this may not be the case.[147]

Contrary to popular belief, however, bargaining for freedom of movement would help all of the players. The creation of super-teams would drive interest in the league year-round and could increase overall league revenue.

B. Contractual Opt-Outs

A second approach, outside of collective bargaining, would be for players to incorporate opt-outs in their contracts. With elite players, this practice is becoming increasingly common, at least for the last year of the contract.

Historically, athletes wanted longer contracts to secure their future position on the team. In baseball, where contracts are guaranteed, this has been a profitable strategy, with star players signing contracts for terms as long as ten years. In football, that strategy is fruitless because the contracts are not guaranteed, and players can be cut at any point without economic consequence. As a result, NFL players seek large signing bonuses, where the compensation is guaranteed because it is paid in advance.[148]

A recent strategy among star NBA players has been to shorten the length of their contracts. The athletes risk injury but get increased flexibility. The short, two-year or three-year contracts enable a player to choose to join another team when it becomes desirable. And the NBA contracts are generally guaranteed. Opt-out provisions give the team or the player (depending on who holds the option) the ability to continue the contract for an additional year or terminate it. Some players then will sign a three-year contract with the option to opt-out after two years.

An obstacle that both NFL and NBA players face in considering how long of a contract to sign relates to the salary cap. The NFL's hard cap, which limits how much a team can pay a particular player. The NBA has a

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[146] Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales After* Brady v. NFL *and* Anthony v. NBA, 45 UC DAVIS L. REV. 1221, 1229-30 (2012).

[147] The disagreement over whether to participate in the 2020 All-Star Game demonstrates this conflict. Stars like LeBron James argued for canceling the event, but the union membership voted in favor of having the event.

[148] Some NFL players have, in recent years, been able to negotiate partially guaranteed contracts, although this is not the norm.

more flexible cap, but the same issues exist, limiting the amount of compensation available to a player. If a player is trying to build a super-team, the player must figure out how to get all of the star players under the salary cap.[149]

The idea of opt-out contracts would help create additional freedom for athletes. Athletes could place the option in the middle of the contract instead of at the end. For instance, athletes could sign four-year or five-year contracts with an opt-out after one or two years. This would allow for athletes to escape bad marriages with teams, or otherwise test their value in the market after particularly successful seasons. Having one opt-out also would provide some predictability to general managers while still maintaining flexibility for the athlete.

Standardizing this approach makes sense in the NFL in particular where, at the moment, the teams have all of the power. Without guaranteed contracts, the term-contract an NFL player signs is the equivalent of an at-will contract. The team would not lose power with opt-out contracts, but the player would gain autonomy.

Teams would also be more likely to trade disgruntled players if the player could opt-out within a year. The opt-out provision would encourage the team to try to get value for the player rather than the player just leaving as a free agent.

C. Basketball As a Unique Situation?

The initial success of Davis and Harden in forcing trades as compared to Watson, Wilson, and Rodgers who did not initially succeed suggests that the "forcing a trade" strategy might not be a successful approach outside of the NBA. In the NBA, the impact of one player can be the difference between winning a championship and not really competing for one. Historically, the third superstar player has resulted in championships for many teams. And with only five players per team in the game at one time, one player can influence the outcome in a way that players in football (with 22 players, not counting special teams) and baseball (10 players) cannot.[150]

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[149] In Miami, James, Bosh, and Wade agreed on salary reductions so that all could fit under the cap. In the case of the Warriors, an unusual bump in the salary cap because of increased revenue gave the Warriors the room to sign Kevin Durant.

[150] Hockey, with five players plus a goalie on ice at a time, might seemingly offer a similar opportunity for individual dominance. *See*, *e.g.*, Wayne Gretzky, STATMUSE, https://www.statmuse.com/nhl/player/wayne-gretzky-2501 [https://perma.cc/2WHF-D2TD] (last visited July 5, 2022) (noting Gretzky's nickname as

Even with quarterbacks in the NFL, for instance, one player can only succeed at a championship level with other good offensive players, a decent offensive line, and a reasonably good defense. One player can tip the balance, but not in such a way that a team might sacrifice to get the player at all costs.[151] Similarly, a dominant pitcher in baseball will not have the same kind of trade-forcing power because the pitcher only plays every fifth day. And a fantastic hitter still depends on others in the lineup to get on base to be able to have a dominant impact on the outcome of a game.

As a result, it seems unlikely that the force-a-trade strategy of Davis and Harden will be successful in other professional sports in the near future. It is possible that other NBA players may try to follow the lead of Davis and Harden in the future.

D. Exploring the Value of Player Movement

In the long run, increasing player movement is a positive development for the functioning of professional sports leagues. It invites the athletes into a greater stake in the capitalistic side of the sport. Freer markets allow individuals to reap their true value in the marketplace, rather than one set by league owners.

The volume of money generated by professional sports continues to grow, and professional sports continue to face challenges concerning how to share that revenue. Owners make every effort to cap the amount of revenue that athletes receive. Collective bargaining relationships have kept these figures around fifty percent of league revenue in most sports.[152]

To be sure, the effect on all players will not be the same. The elite athletes will receive a greater share of the profit than the marginal ones. But that is generally how free markets work—those that can offer a superior product or service receive higher pay.

There are other advantages to increased player movement. The fan interest often grows with the addition of a new player. The new player's game against his former team becomes "must-see" television. The new player can excite the fan base, even if he is unable to deliver a championship; the newfound competitiveness that a new player offers may be enough to provide hope and reinvigorate interest.

The trend toward gambling driving sports interest also resonates with the idea of increased player movement. New players in new situations in-

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the "Great One"). But hockey players typically only spend 2-3 minutes at a time on the ice before switching out for other players because of fatigue.

[151] *See supra* note 90.

[152] *See generally supra* notes 8, 9, and 10.

creases unpredictability, makes outcomes more uncertain, and allows for players to thrive in new situations.

Increased player movement also allows players to escape bad situations. The draft can cause players to end up on teams that make their individual success difficult if not impossible. Despite teams' best efforts, sometimes players just do not fit. But limiting the ability to move to teams deciding to trade players limits player autonomy and makes it likely that years will be wasted in bad situations. If leagues insist on having drafts and preventing players from choosing which team they want to play for, then players should bargain for the right to structure contracts in a way that allows them to escape bad situations.

Interestingly, allowing increased player movement might not result in a proliferation of super-teams. Sometimes less-talented individuals that have a longer history playing together are able to defeat more star-laden rosters that have not gelled.

The increased player movement could also help address the recent phenomenon of tanking. In the NBA in particular, there has been a growing problem of teams giving up winning for multiple years in order to assemble championship teams.[153] With more frequent player movement, waiting for the next lottery pick would not be the favored approach; creating a core of players who opt out to play together would be a favored strategy.

Conclusion

This paper has sought to explore the recent phenomenon of athletes exerting increased autonomy over their choice of teams in professional sports. In doing so, it has questioned long-held values in favor of home town stars; parity; and paternalistic, anti-capitalistic restraints on player movement. It then suggested that athletes should strive to broaden their freedom of movement by collectively bargaining for decreased restrictions on free agency and incorporating opt-out provisions into their contracts. Finally, the paper concluded by highlighting the benefits of increased player movement in professional sports.

[153] Former 76ers general manager Sam Hinkie termed this approach "The Process."

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The Credibility of the Court of Arbitration for Sport

Chui Ling Goh*
Jack Anderson**

ABSTRACT

Established in 1983, the Court of Arbitration for Sport (the "CAS") has since been recognized as the "world's supreme court for sports."[1] It is, however, neither a "court" in the public law sense of the term nor "supreme," given that its decisions can be challenged at the Swiss Federal Tribunal and even at the European Court of Human Rights. The CAS has also faced criticism for its lack of independence and impartiality, the mandatory consent nature of its jurisdiction and its questionable and limited contractual legitimacy. These criticisms have been raised occasionally but largely unsuccessfully by aggrieved parties seeking to quash CAS awards in the courts. Nevertheless, the legal challenges and questions as to the CAS's credibility as an arbitral body persist.

This Article seeks to critically assess the principal criticisms of the CAS by comparing its practices with those of ordinary courts and commercial arbitration institutions. This paper will show that procedurally – with the exception of an egregious gender and geographical imbalance in and on its arbitration lists – the CAS's practices appear compliant with the norms of international arbitration. The paper seeks to facilitate a more informed dis-

* Ph.D. Candidate, LL.M. (Melbourne Law School), LL.B. (National University of Singapore), Advocate and Solicitor (Singapore). The author is privileged to have worked with Professor Jack Anderson on this paper and thanks him for his insightful guidance and mentorship.

** Professor of Law, Melbourne Law School, University of Melbourne.

[1] *See* Foreword by H.E. Judge Kéba Mbaye at M. Reeb, DIGEST OF CAS AWARDS II 1986-1998 (1998).

cussion about, and appreciation of, the CAS than has recently existed and to prompt meaningful reform of the CAS to the ultimate benefit of its users (and especially athletes).

I. Introduction

In 1981, Juan Antonio Samaranch, the President of the International Olympic Committee ("IOC"), envisioned creating a sport-specific jurisdiction within an arbitration tribunal devoted to resolving all disputes directly and indirectly relating to sports.[2] Samaranch thought that a specialized body, providing "flexible, quick and inexpensive" adjudication methods,[3] was necessary to adjudicate the increasingly complex array of transnational and cross-border disputes relating to both Olympic and professional sport.[4] Two years later, the IOC ratified the Court of Arbitration for Sport ("CAS"), since self-described as the "world's supreme court for sport"[5] and subject to Swiss law.[6] Since 1983, the role of the CAS has expanded.[7] No longer seen as simply a vassal of the IOC,[8] the CAS is globally accepted, albeit sometimes uneasily, as the final arbitrator of sporting disputes.[9]

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[2] *See* Court of Arbitration for Sport, *History of the CAS*, TAS/CAS, https://www.tas-cas.org/en/general-information/history-of-the-cas.html [https://perma.cc/2KYT-K8SZ] (last visited May 30, 2022).

[3] *Id.*

[4] *See* Raffaele Poli, *Africans' Status in the European Football Players' Labour Market*, 7 Soccer & Soc'y 278–91 (2006); Wladimir Andreff & Paul D. Staudohar, *The Evolving European Model of Professional Sports Finance*, 1 J. Sports Econ. 3, 257–76 (2000).

[5] Foreword by H.E. Judge Kéba Mbaye at Reeb, *supra* note 1.

[6] *See* Matthieu Reeb, Digest of CAS Awards, 2000-2003 (2004).

[7] The CAS has expanded since 1983, from the inclusion of the CAS Ad Hoc Division in 1996, to the Ad Hoc Anti-Doping Division in 2016, and the permanent CAS Anti-Doping Division in 2019. *See Amendments to the Code of Sports-Related Arbitration (in Force as from 1 January 2017)*, TAS/CAS Court of Arbitration for Sport (2017), https://www.tas-cas.org/fileadmin/user_upload/Amendments_Code_2017_tracked_changes.pdf [https://perma.cc/8R5Z-485P] (last visited May 30, 2022); *Amendments to the Code of Sports-Related Arbitration (in Force as from 1 January 2019)*, TAS/CAS Court of Arbitration for Sport (2019), https://www.tas-cas.org/fileadmin/user_upload/Amendments_Code_2019__en_.pdf [https://perma.cc/PU79-7PHH] (last visited May 30, 2022).

[8] *See* Lazutina & Danilova v. Int'l Olympic Comm. [2003], SFT, 1st Civil Division, 27 May 2003 (Swiss Federal Tribunal).

[9] *See* Richard H. McLaren, *Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror*, 20 Marq. Sports L. Rev. 305 (2010).

Prior to its present state, the CAS experienced several stages of reform in response to various challenges to its authority and independence.[10] In 1994, after the Swiss Federal Tribunal determined that there was sufficient connection between the CAS and IOC to question the CAS's independence under Swiss law,[11] the International Council of Arbitration for Sports (the "ICAS") was created. The ICAS was intended as both an administrative and financial oversight body of the CAS branch and a means of distancing the CAS operationally from the IOC.[12] In 2011, the ICAS amended the CAS's Code of Sports-related Arbitration ("CAS Code"), abandoning the old regime of sports organizations designating the appointment of arbitrators and instead designing a procedure by which CAS arbitrators are appointed into the CAS list of arbitrators.[13] In 2019, major reforms were made to the CAS Code, including the creation of the Anti-Doping Division and the Ordinary Division and Appeals Division, as well as the availability of public disciplinary hearings by request.[14] The present procedural rules pertaining to arbitration at the CAS are set out in the 2021 edition of the CAS Code.[15]

Apart from challenges to its financial and institutional independence from the IOC and other International Federations ("IFs"), the CAS has also been vigorously criticized. First, critics claim that the CAS lacks authority due to the insufficiency of party consent, including athletes with little bargaining power over the operation of mandatory arbitration clauses in the regulations of sport bodies. Second, critics argue that the CAS has limited contractual legitimacy to develop a body of jurisprudence for international sports law.[16]

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[10] *See* Gundel v. Fédération Équestre Internationale (FEI) and & Court of Arbitration for Sport [1993], SFT, 1st Civil Division, 15 March 1993 (Swiss Federal Tribunal); *Raguz v. Sullivan* [2000] N.S.W. Ct. App. 240; Lazutina v. IOC (SFT); Mutu and Pechstein v. Switzerland (European Court of Human Rights, Section III, Application No. 40575/10 and 67474/10, 2 October 2018); Platini v. Switzerland (European Court of Human Rights, Application No. 526/18, 5 March 2020).

[11] *See* Gundel v. FEI & CAS.

[12] *See* McLaren, *supra* note 9, at 307.

[13] *See* Tudor Chiuariu, *Amendments to the Code of Sports-Related Arbitration Setting the Procedure Before the Court of Arbitration for Sport (in Force as of January 1st, 2012)*, 24 Revista Romana de Arbitraj 12–18 (2012), 15-16.

[14] *See* Court of Arbitration for Sport, *supra* note 2.

[15] *See id.*

[16] For references on *lex sportiva, see* Antoine Duval, Lex Sportiva*: A Playground for Transnational Law*, 19 Euro. L.J. 822–42 (2013). *See also* the same author's most recent criticisms of the CAS at Antoine Duval, *Court of Arbitration for Sport Decides Who Gets to Play and Under What Conditions*, Mail Online (June 18, 2021), https://www.dailymail.co.uk/sport/sportsnews/article-9693349/Court-Arbitration-Sport-not-fit-purpose-claims-expert-sports-law.html [https://perma.cc/Q63U-9P77].

This paper outlines the elements of both of these criticisms of the CAS. Part II focuses on CAS's apparent lack of independence and impartiality, principally from the IOC. Part III evaluates the criticisms of deficient consent by parties in the CAS. Part IV analyzes CAS's contractual legitimacy. This paper concludes by explaining how these criticisms may be addressed and the benefits to the industry that outweigh the burdens.

This paper acknowledges that there may be other criticisms of the CAS not expressly reflected here. These criticisms include the lack of transparency in the accounts and reports of the ICAS. This paper further acknowledges that comparing the CAS to entities that hear private, international commercial disputes is limited by the fact that to a large extent, the CAS hears cases which are non-commercial in nature, arising out of various sport-specific disputes, such as transfer disputes, eligibility and disciplinary decisions, and governance disputes. Unlike commercial arbitration where there is generally equal bargaining power among the parties and a genuine consent to resolve the matter privately, at the CAS there is often marked inequality in the frequency of appearance and resourcing of the parties. The inequality is aggravated by the fact that it is often made compulsory for disputes to be submitted to the CAS.

II. Criticism One: Lack of Independence and Impartiality

One of the most common criticisms of the CAS is that it lacks independence and impartiality as the "world's supreme court for sport."[17] Historically, the bulk of the CAS's funding and the majority of its ICAS members and CAS arbitrators are provided by the IOC. It is therefore questionable whether the CAS was, as originally conceived, operationally or institutionally independent of the IOC to the extent required of a tribunal by Article 6(1) of the European Convention on Human Rights.[18] This criticism of the CAS has persisted, despite various institutional reforms beginning in 1994.

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[17] *See* Foreword by H.E. Judge Kéba Mbaye at Reeb, *supra* note 1.

[18] Other criteria would include the term of office of arbitrators, existence of guarantees against outside pressure, the body presenting an appearance of independence, assessment of impartiality based on subjective (individual arbitrators) and objective standards (institutional). *See Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

A. Challenges to the CAS's Financial and Institutional Independence

In 1993, the Swiss Federal Tribunal stated in *Gundel v. Fédération Équestre Internationale and Court of Arbitration for Sport* that, should the IOC become a party to a proceeding before the CAS, there existed substantial links between the CAS and the IOC strong enough to compromise the independence of the CAS.[19] The Swiss Federal Tribunal found that the CAS was wholly financed by the IOC and that the IOC had considerable power over the administration of the CAS, including the ability to modify the CAS statutes and appoint CAS members and arbitrators.[20]

Following *Gundel*, the CAS employed substantive reforms to reinforce its independence and impartiality, resulting in the IOC and other international sports governing bodies signing the Agreement related to the Constitution of the International Council of Arbitration for Sport (the "Paris Agreement")[21] to place the CAS under the administration of the International Council of Arbitration for Sport ("ICAS"). The parties to the Paris Agreement were the IOC, the Association of Summer Olympic International Federations ("ASOIF"), the Association of the International Olympic Winter Sports Federations ("AIOWF"), and the Association of National Olympic Committees ("ANOC").[22] The ICAS was established under Swiss law to act as a buffer layer of governance between the CAS and the IOC.[23]

In 2002, despite the creation of the ICAS as an institutional and financial buffer, Russian cross-country skiers Larisa Lazutina and Olga Danilova challenged the decision of the CAS (which had found in favor of the IOC against the skiers) at the Swiss Federal Tribunal, on the grounds that the policy of maintaining a closed list of arbitrators limited the fundamental freedom of parties to appoint the arbitrator of their choice in contravention of Article 190(2) of the Swiss Private International Law (the "PILA").[24] The Swiss Federal Tribunal determined that the then-current state of administration of the CAS meant that the CAS could be seen as sufficiently independent from the IOC. The Swiss Federal Tribunal further observed that

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[19] *See Gundel v. FEI & CAS*.

[20] *See id.*

[21] *See Paris Agreement*, DIGEST OF CAS AWARDS 561 (1994).

[22] *See id.*

[23] *See* McLaren, *supra* note 9, at 307.

[24] *See Lazutina v. IOC* (SFT)*; see also* Bundesgesetz über das Internationale Privatrecht [IPRG] ("Federal Act on Private International Law"), Dec. 18, 1987, SR 291 [herineafter "PILA"].

"[t]here appears to be no viable alternative to [the CAS], which can resolve international sports-related disputes quickly and inexpensively."[25]

Despite the finding in the Lazutina-Danilova matter by the Swiss courts, scholars continue to argue that the CAS lacks institutional independence. ICAS members remain drawn from or directly appointed by IFs, the IOC, and National Olympic Committees ("NOCs"), which potentially allows for the "refus[al] to re-appoint a recalcitrant member," should an ICAS member fail to adhere to the desires of the bodies that appointed them.[26]

While the ICAS is intended to act as a buffer layer of governance, the incestuous appointment process of ICAS members is questionable.[27] More broadly, ICAS members wield immense power not only to appoint arbitrators in CAS's list of arbitrators, but also to revise the CAS Statutes. Furthermore, the ICAS appointment of CAS arbitrators in the closed list of arbitrators is done in *consideration* of the names proposed by the IOC, IFs, and NOCs.[28] In the election of the President and Vice Presidents of the ICAS, ICAS members are also expected to consult the IOC, ASOIF, AIOWF, and ANOC, which comprise the majority of international sports administration.[29] The position of the President of the CAS is then automatically given to the elected President of the ICAS,[30] thereby perpetuating the fear and perception that ICAS members, or CAS arbitrators, would see the IOC, IFs, and NOCs as their constituency and feel the need, whether consciously or subconsciously, to please that constituency.[31]

The independence and impartiality of CAS's arbitrators have also attracted critical, scholarly concern, although the CAS reformed its mechanisms for the appointment of arbitrators into the CAS's arbitrators list in 2011[32] – whereas the previous prerequisite for arbitrators to be *proposed* by

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[25] Court of Arbitration for Sport, *supra* note 2.

[26] Daniel H. Yi, *Turning Medals into Metal: Evaluating the Court of Arbitration for Sport as an International Tribunal*, 6 ASPER REV. INT'L BUS. & TRADE L. 289, 321 (2006).

[27] The last four members are appointed by the four members that have been appointed by the 12 members before. *See* Court of Arbitration for Sport, *supra* note 2, at S4.

[28] *See id.* at S14.

[29] *See id*. at S9.

[30] *See id.*

[31] *See* Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHI. L.J. 1203, 1229 (2004).

[32] Prior to 2011 CAS reforms, the ICAS was obligated to appoint arbitrators as proposed by IOC, IFs, and NOCs, in the proportions set out in the Code. *See*

the IOC, IFs, and NOCs no longer applies.[33] In addition, while there are more than 400 arbitrators on CAS's list of arbitrators, only a small group of arbitrators are used with any frequency.[34] Furthermore, for cases in the CAS Appeals Arbitration Division, the President of the said Division, not parties or parties' appointed arbitrators, usually appoints the panel president,[35] although parties are free to reject appointments. This, nevertheless, brings into question the independence of the ICAS and its influence from the IOC, IFs, or NOCs, especially when they are parties to the matter before the CAS.

These arguments were also brought to the Swiss Federal Tribunal and the European Court of Human Rights in several cases. In 2016, the CAS heard the case *RFC Seraing v. FIFA*, involving the breach of third party ownership regulations in soccer, as governed by FIFA.[36] The CAS published an award which held against Seraing, a football club in Belgium.[37] In 2017, Seraing challenged this CAS award at the Swiss Federal Tribunal on grounds that the CAS was not sufficiently operationally independent from FIFA.[38] Here, the CAS revealed that FIFA contributed less than 10% of CAS's overall annual budget as compared to the 65% contribution by the entire Olympic Movement. The Swiss Federal Tribunal compared the financial dependency of the CAS on leading sports bodies with that of the ordinary courts being underwritten by the state. Therein, the Swiss Federal Tribunal further concluded that the financial dependence does not directly result in the subjective impartiality of judges. In *Seraing*, the Swiss Federal Tribunal did not find sufficient grounds to revisit its decisions in *Gundel* and *Lazutina* and dismissed the challenge to the CAS award. The Swiss Federal Tribunal decision of *RFC Seraing v. FIFA* had relied heavily on a German *Bundesgerichtshof* (German Federal Court of Justice) decision in 2016 involving a German speed skater, *Claudia Pechstein v. Deutsche Eisschnelllauf-Gemeinschaft (German Speed Skating Union) and International Skating Union,*[39] which reaf-

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Rachelle Downie, *Improving the Performance of Sport's Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport*, 12 MELB. J. INT'L L. 1, 8 (2011).

[33] *See id.*

[34] *See* Straubel, *supra* note 31, at 1234.

[35] *See* Court of Arbitration for Sport, *supra* note 2, at R54.

[36] *See* FIFA, *Commentary on the Regulations on the Status and Transfer of Players Edition 2021*, https://digitalhub.fifa.com/m/346c4da8d810fbea/original/Commentary-on-the-FIFA-Regulations-on-the-Status-and-Transfer-of-Players-Edition-2021.pdf [https://perma.cc/HE39-2S32] (last visited June 29, 2022).

[37] *See RFC Seraing v. Fédération Internationale de Football Association* [2017] SFT 4A 260/2017 (Swiss Federal Tribunal).

[38] *See id*.

[39] *See* Bundesgerichtshof [German Federal Court of Justice], KZR 6/15, 7 June 2016 reported in (2016) BGHZ 66.

firmed that the CAS is an arbitration court pursuant to the German Code of Civil Procedure.

Claudia Pechstein was an Olympian and national speed skater for Germany who was banned for doping in 2009. She challenged the ban imposed by the national and international sports federations before the CAS[40] in 2009 and before the German *Bundesgerichtshof* and the European Court of Human Rights (the "ECtHR") in 2018 (the latter was determined with one other applicant, Romanian football player Adrian Mutu).[41] In *Mutu and Pechstein v. Switzerland*, the ECtHR determined that the CAS was a tribunal for the purposes of Article 6(1) of the European Convention of Human Rights (the "ECHR").[42] Although the ECtHR eventually dismissed Pechstein's challenge against the independence and impartiality of the CAS's list arbitrators on grounds that Pechstein did not provide sufficient evidence on the individual allegations,[43] it acknowledged that it was ready to recognize the susceptibility of athletes in the framework of the CAS disputes, within the institutional and procedural mechanism of the nomination of CAS arbitrators.[44] The ECtHR recognized the influence of IFs and the IOC (through the ICAS), which has authority over the nomination of CAS arbitrators and the appointment of persons who get to preside over the three Divisions in the CAS. The ECtHR also mentioned the advantages of a specialized body outside of the national court system to adjudicate swiftly and inexpensively.[45] There was, nevertheless, a joint dissenting judgment of Pechstein's challenge at the ECtHR, wherein two judges highlighted the "disproportionate and unjustified"[46] nature of the IOC's influence over the CAS.

B. Evaluating the Financial Independence of the CAS

The main point of contention for the challenges against the financial independence of the CAS is the source of funding of the CAS. In substance, the source of funding of the CAS is from sports federations such as the IOC, IFs, and NOCs, pursuant to Clause 3 of the Paris Agreement.[47] The Paris Agreement states that all parties agree to finance the activities of the CAS to

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[40] *See* CAS 2009/A/1912, Claudia Pechstein v. Int'l Skating Union, Award of 25 November 2009; CAS 2009/A/1913, Deutsche Eisschnelllauf-Gemeinschaft v. Int'l Skating Union, Award of 25 November 2009.

[41] *See Mutu & Pechstein v. Switzerland*.

[42] *See* ECHR, 213 UNTS 221, *supra* note 18.

[43] *See Mutu & Pechstein v. Switzerland*, at 157.

[44] *See id.* at 158.

[45] *Id*. at 78, 97.

[46] *Id.* at 55.

[47] *See* Paris Agreement, *supra* note 21.

the extent determined by the ICAS. Parties include the IOC, ASOIF, AIOWF, and ANOC. IFs and NOCs form members to the ASOIF, AIOWF, and ANOC. The funds for the CAS are then attributed under the administration of the ICAS and involve the costs of arbitrators, arbitration fees of the CAS, and other fees incurred by the CAS for disciplinary matters pursuant to Rule 65 of the CAS Code.[48] Given that the CAS hears matters pertaining to the IOC, Ifs, and NOCs, there arise certain concerns that the CAS cannot adjudicate such matters independently without bias.

However, it is noteworthy that while CAS financing is, in substance, by the IFs and NOCs, under the Paris Agreement, the financing of the CAS is *through* the ASOIF, AIOWF, and ANOC. This is significant because this financial arrangement acts as a safeguard to ensure individual IFs and NOCs otherwise unhappy with a CAS award cannot stop contributing to the financing of the CAS, unless that IF or NOC was to leave the ASOIF, AIOWF or ANOC, which would lead to certain consequences for the individual IFs and NOCs, in relation to the Olympic Games. For example, if an individual IF decides to leave the ASOIF, it would lose not only its "good standing with the IOC,"[49] but also its right to receive any share of the revenue from the Summer Olympic Games, even if their sport is included in the program.[50] Similarly, if an NOC decides to leave the ANOC, it would risk losing its status recognition with the IOC and the entitlements attached to it,[51] such as the right to send competitors and officials to the Olympic Games.[52] Coupled with the institutional buffer of the ICAS, the Paris Agreement provides additional safeguards to ensure that the funding of the CAS remains sufficiently quarantined from the administration of the CAS and the findings of its arbitrators. The financial safeguards of the CAS are rather akin to how ordinary courts are funded by public tax revenues, which are collected and distributed to the judiciary.

Nevertheless, apart from disciplinary matters heard before the Appeals Division on decisions rendered by IFs or other sports bodies, parties to the CAS are expected to bear substantial costs of arbitration, which includes,

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[48] *See* Court of Arbitration for Sport, *supra* note 2.

[49] *See* Ass'n of Summer Olympic Int'l Federations, *ASOIF Statutes* (2018), https://www.asoif.com/sites/default/files/download/asoif_statutes_2018.pdf [https://perma.cc/XM8V-P5GZ] (last visited May 30, 2022).

[50] *See id.*

[51] *See* Ass'n of Nat'l Olympic Comms., *Constitution of the Association of National Olympic Committees* (2018), https://www.anocolympic.org/downloads/2018-11-28-anoc-document-anoc-constitution-en.pdf [https://perma.cc/MD72-K8GV] (last visited May 30, 2022).

[52] *See* Int'l Olympic Comm., *Olympic Charter* (2019).

inter alia, the CAS's administrative costs, costs of arbitrators, and ad hoc clerk, if any.[53] So while there might be certain indirect funding of the CAS through the Paris Agreement, in such non-disciplinary matters before the CAS, there is less reason to question the financial independence of the respective arbitration panels, given that the said panels are primarily funded by both parties to the arbitration. Parties' financing of such non-disciplinary matters before the CAS is akin to general international commercial arbitration.

The issue of financial independence also arises for non-commercial disciplinary matters heard at the Appeals Division. As mentioned above, unlike other matters heard before the CAS, arbitration costs incurred for disciplinary matters heard at the Appeals Division are borne by the CAS directly (save for the appeal filing fee of CHF 1,000).[54] As illustrated by the trend of attracting high-value litigation in international commercial arbitration,[55] arbitration is costly, and this provision in article R65 of the CAS Code was included to avoid denying parties' access to the CAS for the appeal of disciplinary decisions by sports tribunals. The nature of a fully funded disciplinary hearing in the CAS is akin to fully funded criminal proceedings and appeals in ordinary courts, wherein accused persons should not be expected to fund their court fees in their prosecution and the process of the administration of justice. Accordingly, it could be argued that, pursuant to Clause 3 of the Paris Agreement, the IFs and NOCs surrender significant portions of the revenue allocated to them as part of the IOC's revenue from the television rights for the Olympic Games, as part of the CAS financing to the ICAS, to ensure that aspects of the CAS, such as disciplinary hearings, can be accessed by aggrieved athletes.

While removing the dispensation of arbitration costs for disciplinary hearings in the CAS is a possible solution, the idea of the funding for appeals on disciplinary matters is to ensure such non-commercial matters are accessible to all parties involved. In non-commercial matters, the CAS takes on a distributive and supervisory role in assessing the merits of each decision and case. As such, it is crucial, if not absolutely necessary, for the CAS to be

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[53] *See* Court of Arbitration for Sport, *supra* note 2.

[54] *Id*. at R65.

[55] *See* Steven Seidenberg, *International Arbitration Loses its Grip*, 96 ABAJ 50 (2010); Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65 (1996); Dean B. Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 HOFSTRA L. REV. 137 (1994); Simon G. Zinger, *Navigating the Russian Shipping Industry: Making the Most of International and Russian Law for Successful Arbitration Against Russian Parties*, 8 USF MAR. L.J. 141 (1995).

equally accessible to applicants for non-commercial matters, quite akin to the processes for criminal and disciplinary cases before domestic courts. There is, without a doubt, a role for fully funded hearings before the CAS, and it is impractical, if not irrelevant, to endeavor for the complete financial independence of the CAS for such non-commercial disputes. Sports arbitration in the CAS was established with the intention of uniformity and accessibility of justice, and this cannot be wholly achieved if parties, especially private persons, are expected to bear the exorbitant costs for their non-commercial matters heard before the CAS. This was raised by the Swiss Federal Tribunal in the case of *Seraing*, where it was argued that neither athletes nor states are the right persons or entities to finance a private sport arbitral tribunal.[56]

In fact, a more practical consideration is whether the CAS provides sufficient financial access for non-commercial cases, given that only costs for disciplinary matters are dispensed with, while other non-commercial cases such as transfer disputes, eligibility cases, and governance cases can only be heard if parties, especially the applicant, are willing to pay the associated costs in the CAS. As such, applicants for non-commercial, non-disciplinary matters before the CAS are subjected to high advance costs for proceedings, pursuant to article R64.2 of the CAS Code.[57] Another consideration is the adequacy of the scope of legal aid that is given to parties under the CAS Legal Aid Commission, which affects the accessibility of the CAS as a dispute resolution and adjudication forum in international sports.[58] Briefly, the CAS Legal Aid Scheme only provides for legal aid for decisions made by IFs, and it is only available to "natural persons".[59] This means that appeals on other decisions, such as those by NFs, are not entitled to CAS legal aid. Smaller and less affluent sports bodies, clubs and other legal entities, are also not entitled to get legal aid from CAS because they do not qualify as natural persons.

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[56] *See RFC Seraing v. FIFA* (SFT).

[57] *See* Court of Arbitration for Sport, *supra* note 2.

[58] For discussions on the accessibility of legal aid before the CAS, *see* Antonio Rigozzi & Fabrice Robert-Tissot, *"Consent" in Sports Arbitration: Its Multiple Aspects*, *in* Sports Arbitration: A Coach for Other Players-ASA Special Series No. 41 (2015).

[59] *See* Court of Arbitration for Sport, *Guidelines on Legal Aid Before the Court of Arbitration for Sport* (2020).

C. Evaluating the Institutional Independence of the CAS

The challenges to the institutional independence of the CAS are centered on the IOC, IFs, and NOCs' influence over the appointment of ICAS members, and therefore the IOC, IFs, and NOCs' influence over the statutes of the ICAS and the appointment of arbitrators onto the CAS's arbitrators list. In *Mutu and Pechstein v. Switzerland*, the ECtHR examined the structure of the ICAS and held that the IOC, IFs and NOCs do exercise real influence over the ICAS, such as the appointment of 12 out of 20 ICAS members.

There are also real concerns pertaining to the independence and impartiality of the small group of arbitrators who are regularly appointed by the CAS.[60] As mentioned above, the practice in the CAS, and among disputing parties, is frequently to select and use a small group of experienced, active arbitrators in the CAS cases, albeit the long list of arbitrators available. While pragmatically, it is less risky for parties to nominate known and experienced CAS arbitrators, such practices do cast an appearance of doubt on the impartiality of the arbitrators, which is akin to appointing a former lawyer to judge a case in court.[61] For example, Prof. Dr. Ulrich Haas, one of the experts engaged by World Anti-Doping Agency in 2006 to revise the WADA Code, had his independence and impartiality as an arbitrator questioned before the Swiss Federal Tribunal in a matter pertaining to an anti-doping violation.[62]

The 2011 CAS reforms sought to significantly reduce the IOC, IFs, and NOCs' direct influence over the appointment of CAS arbitrators, wherein the ICAS is no longer obliged, let alone expected, to consider the proposed arbitrators of the IOC, IFs, and NOCs.[63]

It is admitted that there are still issues within the process of the appointment of CAS arbitrators by the ICAS which could potentially bring the institutional independence of the CAS into question. One issue is the consolidation of power into the President of the ICAS, who is thereafter also appointed as President of the CAS and who is empowered not only to administer the CAS but also to appoint presidents of arbitral panels (or sole arbitrators) for matters before the CAS. This may prove problematic as the panel president or sole arbitrator appointed is empowered to make decisions

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[60] Antonio Rigozzi et al., *Sports Arbitration*, 2013 EURO., MIDDLE EASTERN & AFRICAN ARB. REV. 15, 16 (2013).

[61] *See* Straubel, *supra* note 31, at 1234.

[62] *See Alejandro Valverde Belmonte v, Comitato Olimpico Nazionale Italiano, World Anti-Doping Agency, and International Cycling Union* [2010] 4A_234 / 2010 (Swiss Federal Tribunal).

[63] *See* Court of Arbitration for Sport, *supra* note 2.

about the matter before them, albeit they are expected to do so objectively. However, it is prudent to note that the ICAS appoints arbitrators in consideration of not only the names brought before it by IFs and NOCs, but also athletes' commissions of IFs and NOCs,[64] thereby providing broad-based consensus on the appointments rather than the commonly alleged predisposition towards sporting federations.

Moreover, the practices of the CAS on the appointment of a buffer layer of governance (i.e., the ICAS), procedures for the appointment of arbitrators into the arbitrators list, and rules on the appointment of arbitrators in active cases, are not different from the practices of other arbitration institutions. In most commercial arbitration institutions, such as the Singapore International Arbitration Centre ("SIAC"), International Chamber of Commerce ("ICC"), and London Court of International Arbitration ("LCIA"), there are also similar "buffer layers" on the appointment of arbitrators in cases. In ICC and LCIA, the respective arbitration institutions' "Court" has sole discretion to admit and appoint the arbitrators to sit on the arbitration tribunal, even if nominated by parties.[65] In SIAC, while there is a Panel of Arbitrators which consists of arbitrators appointed by SIAC-appointed Executive Committee, which parties can select from, the President of SIAC has final say in the appointment of the arbitrator(s).[66] Although parties to arbitration proceedings at these commercial arbitration institutions are able to nominate their arbitrators, parties' nominees are still subjected to the influences of bureaucratic processes within the respective arbitration institutions.

Furthermore, it is not uncommon within commercial arbitration to frequently use and engage a small pool of experienced arbitrators who often bring their specialized expertise and knowledge to the adjudication process.[67] Such repeat arbitrators are arbitrators who are repeatedly appointed by the same party, same *type* of party, and on the same issues.[68] This was aptly pointed out in the English case of *Halliburton v. Chubb*,[69] wherein a particular arbitrator was appointed for and by the Defendant before multiple tribunals and the Court of Appeal therein determined that there was no real possibility of bias. The Court of Appeal commented that the pool of suitably

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[64] *See id*. at S14.

[65] *See* LCIA Arbitration Rules (2014), Art 5; ICC Arbitration Rules (2017), Art 13.

[66] SIAC Arbitration Rules (6th ed., Aug. 1, 2016), Rule 9.

[67] *See* Drew J. Hushka, *How Nice to See You Again: The Repetitive Use of Arbitrators and the Risk of Evident Partiality*, 5 ARB. L. REV. 325–40 (2013).

[68] Houchih Kuo, *The Issue of Repeat Arbitrators: Is It a Problem and How Should the Arbitration Institutions Respond?*, 4 CONTEMP. ASIA ARB. J. 247 (2011).

[69] [2018] EWCA Civ 817.

qualified and experienced arbitrators in certain fields may be small, and parties should not be deprived of the opportunity to nominate someone suitable to adjudicate their dispute on grounds of "overlapping" events or circumstances, which was the issue in that case. The issue of repeat arbitrators is, in fact, an inevitable outcome of the pursuit of flexibility in the private adjudication of arbitration, wherein parties are empowered to nominate their adjudicators, thereby creating a free market of expert adjudicators in the field.

Such criticisms of arbitration proceedings are not unique to sport arbitration, and it is not uncommon to find such subtle influences present in all types of arbitration and private adjudication, especially in specialized fields consisting of small pools of close-knit communities of specialized expertise.[70] In commercial arbitration, many institutions and arbitrators have adopted the practice of the International Bar Association ("IBA") Guidelines of Conflicts of Interest in International Arbitration (the "IBA Guidelines") in the assessment of the independence of the arbitrators and corresponding disclosure requirements.[71] The IBA Guidelines provide a definition of conflict of interest in international arbitration and the delineation of factual situations which would enable arbitrators to determine whether they are in conflict and whether they are obliged to disclose their interests, if any.[72]

It may be beneficial for the CAS to expressly adopt the practice of using the IBA Guidelines in assessing the independence of the arbitrators involved within the Arbitrator's Acceptance and Statement of Independence prior to the appointment before the CAS, just as in the practice of commercial arbitration, in order to alleviate challenges to the institutional independence of the CAS. The IBA Guidelines can provide not only definitive situations of conflict of interest and disclosure requirements, but also an internationally recognized standard to rely on with regard to the conflict-of-interest situations faced by arbitrators. There may not be a need for the CAS to codify the IBA Guidelines, just as how arbitration institutions do not codify the IBA Guidelines in their arbitration rules.[73] The IBA Guidelines are an accepted supranational source of law for international arbitration,[74]

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[70] *See Gundel v. FEI and CAS*, and *Lazutina v. IOC* (SFT).

[71] *See* Int'l Bar Ass'n, *IBA Guidelines on Conflicts of Interest in International Arbitration* (2014), https://www.ibanet.org/Document/Default.aspx?DocumentUid=E2fe5e72-eb14-4bba-b10d-d33dafee8918 [https://perma.cc/8SB4-7CKQ] (last visited May 30, 2022).

[72] *See id.*

[73] Downie, *supra* note 32, at 25.

[74] Simon Greenberg et al., International Commercial Arbitration: An Asia-Pacific Perspective (2010), https://www.cambridge.org/core/books/interna-

and they are adopted directly by the CAS in practice, especially during the nomination and appointment processes of CAS arbitrators for active cases. For instance, the appointed arbitrator(s) can include in their official undertaking, pursuant to S18 of CAS Code, that he or she has conformed with the conflict-of-interest requirements in the IBA Guidelines.

Another way to alleviate conflict-of-interest issues could be for the ICAS to appoint renowned arbitrators to sit as a fixed panel on the Appeals Division. While this solution may be a double-edged sword, wherein aggrieved parties can seek to question the independence of the ICAS and the fixed appointment of the panel for the Appeals Division, this arrangement is more akin to the political practice of the executive branch's appointment of judges with tenure in ordinary courts. Furthermore, this solution of fixing a few renowned arbitrators can promote uniformity in decisions at the appellate level of the CAS,[75] supporting *jurisprudence constante*. Further, one could reconsider the criteria for CAS arbitrators to alleviate prevailing issues pertaining to the conflicts of interest or institutional independence of the CAS, such as disallowing CAS arbitrators to sit on any disciplinary tribunals of IFs or other sport associations. This could mitigate any potential actual or apparent bias. Another solution could be restricting the selection of arbitrators from CAS's panel of arbitrators to a narrower pool each time, based on a "taxi-rank" system of arbitrators.[76]

In any event, while it may be a stretch, it is worth considering the public-relations angle to wrangle free from allegations of apparent bias. In ordinary courts, there are contempt-of-court safeguards to ensure that malicious and opportunistic challenges to judges' independence and impartiality are contained. Affording arbitrators the equivalent standards of reverence and respect during the adjudication of cases as judges by instituting certain contempt of court offenses for arbitrators, especially with sufficient safeguards in place, such the IBA Guidelines-compliance, can go a long way toward alleviating public challenges to the independence and impartiality of the arbitrators involved and mitigate perceptions of apparent bias.

There is a specific concern on the lack of transparency arising from the opaque processes by which arbitrators are appointed, as well as the absence of public annual reports and accounts of the CAS or the ICAS. The ICAS is a Swiss foundation formed under article 80 of the Swiss Civil Code (the

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tional-commercialarbitration/A512F7B067C3CDA639A80E956CD1E9C9 [https://perma.cc/K3PG-RKC3].

[75] Sarkar Ali Akkas, *Appointment of Judges: A Key Issue of Judicial Independence*, 16 BOND L. REV. (2004).

[76] Int'l Cotton Ass'n, *ICA Bylaws & Rules* (2013).

"ZGB"),[77] pursuant to the Paris Agreement, which creates an "arbitration institution", i.e., the CAS, to facilitate the settlement of disputes in the field of sport.[78] In general, save for accounting and audit requirements, associations and foundations formed under Swiss law are provided relatively wide room to pursue their purposes; as such, there is no legal requirement for the ICAS or the CAS to publish their annual reports, audited accounts, or meeting minutes.[79] Nevertheless, for the purposes of reinforcing the credibility of the CAS or the ICAS as world's supreme court for sport, it might be prudent to further adopt certain transparency or accountability in the processes by which arbitrators are appointed and selected.

III. Criticism Two: Deficient Consent For Arbitration

The second-most common criticism of the CAS is that parties do not give adequate consent to submit to CAS's jurisdiction due to the mandatory nature of CAS arbitration referral clauses incorporated within matters pertaining to the Olympic Games and in the regulations of sport governing bodies. This argument of deficient consent is predicated on the contractual and consent-based nature of arbitration. Unlike basic accessibility to the domestic courts of a jurisdiction, parties are obliged to agree to CAS arbitration proceedings and, by extension, consent to the exclusion of the jurisdiction of their domestic courts in favor of CAS arbitration proceedings.[80] The consent to arbitration is especially crucial since arbitral awards are widely and almost universally recognized and enforced by domestic courts by virtue of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[81] (the "New York Convention"), providing the arbitration awards the weight of a binding court decision around the world. That is, arguably, one of the main reasons that the validity of arbitration clauses is frequently challenged.[82]

Apart from analyzing the interaction between CAS arbitration and Article 6(1) of the ECHR, this part will also evaluate three main aspects of

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[77] SR 210 Swiss Civil Code of 10 December 1907.

[78] *See* Paris Agreement, *supra* note 21.

[79] *See* articles 83a to 83c of the Swiss Civil Code, *supra* note 77.

[80] *See* Greenberg et al., *supra* note 74, at 2, 51.

[81] *See Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3.

[82] *See* Protocol on Arbitration Clauses, opened for signature 28 July 1924, 27 LNTS 157 (entered into force 28 July 1924); *UNCITRAL Model Law on International Commercial Arbitration 1985*, GA Res 2205(XXI), UN Doc A/40/17 (21 June 1985) Annex I.

CAS arbitration that are often overlooked. First, conditions of participation and mandatory arbitration are commonplace practices in and outside of the sporting industry and ought not to be rendered invalid under the guises of "deficient consent", especially given the mandate afforded to democratically elected sporting organizations. Second, the issue of consent for cross-border disputes is often moot when foreign elements within adjudication exist, thereby incorporating the application of foreign laws and conflict of laws principles into the said dispute. Third, the jurisdiction of domestic courts is not entirely excluded, given that arbitrating parties still rely on domestic laws and the power of ordinary courts for the recognition and enforcement of foreign arbitral awards.

A. CAS Arbitration and Article 6(1) of European Convention of Human Rights

Sports arbitration in the CAS is currently mandated by the IOC for decisions of the IOC and all disputes "arising on the occasion of, or in connection with, the Olympic Games,"[83] as well as all matters pertaining to the World Anti-Doping Code involving international-level athletes.[84] As such, all NOCs and Ifs, and many national sports governing bodies, especially those with a presence at the Olympic Games, are also obliged to subscribe to mandatory arbitration at the CAS in their governing documents, thereby binding their members to an arbitration agreement by reference at the CAS.

The matter of *noles volens* arbitration was first raised before the Swiss Federal Tribunal in the 2007 case of *Guillermo Cañas v. ATP Tour*,[85] wherein it was acknowledged that Cañas was forced to choose between participating in a competition and not submitting to arbitral jurisdiction. At the ECtHR in 2018, Pechstein vehemently argued that the German Speed Skating Union and ISU monopolize the speed skating industry, and without Pechstein conforming to the compulsory requirement to submit disputes to the CAS, she would not be able to earn a living and practice her discipline at a professional level.[86] The ECtHR eventually found that Pechstein's situation amounted to a "compulsory arbitration" wherein Pechstein was not free and unequivocal in her decision to submit to the jurisdiction of the CAS, pursuant to Article 6(1) of the ECHR. While the ECtHR accepted the validity of

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[83] Int'l Olympic Comm., *supra* note 52.

[84] *See* article 13.2.1 of World Anti-Doping Agency, *World Anti-Doping Code* (2015).

[85] *See* Guillermo Cañas v. ATP Tour [2006] SFT, 4P.172/2006, 22 March 2007 (Swiss Federal Tribunal).

[86] *See Pechstein v. Switzerland*, at 109-15.

such "compulsory arbitration" clauses due to the harmonization and uniformity of decisions taken in the field of sport, the Court held that safeguards under Article 6(1) of the ECHR must afforded to the party who did not give free consent to arbitration.[87]

Notwithstanding the position of the European Court of Human Rights, there is still much moral debate on the "forced" and "compulsory" nature of arbitration and the corresponding jurisdiction of the CAS to adjudicate disputes of parties who did not consent to CAS arbitration on a free and voluntary basis. Scholars like Lloyd Freeburn have characterized dispute resolution in the CAS as a "consent-based form for a non-consensual regulatory function," commiserating with the ECtHR's decision that athletes bound to dispute resolution in the CAS, based on arbitration agreements attached to regulations of sporting organizations and conditions of competition, were in fact forced.[88]

B. Evaluation of the Practice of Mandatory Arbitration

Notwithstanding the Swiss Federal Tribunal and ECtHR's determinations that athletes are often faced with the dilemma of signing up to the jurisdiction of the CAS as a condition of participation or losing the opportunity to earn a living (which findings are primarily limited to Switzerland and countries in the European Union respectively), the imposition of conditions to participation in sports is not uncommon. Apart from a mandatory CAS clause, most IFs and NOCs also include, as a condition of participation in the sport and/or competition, compliance with sports anti-doping rules under the World Anti-Doping Agency and World Anti-Doping Code.[89] Most IFs and national sports governing bodies also include conduct rules as a condition for participation in the sport as well, such as in-field and off-field conduct, on athletes and sport administrators.[90] Conditions of participation in sports imposed by sporting bodies have the effect of not only leveling playing fields and ensuring that sporting competition occurs under the

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[87] *See id*. at 96-115.

[88] *See* LLOYD FREEBURN, POWER, LEGAL AUTHORITY AND LEGITIMACY IN THE REGULATION OF INTERNATIONAL SPORT 192 (2018).

[89] *See* World Anti-Doping Agency, *World Anti-Doping Code* (2015), Art 23.5. *See also* World Anti-Doping Agency, *Code Compliance*, WORLD ANTI-DOPING AGENCY (2015). *See also* Björn Hessert, *Cooperation and Reporting Obligations in Sports Investigations*, 20 INT'L SPORTS L.J. 145 (2020).

[90] Fédération Internationale de Natation, *FINA Doping Control Rules (DC Rules)* (2014), https://www.fina.org/sites/default/files/fina_dc_rules.pdf [https://perma.cc/CQ62-VCC8] (last visited May 30, 2022); World Athletics, *World Athletics Anti-Doping Rules* (2019).

same conditions but also ensuring that enforcement of the rules is of the same standards as well. By mandating that sporting disputes be sent to the CAS for adjudication, whether at first instance or appeal, a standard enforcement of sporting rules commences; the alternative is giving each domestic court, in every country, the opportunity to make contrasting decisions on sporting rules.

In fact, conditions are often imposed in certain established industries outside of sports, especially in licensing and employment of qualified persons. For example, to be admitted into the legal profession in most jurisdictions, applicants must submit to high ethical requirements and stipulated conduct in relation to the handling of trust bank accounts and the corresponding internal disciplinary proceedings.[91] In certain industries, such as the building and construction industry in the common law jurisdictions, standard form contracts are typically used by parties, which mandate standard domestic arbitration processes for dispute resolution.[92]

Compulsory arbitration practice is common in other jurisdictions and industries. For example, court-annexed arbitration is mandated by statute and rules of court in certain jurisdictions in America for parties that have commenced litigation in domestic courts.[93] Another example is the use of arbitration clauses in the constitutions of companies which bind members to mandatory arbitration for disputes pertaining to the operation of the constitution and shareholders' disputes.[94] While the deficiency of parties' consent in such arbitration practice is still commonly criticized, the mandatory arbi-

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[91] *See* Bruce A. Green, *Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115 (2000); Scott McLean, *Evidence in Legal Profession Disciplinary Hearings: Changing the Lawyers Paradigm*, 28 U. QUEENSLAND L.J. 225 (2009).

[92] *See* IAN H. BAILEY ET AL., CONSTRUCTION LAW IN AUSTRALIA (2011); Surajeet Chakravarty & W. Bentley MacLeod, *On the Efficiency of Standard Form Contracts: The Case of Construction* (USC CLEO Research Paper, 2004).

[93] Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993); DEBORAH R. HENSLER, RAND CORP., COURT-ANNEXED ARBITRATION IN THE STATE TRIAL COURT SYSTEM (1984), https://www.rand.org/pubs/papers/P6963.html [https://perma.cc/LAG3-ATNS]; A. Leo Levin, *Court-Annexed Arbitration*, 16 U. MICH. J. L. REF. 537 (1982); EDGAR ALLAN LIND & JOHN SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (1983).

[94] *See* JOSEPH LEE, INTRA-CORPORATE DISPUTE ARBITRATION AND MINORITY SHAREHOLDER PROTECTION: A CORPORATE GOVERNANCE PERSPECTIVE (2015); Perry Herzfeld, *Prudent Anticipation? The Arbitration of Public Company Shareholder Disputes*, 24 ARB. INT. 297–330 (2008); Christos Ravanides, *Arbitration Clauses in Public Company Charters: An Expansion of the ADR Elysian Fields or a Descent into Hades?*, 18 AM. REV. INT'L ARB. 371 (2007).

tration clauses in the law, regulations, and governing documents are still often regarded as valid and enforceable, and CAS arbitration clauses in sport regulatory documents should not be held to a different standard.

While it is arguable that the mandatory submission to the CAS treads upon one's right to a fair hearing, pursuant to article 6(1) of the ECHR, such a mandatory arbitration clause is typically inserted into the regulations and governing documents of IFs by their legislative actors, who are primarily persons elected by IF member federations. As such, in the examination of the source of law and legitimacy of such a mandatory arbitration clause, one must appreciate the legitimacy and democratic mandate in the inclusion of the CAS clause within the notably private nature of international sports. Nevertheless, one must also acknowledge present contentions and scholarship pertaining to the democratic deficits present within the organization of national and international sports.[95]

C. Deficient Consent to Cross-Border Sport Litigation and Conflict of Laws

In any event, high-performing athletes who dispute the exclusive jurisdiction of the CAS based on deficient consent are still bound to meet the same legal issues in ordinary courts where there are cross-border elements and foreign laws involved. This is especially the case for high-performing athletes who face disputes or disciplinary matters pertaining to an IF outside of their home country.

In such cross-border sport disputes and matters pertaining to the nationalities and laws of different countries, the issue of domicile is not entirely clear. For example, in the International Association of Athletics Federation (the "IAAF") Ethics Board's (now, World Athletics' Athletics Integrity Unit) determination that a Kenyan official extorted monies from Kenyan athletes in 2018, which involved both the application of the law of Monaco[96] and Kenyan citizens,[97] should the Monaco court have jurisdiction over the adjudication of this dispute or the Kenyan court? And in the determination of the applicable domicile and substantive law of the matter,

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[95] *See* Freeburn, *supra* note 88.

[96] World Athletics Constitution (2019), https://www.worldathletics.org/download/download?filename=E19e5c43-fc9e-4ff4-a71d-eeeec51a9037.pdf&urlslug=A1%20-%20The%20Constitution [https://perma.cc/SKH6-RY9E] (last visited May 30, 2022).

[97] *IAAF Ethics Board Decision Number: 10/2018 In the matter of David Siya Okeyo and Joseph I Kinyua and the IAAF Code of Ethics, (2018); IAAF Ethics Board Decision Number 11/2018 In the matter of David Siya Okeyo and Mr Isaac Mwangi Kamande and the IAAF Code of Ethics, (2018).*

should Kenyan common law principles apply or should Monégasque civil law? Furthermore, if there are foreign elements in the case, irregular rules on conflict of laws apply based on the domestic court in question. While there are trite international conventions on the issue of conflict of laws,[98] not all countries are signatories to the said conventions, and the rules applying conflict of laws would be rough, befuddling, and tedious.

In such situations, parties would not have consented to the application of cross-border elements and foreign laws but would have no say in its application in the adjudication of their matter. One may then argue that parties have no say in the application of cross-border elements and foreign laws because of their citizenship or domicile which pre-determined the application of the applicable laws and conflict of laws principles. A counterargument in support of the mandatory CAS clause is that it is a pre-determined application of arbitration rules in the CAS attached to the parties' membership with the respective sporting bodies with the mandatory CAS clause.

Notably, in CAS arbitration, parties are afforded more freedom to choose the applicable substantive laws. In the Appeals Division, R58 of the CAS Code determines the substantive law in the stipulated order, primarily taking into consideration the law chosen by parties or the law of the country in which the federation is domiciled.[99] In the latter circumstance, the substantive law applied by the CAS would be no different from the law that would be applied by a domestic court adjudicating the appeal. Furthermore, parties at the CAS are given more freedom to choose the applicable substantive law, especially in the Ordinary Division where parties are free to decide the substantive law to be applied to the merits of the dispute, authorize the Panel to decide, or have lacunas filled according to Swiss law.[100]

D. The Available Jurisdiction of Domestic Courts for CAS Arbitration

The jurisdiction of domestic courts is not excluded completely in the adjudication of cases in the various divisions in the CAS. The CAS, like many other arbitration institutions, must still adhere to minimum standards of procedural and substantive fairness, or the awards may be set aside by the domestic court in which the arbitration is located. For all CAS cases, the seat

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[98] *See* The Hague Conference on Private International Law, at Hague Conference on Private International Law, *HCCH*: *Conventions, Protocols and Principles*, https://www.hcch.net/en/instruments/conventions [https://perma.cc/5M3J-NRPU] (last visited May 30, 2022).

[99] Court of Arbitration for Sport, *supra* note 2, at R58.

[100] *See id.* at R45.

of arbitration is Lausanne, Switzerland,[101] and the Swiss Federal Tribunal has jurisdiction to set aside CAS awards which are decided contrary to the requirements under Chapter 12 of the Swiss PIL.[102] For example, CAS awards can be set aside if the arbitral tribunal was not property constituted, the decision of the arbitral tribunal is *ultra vires*, or the award is incompatible with public policy.[103] While the grounds for arbitration awards to be set aside are limited and almost never given, setting aside an award is not unprecedented. The *Oberlandesgericht München* (Higher Regional Court of Munich) did make a finding,[104] albeit later overturned by the Bundesgerichtshof,[105] that the CAS award of Pechstein was unenforceable on the basis that the monopolistic nature of the International Skating Union was contrary to the German Act against the Restraints of Competition. Additionally, in December 2020, the Swiss Federal Tribunal reviewed the arbitral award of the CAS in *World Anti-Doping Agency v. Sun Yang & Fédération Internationale de Natation* upon the admission of evidence that the President of the panel made an inappropriate comment on social media concerning the Chinese race pursuant to article 190(a) of the Swiss PIL.[106] While there are limited instances of setting aside an arbitral award, the jurisdiction of domestic courts for arbitration is not completely excluded.[107]

Apart from the application to set aside arbitral awards at the domestic courts where the arbitration occurred, parties are empowered to make applications for the non-recognition of international arbitral awards at the domestic courts where the international arbitral awards are enforced. Given that many CAS arbitrations are based on cross-border disputes or parties from various jurisdictions, i.e., international arbitration,[108] there is also an opportunity for aggrieved parties to apply to a separate domestic court, apart from the Swiss Federal Tribunal, where the arbitral awards could be enforced on grounds that the award should not be recognized under domestic law. Under

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[101] *See id.* at R28.

[102] *See* PILA, *supra* note 24.

[103] *Id*. at Article 190(2)(b), (c) or (e).

[104] *Oberlandesgericht München* [Munich Court of Appeal], Az. U 1110/14 Kart, 15 January 2015.

[105] *See Mutu & Pechstein v. Switzerland*.

[106] CAS 2019/A/6148 *World Anti-Doping Agency v. Sun Yang & Fédération Internationale de Natation* (award of 28 February 2020).

[107] *See* Antonio Rigozzi, *Challenging Awards of the Court of Arbitration for Sport*, 1 J. Int'l Dispute Settlement 217–65 (2010).

[108] Most CAS awards are rendered under chapter 12 of the Swiss PILA, *supra* note 24, as there is usually one party that had, at that time when the arbitration agreement was entered into, neither its domicile nor its habitual place of residence in Switzerland. See also article 176(1) of the PILA.

Chapter 5 of the New York Convention, parties may challenge the enforceability of CAS awards where the award is expected to be enforced, giving domestic courts authority and jurisdiction over CAS cases adjudicated in the CAS in Lausanne, Switzerland. Most prominently, the New York Convention provides that the recognition and enforcement of foreign arbitration awards can be refused if a domestic court finds that the subject matter of the award is not capable of settlement by arbitration under the laws of the country or if the recognition or enforcement of the award would be contrary to the public policy of the country.[109]

The ability to set aside or challenge the recognition and enforcement of an arbitration award essentially affords domestic courts certain power and authority over domestic and foreign arbitration proceedings involving their domiciled residents or organizations. At the outset, general grounds to set aside arbitration awards or challenges to the recognition or enforcement of arbitration awards are discretionary, whether it is based on the PILA,[110] the New York Convention,[111] or other uniform laws on arbitration such as the United Nations Commission on International Trade Law Model Law.[112] Furthermore, domestic courts are generally free to make the finding on whether the award is contrary to the public policy of the country or incapable of settlement by arbitration regardless of whether parties raise the argument in court, affording domestic courts oversight over arbitration awards that come before them.[113]

Circumstances in which domestic courts have the discretion and power to set aside an arbitral award or refuse the recognition and enforcement of an award on the basis that the award is contrary to the public policy of the country commonly involve fraud or corruption,[114] patent illegality,[115] a find-

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[109] *See Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *supra* note 81.

[110] *See* PILA, *supra* note 24.

[111] *See Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *supra* note 81.

[112] *See* UNCITRAL Model Law, *supra* note 82.

[113] *See* Article V(2) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *supra* note 81 ("Recognition and enforcement of an arbitral award may also be refused *if the competent authority in the country where recognition and enforcement is sought finds that . . . .*") (emphasis added); *see also* Article 36(1)(b) of UNICTRAL Model Law, *supra* note 82, ("Recognition and enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only *if the court finds that . . . .*") (emphasis added).

[114] *See International Arbitration Act* (Cap. 143A, 2002 Rev Ed Sing), at 24.

[115] *See* Oil & Natural Gas Corp. v. Saw Pipes Ltd. (2003) 5 SCC 705; *Venture Global Engineering v. Satyam Computer Services* (2008) 4 SCC 190 at 19, 21.

ing that the award is "wholly offensive to the ordinary reasonable and fully informed member of the public,"[116] or awards which are "so unfair and unreasonable as to shock the conscience of the court."[117] The use of the ground of public policy to set aside or refuse recognition and enforcement of arbitral awards "can never be exhaustively defined" and is unique to each country.[118] For example, the domestic courts in Indonesia interpret the justification of public policy violations very widely to refuse the recognition and enforcement of awards which "endanger the national interests of Indonesia which includes the local economy" or violate the sovereignty of Indonesia.[119] While it is not universal practice to interpret the ground of public policy as widely as Indonesia does, one can appreciate the potential of the power afforded to domestic courts, even if adjudications are submitted exclusively to an arbitral tribunal , like the CAS. It is nevertheless admitted that in Switzerland, there has been only one award which has been annulled for noncompliance with public policy since 1989, despite numerous attempts.[120] In 2012, the Swiss Federal Tribunal determined in *Matuzelum v. FIFA* that the threat of an unlimited occupation ban arising from the FIFA Disciplinary Code could be a "grave violation of privacy" and thereby contrary to public policy pursuant to Article 190(2)(e) of the Swiss PILA.[121]

Furthermore, domestic authorities have the power to determine the nature of disputes which are "incapable of settlement by arbitration" at the stage where domestic courts are used to challenge the recognition and enforcement of foreign arbitral awards, wherein the applicable law governing arbitrability of the award will not be determined by the substantive law of the arbitration agreement but the law where the award is intended to be enforced.[122] Such matters determined by domestic authorities to be "incapable of settlement by arbitration" will then render the arbitration clause invalid and deny the exclusion of the jurisdiction of domestic courts. Many countries deem certain fixed matters not arbitrable and keep their lists of subject matter arbitrability non-exhaustive to cater to public interest-related

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[116] *See* PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank [2007] 1 SLR 597.

[117] *See* McDermott Int'l Inc. v. Burn Standard Co Ltd. (2006) 11 SCC 181.

[118] *See Deutsche Schachtbau v. National Oil* [1987] 3 WLR 1023, p 1035D.

[119] *Astro Group v. Lippo Group* (2009) CJDC 05/Pdt.Arb.Int/2009, 28 October 2009 (Central Jakarta District Court), upheld in *Astro Group v. Lippo Group* (2010) 01/K/Pdt.Sus/2010, 24 February 2010 (Supreme Court of Indonesia).

[120] *See* Rigozzi, *supra* note 107; *see also* Felix Dasser, *International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis*, 25 ASA BULL. 444 (2007).

[121] *See* SFT 138 III 322.

[122] Bernard Hanotiau, *The Law Applicable to Arbitrability*, 26 SACLJ 874 (2014).

issues which may arise.[123] In any event, there are already certain trite aspects pertaining to sport which are already non-arbitrable, such as the non-arbitrability of criminal conduct, which excludes CAS jurisdiction over matters such as match-fixing conduct in sports.

In toto, the compulsive submission of sport disputes to CAS arbitration does not necessarily exclude the jurisdiction of domestic courts. For instance, domestic courts have the responsibility of adjudging challenges to CAS awards, such as attempts to set aside or challenge the recognition and enforcement of awards. It is admitted that this is a theoretic point, wherein in practice, domestic courts have infrequently overturned or failed to recognize a CAS award, or arbitral awards in general,[124] when sporting sanctions are involved rather than financial ones. This point, nevertheless, comes with the practical possibilities of invoking of the court's jurisdiction over the recognition of CAS awards, should it see fit to refuse enforcement or set aside the said arbitral awards.

IV. Criticism Three: The Limited Contractual Legitimacy of the Court of Arbitration for Sport

The third and final criticism evaluated in this paper is the reproach that the CAS has limited contractual legitimacy to adjudicate disputes as the supreme authority in sport, especially since CAS arbitration tends to create jurisprudence above and beyond the contractual mandate of parties. Scholars such as Lloyd Freeburn have argued that the CAS has also adopted practices extending beyond the contracting intentions of parties under the guises of "sport's consistency imperative," or *jurisprudence constante*, as the judicial authority in sports, in the development of international sports law, or *lex sportiva*, which treads upon the legality and contracting legitimacy of the arbitration tribunal hearing the matter. The CAS has not only behaved as the adjudicator of private, contractual disputes between parties, but also endeavored to develop a coherent jurisprudence within *lex sportiva* by adopting precedents and applying principles from past cases.[125]

It is undisputed that the CAS has developed its structure and jurisprudence to be the "world's supreme court in sport" and contributes massively to the development of *lex sportiva*.[126] The court-like nature of the CAS, especially the functioning of the Appeals Division, has brought into question the

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[123] *Id*. at 879-80.

[124] *See* Dasser, *supra* note 120.

[125] *See* CAS 2002/O/373 *Canadian Olympic Committee v. International Olympic Committee*, Award of 18 December 2003, 14.

[126] *See* Duval, *Lex Sportiva*, *supra* note 16.

legitimacy of the quasi-judicial institution, given that the CAS is, essentially, an arbitral tribunal that involves mere private, contractual transactions between parties.[127] Furthermore, the processes instituted for the appointment of ICAS members are not wholly democratic, putting into question the legitimacy of the authority of the ICAS and of the appointment of CAS arbitrators and presidents of the CAS Divisions by the ICAS.

The question herein is whether the limited and private contractual legitimacy that the CAS beholds is sufficient for the CAS to act as a quasi-judicial global body for sport to produce *lex sportiva*. Two main points will be made in this part. First, there are precedents that private jurisprudence and law can contribute to the development of international law, thereby making this issue of the limited contractual legitimacy moot. Secondly, unlike the development of other private law, *lex sportiva* consists largely of public law principles, such as criminal and administrative law, and therefore, the development of *lex sportiva* in CAS arbitration need not be limited to the contractual nature of the issue submitted to the CAS panel.

A. Private Sources of Law Accepted as International Law

International law is traditionally made up of international conventions, international custom, "general principles of law recognized by civilized nations," judicial decisions, and "teachings of the most highly-qualified publicists of the various nations."[128] As such, the limited and private nature of the legitimacy afforded to the CAS, and the development of *lex sportiva* by private arbitration in the CAS, often invites criticisms of CAS authority to create *lex sportiva* and the emerging global body of law and jurisprudence in sports. However, international law has increasingly been recognized to be heavily influenced by the development in private law[129] and the development of international jurisprudence found in arbitration.[130] *Lex sportiva* is no exception.

Scholarly writing often analogizes the development of *lex mercatoria* with the growth of *lex sportiva*, as both areas of law and jurisprudence are

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[127] *See* Freeburn, *supra* note 88, at 189-95.

[128] *Statute of International Court of Justice,* art 38(1).

[129] *See* Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447 (2007); Duval, *Lex Sportiva*, *supra* note 16.

[130] *See* HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION (2002).

established from private sources of law.[131] *Lex mercatoria* is the well-established body of international commercial law that has developed within the domain of private commercial activities based on customs and arbitral awards[132] and is universally accepted as international, as crystallized in present commercial conventions and national laws.[133] While *lex mercatoria* is made up of customs and principles established from centuries worth of commercial practice, the source of law of this universally recognized body of law is not public law, but private. Accordingly, it may be moot to argue that the limited and private nature of the contractual legitimacy of the CAS ought to restrict the adjudicative power of CAS arbitration as a source of jurisprudence for the development of *lex sportiva*.

B. The Public Law Elements of Lex Sportiva

Unlike *lex mercatoria*, *lex sportiva* is not made up of exclusively private law,[134] which may annul the purported need for private consent in the application and development of *lex sportiva*. Public law principles refer to the aspects of law within society that primarily govern the relationship between individuals and government, and the relationships between specific individuals within society, such as constitutional law, administrative law, and criminal law.

Lex sportiva also consists of sports regulation and disciplinary measures such as on-field and off-field conduct and sports anti-doping regulations and sanctions. These aspects of *lex sportiva* are disciplinary in nature, and the tribunals involved are empowered with seemingly quasi-criminal power to issue "penal" punishments[135] that affect the livelihoods of professionals in-

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[131] Leonardo V. P. de Oliveira, *Lex Sportiva as the Contractual Governing Law*, 17 INT. SPORTS L.J. 101–16 (2017).

[132] *See* CAS 98/200, *AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA)*, Award of 10 August 1999 ('AEK UEFA Award') [156], cited in Matthew J. Mitten & Hayden Opie, *"Sports Law": Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution*, 85 TUL. L. REV. 269 (2010).

[133] Most of the international commercial and arbitration conventions today are based on principles in *lex mercatoria.* Examples of such are *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, opened for signature 12 October 1929, 137 LNTS 11 (entered into force 12 October 1929), and the *Convention on the Execution of Foreign Arbitral Awards*, opened for signature 26 September 1927, 92 LNTS 301 (entered into force 26 September 1929). *See Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *supra* note 81.

[134] *See* Lorenzo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, 12 GERMAN L.J. 1317, 1327-28 (2011).

[135] *See* Straubel, *supra* note 31, at 1261.

volved and are vested with the authority to decide a case based on a standard higher than a civil case. Pursuant to Article 3.1 of the World Anti-Doping Code, the burden of proof to be established for cases not involving positive adverse analytical findings is "comfortable satisfaction", a standard higher than most civil law cases (balance of probabilities) but lower than criminal cases (beyond a reasonable doubt).[136] The standard for other non-doping disciplinary tribunals seems to also be "comfortable satisfaction", as seen in the disciplinary cases of extortion by the International Association of Athletics Federation's Ethics Board (now, the World Athletics Athletics Integrity Unit),[137] as well as the FIFA Regulations on the Status and Transfer of Players.[138]

Lex sportiva in the CAS has also been established with reverence to public law principles such as due process and procedural fairness. The CAS itself has highlighted the similarities of the roles of sport governing bodies and governmental bodies in their regulatory, administrative, and sanctioning roles, and it has upheld the regulatory power and authority of sport governing bodies.[139] The Swiss Federal Tribunal has not hesitated to annul decisions by the CAS with procedural defects.[140]

As such, the argument that the CAS has no contractual legitimacy based on defective consent has less merit given that private consent is usually not required by the individuals involved in the application of public law principles. Such public law principles apply by virtue of the parties' membership and involvement in the respective sport governing bodies and the respective application of public law principles in the jurisdiction where the said sport governing bodies are domiciled. The public nature and effect of CAS decisions is also one of the reasons why the CAS is moving towards more public arbitration hearings for hearings at the Appeals Division, pursuant to amendments to the CAS Code made in 2019.[141]

The consideration hereinafter is to what extent the CAS will hear arguments based on substantive public law principles, rather than just procedural ones, given the generally private nature of arbitration. Unlike commercial arbitration, the CAS does not necessarily exclude itself from certain adjudication, such as the hearing of administrative matters on bank-

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[136] World Anti-Doping Agency, *supra* note 84.

[137] *See* IAAF ETHICS BOARD DECISION NUMBER: 10/2018, *supra* note 97; IAAF ETHICS BOARD DECISION NUMBER 11/2018, *supra* note 97.

[138] *See* Article 19 of FIFA, *FIFA Disciplinary Code* (2019).

[139] *See* AEK UEFA Award, *supra* note 132, at 58.

[140] *See Cañas v.* ATP, which annulled the award in *Guillermo Canas v. ATP*; *see also RFC Seraing v. FIFA* (SFT).

[141] *See* Court of Arbitration for Sport, *supra* note 2, at R57.

ruptcy or family law disputes; the scope of disputes before the CAS widens to include adjudication on such matters involving more substantive public law principles. Inevitably, panels in the CAS inevitably must determine to what extent they will adjudicate under the auspices of such public law principles. The CAS Panel hearing the matter of the gender eligibility policies of World Athletics in a case in 2018 subtly alluded to this difficulty when matters of human rights are involved.[142] Eventually, the CAS Panel determined that it was limited in its findings due to the scope of the parties' claims, and it had no jurisdiction to address issues outside the said scope.[143] The understanding thereinafter is that the CAS is akin to an international arbitration body that adjudicates issues which are brought before it and ought to be able to decide on human rights issues brought before it,[144] and its jurisdiction to decide on any matter is highly dependent on the parties bringing the said claim before it.

The above example is illustrative of the interesting interaction between substantive public law principles and private arbitration within sports law, which deserves further and wider discussion beyond the scope of this paper. Nevertheless, on the issue of human rights in international sports law, the approach might be not only to rely on the adjudication process or the judiciary to adopt human rights standards, but also for sports legislators to embody or incorporate the relevant standards in the sporting regulations in order for human rights to be considered within any adjudication process. For example, even though World Athletics publicly stated that it is a private body and not bound by fundamental human rights instruments,[145] there are constitutional provisions on equal treatment and non-discrimination that parties are free to bring before the tribunal in the CAS.[146] The trend towards adopting human rights standards in sporting regulation is a good way to ensure substantive public law principles could be adjudicated before and determined by the CAS.[147]

Nevertheless, regardless of how much of a mandate that the CAS has to adjudicate disputes and disciplinary matters, little can be done to develop substantive jurisprudence in the CAS unless cases (including past cases) are

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[142] CAS 2018/O/5794,5798 *Mokgadi Caster Semenya and Athletics South Africa v. International Association of Athletics Federations*, Award of 30 April 2019.

[143] *See id*. at 625.

[144] *See* Straubel, *supra* note 31.

[145] World Athletics, *IAAF Publishes Briefing Notes and Q&A on Female Eligibility Regulations* (2019), https://www.worldathletics.org/news/press-release/questions-answers-iaaf-female-eligibility-reg [https://perma.cc/U3NV-LN8A].

[146] *See* World Athletics Constitution, *supra* note 96.

[147] *See* FIFA, FIFA Human Rights Policy (2017).

made more accessible to parties. It is impossible to create uniform jurisprudence without access to prior cases and practices.[148] It was reported that only 43 awards were published among approximately 600 total awards rendered in 2019.[149] At present, awards at the CAS Ordinary Division are still not made public unless all parties or the Ordinary Division President decide otherwise.[150] Furthermore, although awards at the CAS Appeals Division are generally made public pursuant to 2019 CAS Code reform,[151] both parties may agree to keep the award from being made public.[152] Awards at the CAS Appeals Division, especially matters pertaining to disciplinary nature, which costs are completely borne by the CAS, ought to be made public. If there are considerations to protect athletes in certain circumstances, it may be more prudent to consider redacting information and details out from the award, instead of not publishing the award. The principles and interest to publish arbitral awards are aptly illustrated in the English Court of Appeal case of *Manchester City Football Club Ltd. V. The Football Association Premier League Ltd. & Ors,*[153] wherein the court upheld the lower court decision to publish sports arbitral decisions on the basis that there is a "public interest in ensuring appropriate standards of fairness in the conduct of arbitration," which will have to be weighed suitably with parties' interest in preserving the confidentiality of the original arbitration and subject-matter.

V. Conclusion

This paper has endeavored to unveil the major criticisms of the CAS by breaking down the arguments and comparing the prevailing practices of the CAS with other arbitration institutions and ordinary courts. It has addressed the commonplace arguments that the CAS lacks financial and institutional independence, the "consent" athletes have provided for arbitration in the CAS under sport regulations is deficient, and the CAS's contractual legitimacy is limited. The authors argued that the present institutional structure of the ICAS provides an adequate layer of governance to address arguments

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[148] *See* Annie Bersagel, *Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field*, 12 Pepp. Dispute Resolution L.J. 189 (2012).

[149] Inside the Games, *The Inner Workings of the CAS, Independence and Sun Yang*, Inside the Games (1591298100), https://www.insidethegames.biz/articles/1094950/what-going-to-cas-really-means [https://perma.cc/6EBN-686P] (last visited May 30, 2022).

[150] *See* Court of Arbitration for Sport, *supra* note 2.

[151] *See id.*

[152] *See id.*

[153] *See* EWCA Civ 1110.

against the financial and institutional independence of the CAS. Furthermore, mandatory arbitration and other conditions of participation are common practices in other industries and should not be struck down by virtue of the "deficient consent" encompassed therein. It is prudent to conclude that sport arbitration in the CAS provides parties in cross-border and transnational disputes considerably more decision-making power compared to parties being subjected to the jurisdiction and conflict of laws principles of foreign courts. Moreover, the *de facto* power of the CAS is not only based on private contractual law, but also significantly based on public law principles, which considerably negates the argument that the CAS has limited contractual legitimacy to create jurisprudence and general principles of law within *lex sportiva*.

This paper demonstrated that the structure and practices of the CAS are not fundamentally defective *per se*, which is the position often propagated by aggrieved parties seeking to overturn a disappointing award by the CAS. It is admitted that the system of cross-border dispute resolution via CAS arbitration is imperfect, and there will always be room made to refine its processes and buttress the authority of CAS as the "world's supreme court for sport." It is also pertinent to keep in mind that sport arbitration at a central institution such as the CAS is the best alternative available to sport litigation in domestic courts, which will only garner inconsistent and unpredictable jurisprudence and the application of general principles. The Swiss Federal Tribunal[154] and ECtHR[155] have mentioned that there is no other viable alternative to the CAS to resolve international sports-related disputes quickly and effectively.

While there are creative recommendations on the creation of an international convention and global sport law body to legitimate the establishment of *lex sportiva* and the use of a uniform forum for sport dispute resolution, there is still little consensus among national governments about how to regulate a principally private industry such as sport. As such, it may be prudent to work within the bounds of private arbitration at the CAS for sport dispute resolution and refine the processes over time in the pursuit to perfect an imperfect system.

This paper has also stipulated various areas within which the structure and processes of the CAS can be improved, whether to buttress its credibility among its stakeholders in sports or reinforce its position as the world's supreme court for sports. For example, the CAS could expressly adopt the IBA Guidelines from existing commercial arbitration practices for concerns

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[154] *See Lazutina v. IOC* (SFT).
[155] *See Pechstein v. Switzerland*.

arising from conflicts of interests of arbitrators, or it could even consider fixing a strict panel of arbitrators for the Appeals Division, akin to the practice of the U.S. Supreme Court, to allow for more uniform decisions and alleviate issues of conflict of interests. Further, the credibility of the CAS could also be buttressed by being more transparent about its arbitrator appointment processes, whether at the stage of appointment onto the panel of arbitrators or the appointment of the President or Sole Arbitrator at the Appeal Division. Finally, there are also contemporaneous concerns about the lack of diversity of the appointment of arbitrators in terms of both gender and geographical representation,[156] which could be addressed better by the CAS in order to maintain its legitimacy as the supreme court for international sports.[157]

[156] In a report by the International Council for Commercial Arbitration, it was reported that, as of 15 June 2021, 90% of the last 80 arbitration appointments were male. *See* International Council for Commercial Arbitration, *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings* (2020), https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8-Gender-Diversity_0.pdf [https://perma.cc/MUM8-NW3Y] (last visited May 30, 2022). *See also* other reports at *Arbitrator Diversity at the Court of Arbitration for Sport Part One*, MORGAN SPORTS L. (2021), https://www.morgansl.com/en/latest/arbitrator-diversity-court-arbitration-sport [https://perma.cc/M6FW-4JV6] (last visited May 30, 2022); *Arbitrator Diversity at the Court of Arbitration for Sport - Part Two*, MORGAN SPORTS L. (2021), https://www.morgansl.com/en/latest/arbitrator-diversity-court-arbitration-sport [https://perma.cc/T3KE-DRGC]; Grit Hartmann, *Tipping the Scales of Justice: The Sport and its "Supreme Court"* (2021), https://www.playthegame.org/media/10851569/Tipping-the-scales-of-justice-%E2%80%93-the-sport-and-its-supreme-court.pdf [https://perma.cc/BQ3X-WDKH] (last visited May 30, 2022).

[157] For the existing debates on gender diversity in international commercial arbitration, see International Council for Commercial Arbitration, *supra* note 156.

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Of Disaster Girl and Everydays: How NFTs Invite Challenging Copyright Assumptions Around Creator Support

Stacey M. Lantagne*

ABSTRACT

Most of the successful monetization of internet fame through memes has historically occurred through offline merchandising: books, T-shirts, and other sponsorships. However, the rise of NFTs has created an entirely new revenue stream around memes. The little girl in the Disaster Girl meme sold an NFT of the meme's famous photograph for over $400,000. She was shocked when she learned that NFTs could provide a way to capitalize on her internet fame.

Previous legal analyses of memes have understood monetization within the traditional copyright structure of licensing and assumed that copyright holders would seek to restrict the meme's use on the internet without consent or payment. NFTs have stepped outside the traditional underpinnings of copyright to reimagine how owning and monetizing creativity work in two important ways: (1) Where copyright law would compensate only the photographer and leave the subject of the meme with no intellectual property rights, NFTs view the subject of the meme as the "owner" entitled to compensation; and (2) NFTs do not seek to control reproduction and distri-

* Professor of Law, Western New England University School of Law. The author wishes to thank the participants of the Franklin Pierce Center of Intellectual Property Academic Roundtable – Works In Progress and the University of Mississippi Faculty Writing Groups for helpful comments and suggestions. The author is also grateful for the University of Mississippi School of Law Summer Research Grant and Western New England University School of Law Summer Research Grant that enabled this article.

bution of the meme, but rather encourage such behavior to increase the value of the underlying meme.

Since the invention of the internet, legal commentators and creative stakeholders have endlessly debated whether and to what extent copyright law should be adjusted for the internet. The rise of NFTs has answered those questions by moving away from the traditional legal understanding of where value lies in favor of endorsing the internet's understanding of value: that there can be value in virality, and that value can be recognized outside of the law's definition of copyright-holder. This Article examines the NFT phenomenon's departure from copyright norms and concludes that NFTs present an opportunity to reconsider how we think about ownership and scarcity in valuing creativity.

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I. Introduction

Non-fungible tokens, or NFTs, have taken the world by storm. Last year, sales of NFTs increased by over 21,000% over the previous year.[1] Despite the seeming ubiquity of these new assets, much confusion exists as to what they are, not least among the people purchasing them. As the government struggles to decide how to regulate NFTs,[2] online communities are trading them and developing their own understandings of what NFTs are.

This Article focuses on a small subculture within the NFT economy: the auctioning of meme NFTs. Most of the successful monetization of internet fame through memes has historically occurred through offline merchandising, such as books, T-shirts, and other sponsorships.[3] However, the rise of NFTs has created an entirely new revenue stream around memes. For instance, the little girl who appears in the Disaster Girl meme sold an NFT of the meme's famous photograph for over $400,000.[4] She was shocked when she learned that NFT's could give her a way to capitalize on her internet fame.[5]

Prior to the rise of NFTs, legal analyses of memes understood possible monetization within the traditional copyright structure of licensing, whereby those wishing to use the meme would request authorization from its owner in exchange for a fee.[6] By conditioning use of a creative work on the copyright holder's permission, licensing operates from a starting point of

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[1] *See* Marco Quiroz-Gutierrez, *Bored Apes and CryptoPunks Help Jolt NFT Market to over 21,000% Growth and $17.6 Billion in Sales Last Year*, Fortune (Mar. 10, 2022, 2:42 AM), https://perma.cc/H6TN-6LA4.

[2] *See* Jessica Rizzo, *The* Dune *NFT Fiasco Is the Least of Crypto's Legal Worries*, Wired (Jan. 19, 2022, 7:00 AM), https://perma.cc/HTB3-ARQD.

[3] Taylor Lorenz, *Memes Are Becoming Harder to Monetize*, The Atlantic (May 31, 2018), https://perma.cc/HR7G-LL3E.

[4] Nicole Lyn Pesce, *'Disaster Girl' Makes over $430,000 Selling the NFT of Her Meme*, MarketWatch (Apr. 30, 2021, 10:30 AM), https://perma.cc/ND8H-WT4S.

[5] *Id.*

[6] *See, e.g.*, Terrica Carrington, Note, *Grumpy Cat or Copy Cat? Memetic Marketing in the Digital Age*, 7 Geo. Mason J. Int'l Com. L. 139, 158 (2016) (analyzing the market of memes as one of licensed advertising); David Tan, *Digital Memes, Fair Use, and the First Amendment*, 24 J. Internet L. 1, 26 (2021) (analyzing the monetization of a meme through licensed merchandising); Cathay Y. N. Smith & Stacey Lantagne, *Copyright & Memes: The Fight for Success Kid*, 110 Geo. L.J. Online 142, 158 (2021) (discussing generally the alleged infringement of a meme commercially exploited through licensing fees); *see also* Furie v. Infowars, LLC, 401 F. Supp. 3d 952, 975-76 (C.D. Cal. 2019) (discussing the market of the meme in question as licensing opportunities); Griner v. King, No. 21-CV-4024 CJW-MAR, 2021 WL

enforced scarcity.[7] Therefore, in the pre-NFT paradigm, licensing a meme presupposed the ability to restrict its presence absent consent and/or payment. Because memes were – and are – defined by their virality online,[8] they could only realistically be restricted in the offline world, so this was mainly where they were licensed.

NFTs, however, have stepped outside the traditional underpinnings of copyright law to reimagine how ownership and monetizing creativity work in two important ways: (1) Where copyright law would compensate only the photographer and leave the subject of the meme with no intellectual property rights, NFTs view the subject of the meme as the "owner" entitled to compensation; and (2) NFTs do not seek to control any reproduction or distribution of the meme, but rather encourage such behavior as to increase the value of the underlying meme.

Since the invention of the internet, legal commentators and creative stakeholders have endlessly debated whether and to what extent copyright law should be adjusted for the internet.[9] The rise of NFTs has answered those questions by moving away from the traditional legal understanding of where the value of a creative work lies and instead endorsing the internet's understanding of value: giving meme ownership to the subject of the meme and recognizing that the value of the meme rests in its unrestricted proliferation online. So, in the auctions of meme NFTs like Bad Luck Brian and Disaster Girl, the people depicted in the memes minted the NFTs and initiated the auctions, not the people who took their famous photographs.[10] The popularity of a given meme also seems to increase the value of the meme's

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5106047, at *1 (N.D. Iowa W. Div. Oct. 20, 2021) (discussing the market of the meme in question as licensing opportunities).

[7] *See* Kevin Roose, *Buy This Column on the Blockchain!*, N.Y. TIMES (June 30, 2021), https://perma.cc/J4KZ-RF94.

[8] *See* Taylor Locke, *Elon Musk Reposted this 28-Year-Old's Meme—and Then It Sold as an NFT for Nearly $20,000 in Just 2 Days*, CNBC (Oct. 22, 2021, 5:38 PM), https://perma.cc/66VN-96WZ ("[M]emes are permissionless . . . .") [hereinafter "Elon Musk"].

[9] *See, e.g.*, Robert L. Shaver, *Copyright Law in the Digital Age*, 49 ADVOCATE 17 (2006); Susanna Monseau, *Fostering Web 2.0 Innovation: The Role of the Judicial Interpretation of the DMCA Safe Harbor, Secondary Liability and Fair Use*, 12 J. MARSHALL REV. INTELL. PROP. L. 70, 75 (2012); Marketa Trimble, *The Multiplicity of Copyright Laws on the Internet*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 3 39 (2015); Brad Frazer, *Recent Developments in Internet Law*, 50 Advocate 26 (2007); Lateef Mtima, *Whom the Gods Would Destroy: Why Congress Prioritized Copyright Protection over Internet Privacy in Passing the Digital Millennium Copyright Act*, 61 RUTGERS L. REV. 627 (2009).

[10] *See* Zach Sweat, *Scumbag Steve NFT Sells at Auction for Over $57,000*, KNOW YOUR MEME NEWS (Mar. 15, 2021, 6:38 PM), https://perma.cc/4GMK-A525 (listing

NFT.[11] For instance, when Elon Musk tweeted out Eva Beylin's meme, the increased virality helped her sell the NFT for almost $20,000.[12] Their divergence means that no one knows what to do with copyright and NFTs – and that makes them exciting.

This Article examines the NFT phenomenon's departure from copyright norms and assesses whether its evaluation of ownership and remuneration has any lessons for the future of digital copyright law. It specifically focuses on how NFTs have treated memes to provide insight into how communities around NFTs understand their value. Part II begins with an examination of the historical challenges around monetizing memes and how memes have been licensed in the offline world. Part III turns to the development of NFTs, discussing what they are and how they have been used. Part IV analysis the ways in which NFTs challenge our traditional thinking around copyright, particularly questions of ownership and scarcity. Finally, Part V imagines how we might accept NFTs' invitation to rethink how we support creativity.

II. Monetizing Memes

One of the most challenging questions to answer about the copyrightability of memes is definitional: what qualifies as a meme in the first place?[13] There is no single, agreed-upon definition. "Even websites dedicated to keeping a scholarly historical record of memes, like Know Your Meme, do not define the term."[14] Some people use the word "meme" to refer to a "specific subset of internet behavior that involves pasting captions onto other people's photos. The catalog on Know Your Meme . . . include[es] basic caption manipulation as well as viral sensations with more complicated histories."[15] Merriam-Webster defines the term as "an amusing or interesting item (such as a captioned picture or video) or genre of items

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meme NFTs being "sold by their creators or the individuals seen in the memes themselves"); Pesce, *supra* note 4.

[11] *See 7 Classic NFT Memes that Sold for A Lot of Money*, NFTICALLY (Feb. 16, 2022), https://perma.cc/2G68-JKQW (praising NFT memes because "[m]emes are an important part of internet culture").

[12] *See* "Elon Musk", *supra* note 8.

[13] *See* Stacey M. Lantagne, *Famous on the Internet: The Spectrum of Internet Memes and the Legal Challenge of Evolving Methods of Communication*, 52 U. Rich. L. Rev. 387, 389 (2018).

[14] *Id.*

[15] Lantagne, *supra* note 13, at 389.

that is spread widely online especially through social media."[16] The Wikipedia entry of "meme" defines it as "a concept that spreads rapidly from person to person via the Internet, typically as a form of humor."[17] A consistent quality of everything deemed a meme is replicability.[18] A meme, at heart, *must* be replicated.

This has made the monetization of memes online challenging. Traditional copyright law considers monetization a quality of scarcity: people will pay to obtain something they cannot get anywhere else.[19] Since a meme is the opposite of scarce, finding a way to monetize meme-dom flummoxed many. For most of the history of the internet, the owner of a meme who wanted to make money from it had to license the meme in "traditional" ways by putting it into the tangible physical world. This "fixed" the meme according to how copyright law traditionally viewed a creative work: as intellectual property physically embodied in a book, or a board game, or a calendar.[20] So, the owner of Grumpy Cat made money with books and stuffed animals.[21] The owner of Success Kid licensed the image for use in advertising.[22]

This offline merchandising was easier for some people to accomplish than others. To license a meme, one had to own the copyright of the underlying work, such as the photograph, that became the meme. Copyright ownership attaches to the creator of a work, so the owner of a photograph is the photographer. Accordingly, licensing a meme of one's pet could be straightforward from a copyright perspective. Memes that were people's children, for better or worse, were also easy to monetize, as in Success Kid: the parent who took the photograph could license the meme of their child. But even if one held the copyright to a meme, identifying a monetary stream could be difficult because it was difficult to chase down users to demand money online where the meme was replicating quickly, and it was equally difficult to

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[16] *Meme*, MERRIAM-WEBSTER, https://perma.cc/5UVS-NKWR (last accessed Apr. 10, 2022).

[17] *Meme*, WIKIPEDIA, https://perma.cc/JD4M-9JE6 (last accessed Apr. 10, 2022).

[18] *See id*.

[19] *See* Roose, *supra* note 7.

[20] *See* 17 U.S.C.A. § 102.

[21] *See* Colleen Nika, *Grumpy Cat Stuffed Animals – Spread the Disapproval This Holiday Season*, REFINERY29 (Dec. 8, 2013, 6:30 PM), https://perma.cc/V7CJ-F63A.

[22] *See* Harry Ainsworth, *Where Is the Boy from the 'Success Kid' Meme Now?*, THE TAB, https://perma.cc/GC8E-TK9C (last accessed Mar. 13, 2022).

convince people to pay money for the meme in an offline context where it was outside of its natural milieu.[23]

If it was difficult to monetize your meme fame as a copyright holder, it was much more difficult when a photo or video clip taken of you went viral. There, the person in the photograph or video clip is not the copyright holder; the photographer is.[24] Because they were not the copyright holders, people appearing in memes lacked substantial control over the meme, because they did not even hold the traditional offline rights exclusively held by a copyright owner, such as the right to distribute copies and prepare derivative works.[25] As Part VI will explore in more depth, we might call this type of meme a "split-rights" meme, because the underlying photograph or video's copyright belongs to one entity, while the person depicted in the photograph possesses separate publicity and privacy rights.[26] While a person may attempt to block a copyright holder's licensing of a photo based on publicity or privacy rights in certain very limited circumstances,[27] these rights do not give a subject the right to demand licensing of the photo.[28] The copyright holder exclusively controls whether it should be licensed.[29] The two interest-holders might not agree on monetizing the meme.

Of course, memes can and have been monetized and exploited without the permission of either the copyright holder or subject. For instance, Sweet Brown, the subject of the "Ain't Nobody Got Time for That" video meme, sued over a remix of the meme being sold for profit on iTunes.[30] (The case was eventually dismissed without prejudice due to her failure to prosecute.[31]) Antoine Dodson, the subject of the "Bed Intruder" meme, similarly

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[23] *See* Kalhan Rosenblatt, *A Meme Gold Rush? Classic Viral Images Are Selling as NFTs for Thousands of Dollars*, NBC NEWS (Apr. 29, 2021, 5:39 PM), https://perma.cc/KC68-VL78 ("As far as it goes with becoming a meme, it's very difficult to monetize that. We've spoken to numerous people who have become memes and have had a lot of difficulty making money off their creations.").

[24] *See* Lantagne, *supra* note 13, at 400-01.

[25] *See* 17 U.S.C. § 106.

[26] *See* Lantagne, *supra* note 13, at 390.

[27] *See, e.g.*, Hepp v. Facebook, 14 F.4th 204 (3d Cir. 2021).

[28] *See* Joshua Azriel, *Photographers Sue Celebrities for Copyright Infringement*, 24 J. INTERNET L. 3, 7 (2020).

[29] Licensing under normal circumstances would doubtless implicate one of the rights, such as distributing the photograph or copying the photograph, that belongs exclusively to the copyright holder, *not* to the person depicted in the photograph. *See* 17 U.S.C. § 106.

[30] *See* Megan Rose Dickey, *'Ain't Nobody Got Time for That' Viral-Video Star Does Have Time to Sue Apple*, BUS. INSIDER (Mar. 12, 2013, 11:22 AM), https://perma.cc/5ZNT-UAD2.

[31] Wilkins v. Citicasters Co., No. 5:13-cv-00026 (W.D. Okla. Sept. 23, 2013).

had his viral news interview remixed into a for-profit song.[32] By and large, the people who populate our memes have struggled to find ways to convert that fame into money.

III. The Arrival of Non-Fungible Tokens

Non-fungible tokens, or NFTs, are "authenticated digital assets."[33] In some ways NFTs resemble cryptocurrency because they depend on the same authentication procedure "through a decentralized system of nodes."[34] However, each bitcoin is designed to be interchangeable with other bitcoins[35] in the same way that each dollar bill is designed to be interchangeable with other dollar bills.[36] Conversely, each NFT is guaranteed to be unique (hence, non-fungible).[37] If you own the NFT for a particular photograph of a kitten, what you really own is a token saying that you own that kitten photograph.[38] There may be other versions of the kitten photograph on the internet over which you have no ownership. Your NFT merely states that you own a particular version, which is sometimes termed the "authentic" or "original" version of the photograph.[39]

It is important to be precise regarding what NFT ownership confers. The person who owns an NFT attached to a photograph usually does not own the copyright of the photograph — only the NFT that has been linked to that particular digital copy of the otherwise generally available photo-

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[32] *See MEMES, Part 7: Dead Giveaway*, Endless Thread (Nov. 5, 2021), https://perma.cc/NR83-BV9K.

[33] 26 No. 4 Cyberspace Lawyer NL 1.

[34] *Id.*

[35] *See* Rosenblatt, *supra* note 23.

[36] *See* Oscar Holland, *How NFTs Are Fueling a Digital Art Boom*, CNN (Mar. 10, 2021), https://perma.cc/KB64-R7VW.

[37] *See* 26 No. 6 Cyberspace Lawyer NL 1; Nicholas O'Donnell, *No, You Probably Can't Sell Your Basquiat as an NFT*, Apollo (May 12, 2021), https://perma.cc/X9DV-YRXX.

[38] The actual usefulness of NFTs in establishing ownership of art has been challenged. *See* James David (@jamesdavid), Twitter (Aug. 14, 2021) https://twitter.com/jamesdavid/status/1426664478200930310 ("[I]f an NFT relies on a domain that expires the image can be lost."); Brian L. Frye (@brianlfrye), Twitter (Aug. 14, 2021, 5:25 PM), https://twitter.com/brianlfrye/status/1426656132664229889 ("No matter what anyone says, it has nothing but a nominal connection to any artwork it purports to represent. An 'NFT of an artwork' is like a dollar bill 'of George W.'").

[39] *See* 26 No. 6 Cyberspace Lawyer NL 1 ("[W]hile you own the token with code linked to the provably unique image or other work, others may have copies of the underlying work. But only you can own that token.").

graph.[40] NFTs themselves do not contain any content other than acting as a "token[. . .] that . . . refer[s] to works of digital art by linking to them."[41] " 'All [an NFT] is, is a URL saying 'Look at this place on the internet.' "[42]

On the one hand, owning an NFT can be compared to owning a copy of a book. Buying a book in a bookstore does not give the purchaser a copyright in the book; rather, it provides them with rights only to that particular copy. Everyone else can freely access other copies of that book in their own bookstores and libraries. A cryptocurrency group recently learned this the hard way when it bought a copy of a book in the belief that owning the copy gave them adaptation rights.[43]

On the other hand, however, buying an NFT cannot be compared to buying a book, because it does not actually convey any object at all, digital or physical.[44] Buying a book provides you with a copy of the book to take home and read. Even buying a digital copy of a book provides you with a digital item, according to certain terms of use. An NFT, by contrast, is more like the receipt you get at a coat check or a valet. It tells people that you own something located somewhere. That thing, however, is not in your possession and could disappear, in the way that your coat might disappear from a coat room, or your car might get lost at a valet.[45] In the real world, this might be unlikely, but not impossible. In the digital world, scams that might deprive you of your digital coat or car seem far more likely.[46]

NFTs are often associated with digital artwork.[47] For instance, the artist Beeple sold an NFT for his digital art piece "Everydays: The First 5000 Days" for $69 million.[48] The NFT market has come down somewhat from

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[40] *See, e.g.*, Roose, *supra* note 7 ("Our lawyers want me to note that the NFT does not include the copyright to the article or any reproduction or syndication rights.").

[41] Rizzo, *supra* note 2. *See also* Kevin Collier, *NFT Art Sales Are Booming. Just Without Some Artists' Permission*, NBC NEWS (Jan. 10, 2022, 3:53 PM), https://perma.cc/R2YV-6LBH ("NFTs are not art themselves but rather digital deeds."). This means that if the property referred to in the NFT disappears, the owner of the NFT could end up with the equivalent of a broken link. *See* Rizzo, *supra* note 2.

[42] Collier, *supra* note 41.

[43] Adrienne Westenfeld, *The Crypto Bros Who Thought They Bought the Dune Rights Feel Misunderstood*, ESQUIRE (Mar. 1, 2022), https://perma.cc/7XGD-N8HH. The group later insisted it did not think it bought the copyright, although this argument has been called "somewhat implausibl[e]." Rizzo, *supra* note 2.

[44] *See* Rizzo, *supra* note 2.

[45] *See id*.

[46] *See* Edward Ongweso Jr., *The NFT Ecosystem Is a Complete Disaster*, VICE (Feb. 1, 2022, 1:43 PM), https://perma.cc/GL6P-8C9V.

[47] *See* 26 No. 4 Cyberspace Lawyer NL 1.

[48] *See* 26 No. 6 Cyberspace Lawyer NL 1; 26 No. 4 Cyberspace Lawyer NL 1; Danny Nelson, *Quarterback Patrick Mahomes Joins Gronk in NFL Blitz of NFT Mania*,

that high-water mark,[49] but well-known art auction houses like Christie's run NFT auctions as they would run auctions for any other kind of fine art.[50]

But NFTs are more than just digital artwork. Anything can become an NFT. The limit is your imagination.[51] The *New York Times* made an NFT of a column about NFTs.[52] Jack Dorsey made an NFT of the first-ever tweet.[53] A group of authors decided to sell NFTs in a new series of fantasy stories and, apparently, their accompanying fanfiction (and then backed off when there was a backlash to the idea).[54] You can buy NFTs for basketball highlight videos.[55] You can buy an NFT racehorse.[56] Digital NFT marketplaces are recording monthly sales in the billions of dollars.[57]

You can also buy NFTs for memes. Matt Furie, the creator of Pepe the Frog, has been on a long march to recapture some meaningful control of his creation. In that effort, he sold an early NFT of a Homer Simpson Pepe for nearly $40,000[58] and an NFT of an early Pepe cartoon for around $1 million.[59] A series of unauthorized "counterfeit" Pepes called "Sad Frogs" netted $4 million in sales, charging around $450 a frog.[60] And the creator of the Nyan Cat GIF made nearly $600,000 auctioning off an NFT.[61] Those

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CoinDesk (Sept. 14, 2021, 8:26 AM), https://perma.cc/YG7A-Z9DT; Jacqui Palumbo, *First NFT Artwork at Auction Sells for Staggering $69 Million*, CNN (Mar. 12, 2021), https://perma.cc/6TK9-RSK3; O'Donnell, *supra* note 37; Roose, *supra* note 7; Rizzo, *supra* note 2.

[49] *See* Raisa Bruner, *Teen Artists Are Making Millions on NFTs. How Are They Doing It?*, Time (Sept. 7, 2021, 4:54 PM), https://perma.cc/MH3J-P4HG.

[50] *See* Taylor Dafoe, *Artist Dread Scott's First NFT Is a Video of a White Man atop an Auction Block. He's Taking It Straight to Christie's*, Artnet News (Sept. 14, 2021), https://perma.cc/D3Y8-6SXB.

[51] *See* Ongweso, *supra* note 46 ("[T]he explicit goal here is to turn every inch of our physical world—and any digital world—into a place where nearly every experience and thing is quantified, commodified, and privatized.").

[52] *See* Roose, *supra* note 7.

[53] *See* Will Gottsegen, *Jack Dorsey: Proceeds from Tweet NFT Will Go to Africa Relief Charity*, Decrypt (Mar. 9, 2021), https://perma.cc/4NGL-XGZB.

[54] *See* Heloise Wood, *YA Authors Shelve NFT Story After Social Media Backlash*, The Bookseller (Oct. 25, 2021), https://perma.cc/FE24-9P57.

[55] *See* Roose, *supra* note 7.

[56] *See* Taylor Lorenz, *Digital Horses Are the Talk of the Crypto World*, N.Y. Times (May 12, 2021), https://perma.cc/LPD2-CGBX.

[57] *See* Bruner, *supra* note 49.

[58] Rosenblatt, *supra* note 23.

[59] *See* Ekin Genc, *Pepe the Frog's Creator Nuked a $4 Million NFT Collection over Copyright,* Vice (Aug. 20, 2021, 9:00 AM), https://perma.cc/M2L4-CYV3 [hereinafter "Pepe"].

[60] *See id.*

[61] *See* Holland, *supra* note 36; Rosenblatt, *supra* note 23.

already successful in the NFT space have focused on memes as a potentially huge boon for creators. For example, in 2021, twelve-year-old coder and successful NFT creator Benyamin Ahmed said, "I think memes have significant value . . . [and] play a big part in this space."[62] NFTically, "a venture that helps brands, creators and artists to setup and launch their NFT marketplace," highlighted NFT memes as "here to stay" because they "depict ownership of human emotion on the digital medium."[63]

IV. NFTs, Memes, and Copyright Law

The set-up of meme NFTs pushes against the assumptions of copyright law in two ways. First, discussions of NFT meme auctions assume that the subject of the meme, rather than the copyright holder, has the right to auction off the meme NFT. Second, NFT auctions embrace virality instead of scarcity, so memes that are more widespread and recognizable are considered more valuable.

Before the rise of NFTs, the people depicted in memes often sought compensation under copyright law theories.[64] They frequently assumed that, as the meme's subject, they had some legal right to control the meme and receive compensation for its use. As Part II established, this is a persistent misconception.

As we saw in Part II, many memes are "split-rights" situations. There *is* a copyright holder who created the underlying work depicted in the meme, but this is not the person depicted in the meme who is often referred to as "the meme" themselves. Take a popular meme like Disaster Girl.[65] Disaster Girl depicts a four-year-old child, caught in the moment of smiling in a devious way at a camera, while a house burns down in the background. The image is often interpreted as the little girl reveling in the catastrophe occurring behind her.[66] Because she did not take the photograph, Disaster Girl has only a privacy and publicity right in the meme, meaning she has a limited right to control the use of her image to be exploited, tempered by generous First Amendment considerations in favor of permitting the public

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[62] Taylor Locke, *This 12-Year-Old Coder Is Set to Earn Over $400,000 After About 2 Months Selling NFTs*, CNBC (Sept. 1, 2021 1:29 PM), https://perma.cc/LUJ8-YX96 [hereinafter "12-Year-Old Coder"].

[63] 7 *Classic Memes, supra* note 11.

[64] *See* Lantagne, *supra* note 13, at 402.

[65] *See* Disaster Girl, Know Your Meme, https://perma.cc/JEC5-JWSH (last accessed Mar. 13, 2022).

[66] *See id.*

access to items in the public interest (including, arguably, memes).[67] This publicity right interest might be enough to block licensing of the meme for use in connection with product advertising. But generally, it would not be sufficient to suppress circulation of the meme, because the copyright holder has exclusive rights over reproduction and distribution.[68] Moreover, Disaster Girl's publicity right would not allow her to license the meme traditionally for commercial exploitation, since traditional licensing would require reproduction and distribution of the photograph.[69]

Confusion over how the rights in a photograph are divided is not limited to memes. There has been a rash of litigations in the past few years involving paparazzi photographers suing the celebrities depicted in their photographs for reposting them on social media.[70] This is another split-rights situation, and the interests of the copyright holder and the subject may not align. Moreover, the person depicted in the photograph feels that they may have some inherent right over their likeness – for instance, to post the photograph on their social media – that copyright law does not recognize. The publicity and privacy rights of these subjects often play second fiddle to the copyright holder's copyright rights. Courts favor the copyright holder's right to publicize a photograph over the subject's right to block it. For example, a federal district court in California said in a 2015 decision:

> Since Plaintiffs do not identify any use of their likenesses not wholly contained within the photographs, Plaintiffs' claims seek to prevent Defendant from distributing the copyrighted work itself . . . Accepting Plaintiffs' interpretation without separating the likeness from the work would . . . destroy copyright holders' ability to exercise their exclusive rights under the Copyright Act, effectively giving the subject of every photograph veto power over the artist's rights under the Copyright Act and destroying the exclusivity of rights the Copyright Act aims to protect.[71]

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[67] 6 Rudolf Callman, Callmann on Unfair Competition § 22:34. (4th ed. 2010).

[68] *See* 17 U.S.C. § 106.

[69] *See id*.

[70] *See* Charles Trepany, *Liam Hemsworth, Ariana Grande and More: Celebs Sued by Paparazzi over Copyright*, USA Today (Dec. 16, 2019), https://perma.cc/K239-ABAN.

[71] Maloney v. T3Media, Inc., 94 F. Supp. 3d 1128, 1137–38 (C.D. Cal. 2015), aff'd, 853 F.3d 1004 (9th Cir. 2017); *see also* In re Jackson, 972 F.3d 25, 40 (2d Cir. 2020).

Or, to put it in non-legal terms: "[D]espite being the unwilling subject of the photograph, I could not control what happened to it."[72] The paparazzi cases show that the photographer's desire to hide a photograph trumps the subject's ability to publicize it.[73]

The subject's lack of legal rights also explains why the phenomenon of "revenge porn" demanded a new statutory regime. Under copyright law, unless the subject of explicit photographs took them, that person could not control their dissemination. Recognizing the harm done to people depicted in revenge porn, many states addressed the problem by passing a statute giving greater power to the subjects of revenge-porn photographs to prevent their use.[74]

NFTs echo this power shift toward subjects in a less harmful context. Anyone can mint an NFT of anything they want.[75] So, if the subject of a meme wants to auction that meme as an NFT, that person can mint the NFT and run the auction, as occurred with Disaster Girl,[76] Bad Luck Brian,[77] and Scumbag Steve.[78] Because they minted and auctioned the NFT, they receive the money — not the photograph's copyright holder. Although NFTs were originally touted by some commentators as "a powerful tool to protect artists' rights," in the meme context it is not the artists but the subjects who are benefitting.[79] NBC News has reported that "[A]n influx of viral celebrities featured in classic memes have minted and sold their images as NFTs . . . ."[80] Know Your Meme concurred that meme NFTs are being successfully auctioned by the people depicted in them.[81] Commentators say purchasing an NFT is analogous to getting an autograph from a famous

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[72] Emily Ratajkowski, *Buying Myself Back*, THE CUT (Sept. 15, 2020), https://perma.cc/4BDF-NWMQ.

[73] In those cases, the paparazzi does not entirely wish to hide the photographs, but they do want to block the subject from publicizing them.

[74] *See* Christian Nisttáhuz, *Fifty States of Gray: A Comparative Analysis of 'Revenge-Porn' Legislation Throughout the United States and Texas's Relationship Privacy Act*, 50 TEX. TECH L. REV. 333, 348 (2018).

[75] *See* Nicholas Rossolillo, *A Complete Guide to Minting NFTs (Using OpenSea as an Example)*, MOTLEY FOOL (Mar. 7, 2022), https://perma.cc/E2XR-YXD3 (detailing the process with no requirement of proof of ownership over the file being minted).

[76] *See Zoë Roth Sells 'Disaster Girl' Meme as NFT for $500,000*, BBC NEWS (Apr. 30, 2021), https://perma.cc/7HBA-QJQK.

[77] *See* Rosenblatt, *supra* note 23.

[78] *See* Sweat, *supra* note 10.

[79] *See* Clifford C. Histed, *The Coming Blockchain Revolution in Consumption of Digital Art and Music: The Thinking Lawyer's Guide to Non-Fungible Tokens (NFTs)*, K&L GATES (Mar. 25, 2021), https://perma.cc/KP2A-AEED.

[80] *See* Rosenblatt, *supra* note 23.

[81] *See* SWEAT, *supra* note 10

person.[82] For meme NFTs, that famous person is the person depicted in the meme, not the person who took their photograph.

Accordingly, Zoë Roth, the subject of the Disaster Girl meme, sold her NFT for over $400,000 in 2021.[83] She commented that she was excited to finally have a means to capitalize on her fame as a meme.[84] Similarly, Scumbag Steve, a meme of a young man interpreted to be a "scumbag" based on his clothing and facial expression,[85] sold his NFT for $57,000.[86] After the success of the meme's NFT auction, a commentator tweeted that Scumbag Steve was "finally get[ting] rewarded for having his face plastered as a meme for a very long time."[87] The real Scumbag Steve, a man named Blake Boston, agreed that he was "grateful" for the money raised.[88] "Anything's better than $0," he said.[89] The subject of Overly Attached Girlfriend sold the NFT for about $411,000,[90] and the subject of Bad Luck Brian sold his for around $36,000.[91]

It is not exactly clear what the copyright implications of these NFT auctions are. For Disaster Girl and Scumbag Steve, the subjects' parents took the photographs, avoiding a split-rights conflict between subject and copyright holder.[92] While Overly Attached Girlfriend was the copyright holder of her meme, Bad Luck Brian was not. Some meme subjects who have sold NFTs may have gotten permission from the copyright holder. People have created NFTs for a wide range of works to which they have dubious copyright claims, sometimes attracting attention from the original artist.[93] Pepe the Frog's original creator had a collection of "sad frogs" removed from an

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[82] *See* Rosenblatt, *supra* note 23; Ekin Genc, *Overly Attached Girlfriend NFT Sells for $411,000*, DECRYPT (Apr. 4, 2021), https://perma.cc/398F-GY22 [hereinafter "Overly Attached Girlfriend"].

[83] *See* Pesce, *supra* note 4.

[84] *See id*.

[85] Billy Baker, *Savoring Time as the Internet's Favorite Punching Bag,* BOSTON (Nov. 24, 2011), https://perma.cc/2923-53N3.

[86] *See* Sweat, *supra* note 10.

[87] *See id.*

[88] *See id.*

[89] *See Blake Boston Revisits Becoming 'Scumbag Steve' as We Catch Up with Him for the Meme's 10-Year Anniversary and Upcoming NFT Auction*, KNOW YOUR MEME (2021), https://perma.cc/6DX9-22SP [hereinafter "Blake Boston"].

[90] *See* "Overly Attached Girlfriend", *supra* note 82.

[91] *See* Rosenblatt, *supra* note 23.

[92] *See id*; "Blake Boston", *supra* note 89.

[93] There have also been trademark disagreements. *See* Tanzeel Akhtar, *Nike and Hermes File Lawsuits for Trademark Infringement as Fashion Collides with NFTs*, COINDESK (Feb. 4, 2022), https://perma.cc/V4E2-ZEHR.

NFT marketplace for allegedly violating his copyright.[94] The Basquiat estate intervened to block an NFT auction that purported to sell the right to destroy an original Basquiat work.[95] Miramax sued Quentin Tarantino over his plans to offer *Pulp Fiction* NFTs.[96] OpenSea, "the most popular marketplace for NFTs," found that "over 80 percent" of the works being minted on its marketplace "were plagiarized works, fake collections and spam," and the situation has been described as "an art thievery quagmire of its own making."[97] Complaints from digital art websites regarding fraudulent NFTs are increasing exponentially.[98]

Whether or not NFTs constitute copyright infringement is not clear-cut. We do not yet have any cases or rulings on the question. One theory is that "creating the NFT in the first place may be copyright infringement" because it produces an unauthorized reproduction of the work.[99] To mint an NFT, you have to upload the file that your NFT will point back to as the "image asset."[100] If you do not have the rights to make a copy of that file, then reproducing it to upload it for the purpose of minting the NFT could be considered copyright infringement in and of itself, as the copying of a copyrighted work is a right that belongs exclusively to the copyright holder to control.[101]

However, the NFT itself is arguably "irrelevant" to copyright infringement, since the NFT itself has no content within it — it is simply a receipt for a particular copy of the work.[102] The uploading of the file to connect to the NFT might be copyright infringement — but that is not the NFT. Accordingly, as long as the NFT is being sold without representing that it includes any of the exclusive rights of copyright, the *minting* process of the

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[94] *See* "Pepe", *supra* note 59.

[95] *See* O'Donnell, *supra* note 37; Rizzo, *supra* note 2.

[96] Miramax, LLC v. Quentin Tarantino, Dkt. No. 2:21-cv-08979 (C.D. Cal. Nov. 16, 2021).

[97] *See* Ongweso, *supra* note 46.

[98] *See id.*; *see also* Collier, *supra* note 41 ("[T]hanks to the explosion of the NFT art market, thieves have started stealing her work at a jaw-dropping rate.").

[99] *See* O'Donnell, *supra* note 37. Keith Estiler, *Cj Hendry Destroys Basquiat and Warhol Artwork in NFT Stunt*, HYPEBEAST (Apr. 16, 2021), https://perma.cc/WFV4-RJ2S.

[100] See Sumi Mudgil, *How to Mint an NFT*, ETHEREUM FOUND. (Apr. 21, 2021), https://perma.cc/JP24-NXSA.

[101] *See* 17 U.S.C. § 106. There are exceptions which allow people to make copies without the copyright holder's consent, such as for personal archival purposes, or for fair use. *See* 17 U.S.C. § 107. Such exceptions seem unlikely to apply in the explicitly commercial marketplace of NFTs.

[102] Collier, *supra* note 41.

NFT might have implicated copyright but the mere sale of the NFT arguably does not violate any intellectual property law, since it does not involve a further reproduction of the file.[103] At least some of the meme NFTs appear to explicitly disclaim ownership of the copyright of the meme, attempting to disconnect the meme from copyright altogether.[104] At any rate, the terms of use of the NFT platform being used for many of these auctions explicitly states that the NFT's sale does not confer any copyright, that there may be other claims on the image asset connected to the NFT, and that the platform itself will not be liable for any copyright or trademark infringement connected to the NFT.[105]

The control and compensation that the rise of NFTs has given to meme subjects raises whether a wider ambit of control could, or should, be given to the subjects of photographs more generally. Should we reconsider how the legal system traditionally values the rights of the copyright holder over the rights of those subject? The Supreme Court's first decision recognizing the photographer as the sole copyright holder of a photograph, *Burrow-Giles Lithographic Co. v. Sarony*,[106] took place in a world in which photography was a highly specialized and complicated profession. Photographs were scarce luxuries that those who could afford them deliberately chose to have taken. Indeed, the Court's description of the process of taking the photograph of Oscar Wilde at issue sounds more like painting a portrait: it involved "selecting and arranging the costume, draperies, and other various accessories . . . arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, [and] suggesting and evoking the desired expression."[107] In such an atmosphere, equating the photographer with a painter as the sole creator of the work made sense.

Today, everyone with a smartphone is a photographer, able to snap a photograph in seconds just by reaching into a pocket. The vast majority of photographs do not involve the painstaking, time-intensive process that Oscar Wilde's photographer followed in *Burrow-Giles*.[108] Given how radically the medium of photography has changed, perhaps the law should re-evaluate how it views the rights to a photograph. While the quick, easy, and cheap

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[103] *See also* "Elon Musk", *supra* note 8 ("[B]ecause of the legal gray area that NFTs exist in, it's not clear whether the use of this image infringes on any potential copyright laws.").

[104] *See* Rosenblatt, *supra* note 23.

[105] *See Terms of Service,* FOUND. LABS (Apr. 8, 2022), https://perma.cc/MSJ6-3LX8.

[106] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).

[107] *Id.* at 60.

[108] *See id.* at 54.

act of taking a photograph requires little effort for the photographer, it grants them enormous power over the person depicted in the photograph, even when it was taken without their knowledge. This was a far more unusual occurrence when photography was a time-intensive, heavily posed art.[109] The revenge porn situation might most starkly challenge our assumption that the person who cares most about a photograph is its taker. There, it is very clear that the person depicted in a photograph is more greatly harmed by its unfettered use than is the copyright holder. Like the NFT market's greater grant of control to the meme's subject, state laws giving revenge porn victims power over the dissemination of their photographs urge us to consider whether today's power imbalance between photographer and subject deserves legal acknowledgement.

The control and compensation that NFTs have afforded meme subjects also invites questioning whether we should worry about compensating people who become memes. Unlike athletes and celebrities, who have recourse to other revenue streams, people who become memes seldom receive any compensation.[110] There is an argument that it is unnecessary to compensate anyone in memes. If copyright law is about granting property rights in creative output to incentivize creativity,[111] the people depicted in memes typically do not need that incentive because they generally become memes inadvertently. Very few meme subjects were consciously involved in creating their memes. Copyright law views the photographer who took the underlying meme photograph as the creator needing creative incentive, not the meme subject. Further, memes most often arise organically from the collective action of the internet, meaning no individual person requires a financial incentive to produce a meme.[112]

In fact, the internet has shown that people seldom need an incentive for the initial act of creativity. Social media is full of creators who post without payment. What people seem to want is to be compensated for an act of creativity that the world deems valuable *after* it has come into being. This compensation does not line up with the rewards created by copyright law. People create TikTok dances for free all the time but hope to be compen-

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[109] Emily Ratajkowski has written movingly of her loss of control of her image and the emotions connected to her body's exploitation by photographers. *See supra* note 72.

[110] *See* Nelson, *supra* note 48 (noting that NFTs are "*another* method to expand athletes' personal brands").

[111] Tonya M. Evans, *Cryptokitties, Cryptography, and Copyright*, 47 AIPLA Q.J. 219, 226 (2019) [hereinafter "Cryptokitties"].

[112] *See* Lantagne, *supra* note 13, at 412-13.

sated if one of those dances gains pervasive notoriety.[113] But since copyright law does not protect individual dance moves, many viral dance moves may not be copyrightable. Moreover, copyright law provides value by creating scarcity. It incentivizes creators by letting them control reproduction and dissemination of their creative work. However, on the internet, there is little value until the creative work is uncontrollably reproduced, giving it viral fame. Therefore, to the extent copyright is meant to incentivize creativity, in the digital world it does so imperfectly. Much of the creativity of the internet exists outside of copyright law's value judgments.

The internet has accordingly exposed that our intellectual property system might understand compensation incorrectly. Our system is ineffective at making people feel compensated for creativity society deems valuable. Take, for example, the recent spate of litigation against videogames based on their use of famous dance moves performed by players' avatars. In one case, Alfonso Ribeiro sued Fortnite for copying his well-known "Carlton Dance."[114] The Copyright Office refused to register the dance move, on the ground that it was a "simple routine" that could not be copyrighted.[115] The Carlton Dance clearly had value for its audience because the videogame developers wanted to exploit it, but copyright law permitted that exploitation.

In another case over a video game's use of a dance routine that the Copyright Office deemed unprotectable, the rapper 2Milly bluntly noted that it appeared Black creators were disproportionately affected by appropriation of uncopyrightable work in a way that devalued their creativity. He stated that "Epic has consistently sought to exploit African-American talent in particular in Fortnite by copying their dances and movements."[116] Black creators on TikTok went on strike in the summer of 2021, "[t]ired of not receiving credit for their creativity and original work — all while watching white influencers rewarded with millions of views performing dances they didn't create."[117]American intellectual property law has a long history of oppressing and exploiting Black creators,[118] from refusing to allow enslaved

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[113] *See* Cache McClay, *Why Black TikTok Creators Have Gone on Strike*, BBC NEWS (July 15, 2021), https://perma.cc/NE5P-2RVH.

[114] *See* Ribiero v. Take-Two Interactive Software, Inc., Compl., Dkt. No. 2:2018cv10417 (C.D. Cal. Dec 17, 2018).

[115] *See* Ribiero, Mot. To Dismiss, Dkt. 2:2018cv10417 (C.D. Cal. Feb. 13, 2019).

[116] Baker v. Epic Games, Inc., Compl. 35, Dkt. No. 2:19CV00505 (C.D. Cal. Jan. 23, 2019).

[117] Sharon Pruitt-Young, *Black TikTok Creators Are on Strike to Protest a Lack of Credit for Their Work*, NPR (July 1, 2021), https://perma.cc/UQ4A-AZC9.

[118] *See id.* ("We can take any historical period and look at popular culture . . . and see the ways in which white folks who have access to mainstream capital and

people to hold patents to their inventions[119] to letting Rock-n'-Roll labels take the work of Black artists and attribute it to white artists under the statutory compulsory licensing system.[120] Looking at the example of dance, Anthea Kraut found that "[w]ith few exceptions, the names of non-white dancers are not present, or at least not easily detectable, in official copyright archives from the first two-thirds of the twentieth century."[121] In relation to Black creators' TikTok strike, Sarah J. Jackson described how:

> Since the founding of this country, Black art forms, Black dance forms, have been appropriated, watered down, repackaged and used to make money by white folks . . . And so, if you put it in that context of that longer history of basically stolen labor and stolen creativity, then you start to see why it matters to people and why it's important to people to be credited for the origins of these things.[122]

This story continues today in the digital context. The originators of popular internet content often do not receive compensation for it under our existing intellectual property system, and the brunt of this is often suffered by Black artists.[123] A larger reckoning with who the copyright system compensates is long overdue. In a surprising way, meme NFTs have become part of that battle by giving compensation to whom the internet values, rather than whom the law prioritizes.

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mainstream media and other forms of access were drawing inspiration from the art forms and creative forms of Black folks.").

[119] *See* Brian L. Frye, *Invention of A Slave*, 68 SYRACUSE L. REV. 181, 181-82 (2018).

[120] *See* Neela Kartha, *Digital Sampling and Copyright Law in a Social Context: No More Colorblindness!!*, 14 U. MIAMI ENT. & SPORTS L. REV. 218, 232-33 (1997); *see generally* K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339 (1999); Vincent R. Johnson II, *Sampling as Transformation: Re-Evaluating Copyright's Treatment of Sampling to End Its Disproportionate Harm on Black Artists*, 70 AM. U. L. REV. F. 227 (2021).

[121] ANTHEA KRAUT, CHOREOGRAPHING COPYRIGHT RACE, GENDER, AND INTELLECTUAL PROPERTY RIGHTS IN AMERICAN DANCE 128 (2015) (quoted in Gia Velasquez, *No Credit Where Credit Is Due: Exploitation in Copyright*, 99 J. PAT. & TRADEMARK OFF. SOC'Y 693, 702 (2017)).

[122] Pruitt-Young, *supra* note 117.

[123] *See* Shamira Ibrahim, *How the Internet Became a Playground for Exploiting Black Creators*, VICE, https://perma.cc/A45A-3QQD (last accessed May 7, 2022).

A. Scarcity vs. Virality

Copyright law has always had the fundamental purpose of creating scarcity.[124] When the printing press — the World Wide Web of its day — threatened to make information more accessible than ever, copyright was created to give printers the power to prevent copying.[125] The effect was to create artificial scarcity when virality threatened.[126]

Copyright protections were predicated on the theory that scarcity helps create value.[127] When the online peer-to-peer music sharing network Napster was developed to make music distribution easier than ever, it proposed making all music available to its users for a monthly flat fee. This would have brought in a considerable amount of money to be divided among the stakeholders: as one commentator put it, "more money than ever dreamed of."[128] However, the mainstream music industry clung to the idea that maintaining the scarcity of music was necessary to retain its value.[129] Artists and record labels successfully sued Napster for copyright infringement, eventually leading it to shut down.[130] The same desire for scarcity underlies the Motion Picture Association's longstanding concern with piracy. If the movie or television show can easily be found in free or cheap unauthorized copies, then the copyright's value falls.[131]

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[124] *See* Jake Linford, *Copyright and Attention Scarcity*, 42 CARDOZO L. REV. 143, 145 (2020).

[125] *See id.* at 156.

[126] *See id.* at 146.

[127] *See* Roose, *supra* note 7.

[128] Michael Gowen, *Requiem for Napster*, PC WORLD, (May 18, 2002, 12:17 PM), https://perma.cc/SU8N-G87Y.

[129] *See* Stephen Dowling, *Napster Turns 20: How It Changed the Music Industry*, BBC (May 31, 2019), https://perma.cc/Z8CH-BNR (quoting *Rolling Stone* journalist Steve Knopper: "[The record business] sure made it unnecessarily hard for themselves for a long time."); *see also* Casey Rae-Hunter, *Better Mousetraps: Licensing, Access, and Innovation in the New Music Marketplace*, 7 J. BUS. & TECH. L. 35, 40 (2012) ("The mainstream recorded music industry was slow to understand and exploit the dynamics of the emerging digital music marketplace[,] . . . [preferring a] return to the old system of scarcity and near-exclusive control of distribution."); *cf.* Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 7 (2005) (suggesting that the record companies move forward with digital music by "abandon[ing]. . .the scarcity paradigm").

[130] *This Day in History (March 6, 2001): The Death Spiral of Napster Begins*, HISTORY, https://perma.cc/DMH5-HP66 (last visited July 11, 2022).

[131] *See* "Cryptokitties", *supra* note 111, at 249.

NFTs have been described as representing the ability to "create[ ] digital scarcity,"[132] which heretofore has been a challenge on the internet.[133] One article describes the NFT phenomenon as follows: "Buyers require . . . representations to ensure that their NFT is legitimate and rare, rarity being one of the most valuable qualities of these assets."[134] While some NFT marketplaces state that creators "may have to represent . . . that the work [in question] is scarce,"[135] in practice this requirement is nonsensical. The alleged rarity of NFTs is entirely fake. The *NFT* is rare and scarce; the work it is attached to, by contrast, can often be found in many other places in the identical form as the version linked with the NFT.[136] The same article even acknowledges this: "[W]hen an artist sells a piece of NFT art, it is not the actual underlying artwork that is being sold. Rather, it is a copy of the art, with the NFT representing ownership of the copy."[137] All other copies of the art continue to exist, and, in the world of memes, continue to be copied and shared at will.[138]

Instead of creating scarcity, NFT markets appear to prioritize virality as a source of value, especially when it comes to memes. The more viral a meme is, in the NFT meme economy, the greater the value of the meme. Ross Blum, the "Chief Operating Officer at Quidd, the world's largest social marketplace for digital goods and media technologies,"[139] gave the following description:

> But that one-of-one card potentially only has value . . . based on [ ] the rareness, and there is no sort of context, there is no community, there is no

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[132] Katya Fisher, *Once Upon a Time in NFT: Blockchain, Copyright, and the Right of First Sale Doctrine*, 37 CARDOZO ARTS & ENT. L.J. 629, 631 (2019); *see also* Holland, *supra* note 36.

[133] *See* Roose, *supra* note 7.

[134] Chris Bennett & Cody Koblinsky, *Non-Fungible Tokens: Emerging Issues in the Emerging Marketplace*, DLA PIPER (Mar. 30, 2021), https://perma.cc/K4H7-T9RW.

[135] 26 No. 4 Cyberspace Lawyer NL 1.

[136] *See, e.g.*, *Dread Scott: White Male for Sale*, CRISTIN TIERNEY (2021), https://perma.cc/SD5T-MM8H.

[137] 26 No. 4 Cyberspace Lawyer NL 1.

[138] *See* Ross Blum et al., *Panel 1: Digital Art and Digital Collectibles*, 37 CARDOZO ARTS & ENT. L.J. 567, 569-70 (2019); Chris Berg, *Non-Fungible Tokens and the New Patronage Economy*, COINDESK (Mar. 22, 2021), https://perma.cc/V6Y2-LBNE. *But see* 26 No. 4 Cyberspace Lawyer NL 1 ("As with any collector's item, uniqueness and scarcity are the two most important attributes that make NFT art valuable. NFT art will only attract demand if uniqueness and scarcity are guaranteed. Creators will have to make the necessary representations for buyers to trust that they are getting a one-of-a-kind product.").

[139] Blum, *supra* note 138, at 568.

> story behind it and it's just rivalries, it's not necessarily different than any other sort of unique object out there, say, your Grandma's hand-knit sweater or a rare piece of art that your friend made. But the notion that these things have value is really brought together by appearance, belonging, the interest and . . . the incentive structure of wanting to own these digital objects.[140]

In other words, the more well-known the underlying work of an NFT is, with a community of people interested in it, the more value the NFT has. In the case of memes, if you can find the meme everywhere, then it is worth money: "[E]stablished, years-old memes seem to be the most in demand among NFT buyers."[141]

Given that value is found in a meme's popularity, and that the copyright status of memes is frequently uncertain, the sale of a meme NFT typically does not seek to restrict access to the meme.[142] For instance, the Nyan Cat GIF NFT was sold with a simple "limited, worldwide, non-assignable, non-sublicensable, royalty-free license to display the Digital Artwork."[143] This limited right of display is what many other people around the world were already exercising when they used or reposted the GIF. The purchaser has the right to resell the NFT but otherwise is not allowed to make "commercial use" of the GIF.[144] Meme NFTs often do not involve granting any of the exclusive rights of copyright, because the split rights situation means the NFTs are often sold by the subject, not the copyright holder. The possessor of the NFT accordingly "cannot prevent the spread or use of the meme,"[145] even if a meme could be put back in its box.[146]

But it appears that meme NFT owners do not want the ability to restrict dissemination. They usually wish to encourage further viral distribution of the meme, because creating scarcity of the meme would detract from the NFT's value.[147] In fact, some have seen meme NFTs as a way of reviving "dead memes," or "meme[s] that w[ere] once popular but ha[ve] since lost

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[140] *Id.*

[141] Rosenblatt, *supra* note 23.

[142] *See* "Overly Attached Girlfriend", *supra* note 82 ("Morris cannot prevent anyone from spreading the meme, nor can the new owner of the NFT.").

[143] *Terms of Service*, FOUND. LABS (June 26, 2021), https://perma.cc/DQV9-XQ42.

[144] *Id*.

[145] *See* Rosenblatt, *supra* note 23.

[146] *See* "Overly Attached Girlfriend", *supra* note 82 ("[S]elling memes as NFTs will only give these creators control over their finances, not the memes themselves.").

[147] This seems to be different from the holders of NFTs of other kinds of creative works, who seem to resent their creative properties proliferating elsewhere on the

[their] stature."[148] An expensive NFT sale attracts attention and brings a meme back into the "spotlight."[149] Again, the NFT causes the opposite of scarcity.

Some NFT meme markets try to create the impression of scarcity by taking a ubiquitous meme like Pepe the Frog[150] and creating spin-off "rare Pepes."[151] However, even these are taking advantage of the widespread viral fame of the original underlying meme. Many NFT meme buyers lean into the fact that a meme NFT only has value because it viral.[152] It has been observed that shortly after a celebrity with a large online following, like Elon Musk, posts a meme on Twitter is a prime time to take advantage of the increased value brought by such exposure by quickly minting an NFT.[153]

The trend toward virality in NFT markets goes against the instinct underlying copyright law for centuries. After all, who would pay for something that can be obtained for free? The obvious answer is no one. Often, when someone buys an NFT, they are not only or even mostly paying for a digital file that is freely available elsewhere. Instead, NFTs often come packaged with other perks and features.[154] For instance, some NFTs are sold with ongoing royalty payments or dividend streams.[155] Others permit further

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internet. *See* Victor Tangermann, *Person Furious That Someone Right Click Saved Their Precious NFT*, FUTURISM (Nov. 5, 2021), https://perma.cc/VS96-WT77.

[148] *See* Rosenblatt, *supra* note 23.

[149] *Id.*

[150] *See Pepe the Frog*, KNOW YOUR MEME, https://perma.cc/72CG-WWMC (last visited Apr. 21, 2022).

[151] *See* Corin Faife, *Meme Collectors Are Using the Blockchain to Keep Rare Pepes Rare*, VICE (Jan. 27, 2017), https://perma.cc/63XY-SYQP. Arguably, these are *bad* Pepes, because the good, useful memes are the ones everybody knows.

[152] *See also* Rizzo, *supra* note 2 (noting that some people "are already launching NFT projects governed by Creative Commons licenses," which, "[a]t their least restrictive, . . . allow artists to waive all rights to their work, making their images freely available to anyone to use or adapt for any purpose").

[153] *Cf.* "Elon Musk", *supra* note 8.

[154] *See* Steve Kaczynski & Scott Duke Kominers, *How NFTs Create Value*, HARV. BUS. REV. (Nov. 10, 2021), https://perma.cc/A7VQ-L4R9 ("It's not uncommon to see creators organize in-person meetups for their NFT holders, as many did at the recent NFT NYC conference. In other cases, having a specific NFT in your online wallet might be necessary in order to gain access to an online game, chat room, or merchandise store. And creator teams sometimes grant additional tokens to their NFT holders in ways that expand the product ecosystem: owners of a particular goat NFT, for example, were recently able to claim a free baby goat NFT that gives benefits beyond the original token; holders of a particular bear NFT, meanwhile, just received honey.").

[155] 26 No. 6 Cyberspace Lawyer NL 1.

commercialization of the art connected to the NFT, such as merchandising.[156] Bands sell NFTs that come with vinyl albums or concert tickets.[157] The Red Sox auctioned an NFT "that comes with an exclusive experiential VIP package, including the opportunity to throw the ceremonial first pitch at Fenway Park, two tickets to a Red Sox home game, a stadium tour and a meet and greet with Red Sox alumni."[158] As noted already, Quentin Tarantino planned to auction NFTs that would come with "previously unknown secrets" about the movie *Pulp Fiction*.[159] The NFT of a Basquiat drawing famously purported to include the right to destroy the one original of the physical work.[160] Arguably, it is those other perks and features that provide the NFT's economic value, and the "one true original" billing is really just a red herring. While the transaction might be described as the purchase of an NFT, you are often really paying for a vinyl record or event tickets. You can hardly get more old-school than that.

However, NFTs are usually discussed as if they are not often about these physical perks. Instead, commentators have praised NFTs for "enabl[ing], for the first time, verifiable digital scarcity — an elusive technological characteristic in the world of Web 2.0."[161] This discussion frames NFTs in terms of their promise of owning the true original digital version of a work. But that raises the question of why such ownership is considered appealing in the first place. Why would owning an "original" with possibly millions of identical versions matter?

In one sense, this resembles the debate over art forgery.[162] If a copy of a masterpiece is virtually indistinguishable from the original, who is harmed by the fact that is it *not* the original? If the value of an original piece of art lies in its originality or the fact that it was touched by a particular person, then if so, why?[163] Forgers have explicitly forced this question by releasing

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[156] *See* 26 No. 4 Cyberspace Lawyer NL 1.

[157] *See* Roose, *supra* note 7.

[158] Thomas Harrigan, *Bid on Limited-Edition Fenway Park NFTs*, Major League Baseball (Aug. 9, 2021), https://perma.cc/RWJ9-QJGL.

[159] Miramax, LLC v. Tarantino, Compl. 1, Dkt. No. 21-cv-08979 (C.D. Cal. Nov. 16, 2021).

[160] *See* O'Donnell, *supra* note 37.

[161] "Cryptokitties", *supra* note 111, at 220.

[162] *See* Blum, *supra* note 138, at 571.

[163] *See, e.g.*, Max Horberry, *The Artist Beneath the Art Forger*, N.Y. Times (Feb. 21, 2020), https://perma.cc/8YCP-G4JN (noting that forgery "champion[s]" the idea that art has "intrinsic merit" and does not need to be deemed an original copy in order to be appreciated and have value); Kevin Wiesner, *1,000 Warhol Artworks Are on Sale for Just $250 Each. But Only One is Real*, CNN (Oct. 25, 2021), https://

NFTs of their forgeries.[164] NFTs attack the question head-on. In the world of NFTs, you do not just get a forgery. You get a digital file identical to every other digital copy of that file. Some commentators have remarked that NFTs can "protect investors by helping establish provenance of art works"[165] and anticipate that they will bring about the return of the scarce and controllable world in which "everything is on blockchain and you're not able to create [ ] copies anymore."[166] However, at heart, NFTs ask the question of why we should care about copying when the copy and the original are indistinguishable. Is the *idea* of scarcity worth so much to us that we would pay six figures for a digital cat, just because we're told it is unique, even if we know the same image can be found practically everywhere online?[167]

The answer might be that it is not the scarcity, but the community, that creates the value. Those in the art space of the NFT world have acknowledged that it is not the aesthetics of the art but rather the community surrounding the art that decides its value.[168] Indeed, the most valuable NFTs often come with "community spaces": access to members-only exclusive places, either on Discord servers or in real life.[169]

Memes are primed to be commodified in a space where value is based on community. A meme, unlike an individual piece of art, definitionally relies on community to exist because it is predicated on virality. If something becomes a meme because it is replicated and shared, then memes cannot exist outside of a community. One can try to create something that *looks* like a meme, such as a photo with text overlaid, but it is not a true meme until it is replicated. Indeed, some NFT artists have noted that art bought and sold via NFTs qualitatively resembles memes because of its reliance on community.[170] One artist described the NFT community as "mycelium — the interconnected fungus network that forms a community in the way tree

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perma.cc/6PJ5-URJQ (noting the criticism that the art industry cares more about the pointlessness of possessing an original copy than it does about "the art itself").

[164] *See, e.g.*, Sarah Cascone, *Master Forger Wolfgang Beltracchi Shows Off His Skills (and Pointed Humor) with a New NFT Collection*, ARTNET (Oct. 11, 2021), https://perma.cc/9JUZ-X38A.

[165] 26 No. 6 Cyberspace Lawyer NL 1.

[166] Tonya M. Evans et al., *Panel 2: Art Law and Blockchain*, 37 CARDOZO ARTS & ENT. L.J. 589, 601 (2019).

[167] The answer is, apparently, yes. *See* "Cryptokitties", *supra* note 111, at 250.

[168] *Cf.* Bruner, *supra* note 49.

[169] Reply All, *#185 The Rainbow Chain*, GIMLET MEDIA (Apr. 7, 2022), https://perma.cc/R7Y6-U7M8; *see also* Larry Dvoskin, *Why Community Is the Secret to NFT Success*, ROLLING STONE (Jan. 17, 2022), https://perma.cc/9SJG-U4TH.

[170] *See* "12-Year-Old Coder", *supra* note 62.

roots interconnect with each other."[171] Successful NFT artists use the NFT community as a substitute for the traditional model of agents or managers.[172] Without that connection to community, it can be difficult to join the NFT goldrush.[173] "[N]urturing the community is exactly how you get ahead in the NFT space."[174] The community aspect drives people to purchase your NFTs out of a desire to support you and belong to your digital community.[175]

V. Envisioning a New Way of Thinking About Creative Value

The huge amounts of money currently being spent on NFTs creates the idea of an exciting and unpredictable new commodity fundamentally different from traditional media. The desire to participate in this action by purchasing an NFT seems less connected to the particular file the NFT is attached to and more to the hype around the NFT market as a cash cow. This is like buying a book not because you want to read that particular book, but because you are speculating in the book's after-market. In the first few months of 2021, more than $2 billion was spent on NFTs.[176] By the third quarter of 2021, it was almost $11 billion.[177]

Fundamentally, however, NFTs are not new. They are a form of speculation and investment such as has existed for millennia. People buy NFTs hoping they are "good investment[s]" that "will increase in value."[178] These buyers are not necessarily admirers of the underlying work, but investors. Some people have compared this to the Beanie Babies craze of the 1990s.[179] Others have classified it as a pyramid scheme.[180] At best, they are "as risky as gambling." Some claim that "few financial professionals would recom-

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[171] *See* Dvoskin, *supra* note 169.

[172] *See id.*

[173] *See id.*

[174] Will Fan, *Leading in the New World of NFTs: Creating Community and Intrinsic Value*, Forbes (Jan. 6, 2022), https://perma.cc/JXV8-LC47.

[175] *See id.*

[176] *See* Anthony J. Dreyer & David M. Lamb., Can I Mint an NFT With That?: Avoiding Right of Publicity and trademark Litigation Risks in the Brave New World of NFTs (2021), available on Westlaw at 2021 WL 1850623.

[177] *See* Collier, *supra* note 41.

[178] 26 No. 6 Cyberspace Lawyer NL 1.

[179] *See* Roose, *supra* note 7; *cf.* Ongweso, *supra* note 46.

[180] *See* Jacob Kastrenakes, *I Spent Hours Waiting to Find Out What an NFT Looks Like IRL*, The Verge (Nov. 6, 2021), https://perma.cc/9JJA-BCG6.

mend" cryptocurrency in general.[181] Critics have accused them of "being used to propose increasingly more nebulous, abstract, and unwieldy categories of objects and goods and services."[182] At some point, the speculative bubble will likely burst and the prices will sink. There will be winners and losers, and the world will move on to the next big thing.[183] Indeed, there is some indication the market may have already started to crash. Trading on the biggest NFT marketplace dropped by 80% in a single month in the spring of 2022, and on average NFT prices have declined nearly 50% from their peak a few months earlier.[184] The number of accounts trading in NFTs in March 2022 was about half the number doing so in November 2021.[185]

Though they may not be a fundamentally new phenomenon, the rise of NFTs nonetheless presents an opportunity to rethink how we view creativity. In a world in which the scarcity of creative properties is increasingly challenging to manufacture, large copyright holders have spent enormous amounts of money to preserve "artificial scarcity" and therefore profits.[186] Some have lobbied against the proliferation of their works online[187] and sought more and more technological controls to try to cabin replication. Most recently, a new SMART Copyright Act has been proposed to "reduce online theft."[188] In this context, NFTs have been described as the way forward for artist compensation. They have been touted as "a much-needed way" for creators to monetize their work online[189] and greeted as an equalizer in "copyright-intensive industries" that are often controlled by a few powerful entities.[190]

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[181] *See* Alyson Krueger, *How Much Real Money Can You Make From Virtual Art?*, N.Y. TIMES (Mar. 12, 2022), https://perma.cc/8GV8-N24L; *see also* Rizzo, *supra* note 2.

[182] *See* Ongweso, *supra* note 46 ("[T]he greatest predictor of any NFT's value isn't its appearance but its previous price points. None of this sounds like a functional market so much as a mad grab for profit.").

[183] *Cf.* Krueger, *supra* note 181 ("[W]hat many NFT artists create or collectors invest in will be worth little or nothing in the long term."); *see also* O'Donnell, *supra* note 37 (describing NFTs as "Dada-esque: it's equivalent to presenting a poster of the *Mona Lisa* as a unique work of art"); Westenfeld, *supra* note 43 (noting that some market participants "don't even know what they're buying").

[184] *See* Miles Kruppa et al., *The Great NFT Sell-Off: Has the Digital Collectibles Craze Hit its Peak?*, FIN. TIMES (Mar. 10, 2022), https://perma.cc/NK8P-GEXU.

[185] *See id.*

[186] *See* Jake Linford, *Copyright and Attention Scarcity*, 42 CARDOZO L. REV. 143, 143 (2020).

[187] *Cf.* David Nelson, Note, *Free the Music: Rethinking the Role of Copyright in an Age of Digital Distribution*, 78 S. CAL. L. REV. 559, 568 (2005).

[188] SMART Copyright Act of 2022, S. 3880, 117th Cong. (2022).

[189] 26 No. 6 Cyberspace Lawyer NL 1.

[190] "Cryptokitties", *supra* note 111, at 220.

Consider, for example, NFTs' much-lauded inclusion of resale rights. Many NFTs are sold with resale rights attached. Resale rights guarantee the artist will receive a cut of any future sales, or resales, giving the artist a right to some of the value generated by their work's appreciation.[191]

> [V]isual artists do not generate considerable income from the reproduction and communication rights that are available to other creators under copyright law. The artist's resale right seeks to address this financial disparity by ensuring that visual artists receive a portion of the price paid for their tangible artwork each time it is resold.[192]

As Paris Hilton's team weighed in, "[B]lockchain technology will allow artists to get paid on secondary sales as well. That's never happened before and it is mindblowing how much that can change things for artists."[193] The NFT market did not invent including resale rights in art sales. Artists including Grant Wood and Robert Rauschenberg began lobbying for it in the 1940s and 50s.[194] Mandatory resale rights are common in many countries,[195] but Congress refused to pass laws mandating them in the United States.[196] When California tried to pass its own statute granting artists a resale right, it was held to be pre-empted by federal law.[197] While artists could theoretically include resale rights in their contracts, few have done so successfully.[198]

The resale right that failed to flourish in the offline world has become a praised feature of the NFT world. NFTs' digital contracts make the resale right easier to police than in the offline world.[199] However, the challenges of enforcing such contracts offline may apply with equal force to online sales.[200]

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[191] *See* Blum, *supra* note 138, at 582; "12-Year-Old Coder", *supra* note 62; Holland, *supra* note 36; Pesce, *supra* note 4; Roose, *supra* note 7; Rizzo, *supra* note 2.

[192] Zhao Zhao, *Fulfilling the Right to Follow: Using Blockchain to Enforce the Artist's Resale Right*, 39 CARDOZO ARTS & ENT. L.J. 239, 244 (2021).

[193] Team Paris, *I'm Excited About NFTs—You Should Be Too*, PARIS (Apr. 8, 2021), https://perma.cc/KK6E-3KAM. *See also* Kaczynski & Kominers, *supra* note 154 (describing NFTs as "enabl[ing] a new type of royalty contract").

[194] *See* Rizzo, *supra* note 2; Brian L. Frye, *Equitable Resale Royalties*, 24 J. INTELL. PROP. L. 237, 239 (2017) [hereinafter "Resale Royalties"].

[195] *See* "Resale Royalties", *supra* note 194, at 240; Rizzo, *supra* note 2.

[196] *See* "Resale Royalties", *supra* note 194, at 240; Rizzo, *supra* note 2.

[197] *See* "Resale Royalties", *supra* note 194, at 240; Rizzo, *supra* note 2.

[198] *See* "Resale Royalties", *supra* note 194, at 249 ("Few artists ever tried to use the Projansky Contract, and even fewer successfully convinced buyers to accept it. Ironically, only artists whose artworks were already in considerable demand could insist that buyers accept the Projansky Contract . . ."); Rizzo, *supra* note 2.

[199] *See* Zhao, *supra* note 192, at 253.

[200] *See* "Resale Royalties", *supra* note 194, at 249.

It may be difficult to form enforceable contracts with future buyers that the artist has no relationship with. A resale right might also be found impermissible in the United States under the first sale doctrine, which cuts off the copyright holder's rights at the first sale of a copy of a copyrighted work, leaving subsequent sales unencumbered.[201] The digital, intangible nature of the art linked with NFTs might affect some of this analysis, but so far the implications are unknown. While these resale rights are currently part of the market vogue around NFTs, their use may therefore diminish in the future and is certainly not guaranteed.

NFTs' incorporation of resale rights is an example of how NFTs invite rethinking how we measure creative value. The prevalence and popularity of resale rights in the NFT world indicates that artists want these rights. That suggests that copyright law is out of step with how artists today think about their creative value. As discussed, NFTs offer a way to decouple value from scarcity and instead commodify value in other ways. Radically, NFTs might also be taken a step farther: the fictional middleman, represented by receiving a bit of blockchain in exchange for paying artists, could be cut out altogether so that one is directly supporting artists and creators. Given the dubious independent value of the blockchain that represents an NFT,[202] we can imagine a world in which we drop the pretense and directly sponsor the artist the NFT compensates. Rather than paying for an NFT of a digital file that exists all over the internet, we would simply pay the artist of the digital file as payment for the aesthetic enjoyment of the digital art without receiving anything else in return. This idea is idealistic: people like to own things, and many buy NFTs for the potential return on investment that could accompany ownership. But it is an instructive thought exercise because it challenges our understanding of what is valuable about an artistic experience. Must we create scarcity and exercise exclusive property rights to enjoy art,[203] or can we find a way for the support of artists and the virality of art to exist simultaneously?

Not all creativity exists in spaces built on scarcity and ownership. In fact, much of the creativity on the internet takes place in a viral world of endless replication. The creativity on social media — a space used by billions of people — is replicated over and over as content is shared. Finding a

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[201] *See id.*

[202] *See* Roose, *supra* note 7 ("There are . . . legitimate questions about what, exactly, NFT buyers are getting for their money . . . .").

[203] *See, e.g.*, Joan Westenberg, *How Music NFTs Will Rewrite the Streaming Economy*, MEDIUM (Nov. 29, 2021), https://perma.cc/ZLP6-MWB7 ("Digital scarcity is necessary to create a unique user experience and enable fans to form longer-lasting and more profound connections with their favorite artists.").

way to monetize content in this environment can be challenging, as people who have become memes have discovered. NFTs are a means of monetization. But maybe they could also open the door to reimagining monetization. If you are willing to pay for an essentially meaningless bit of blockchain, might you pay directly for people involved in making art, with no ownership myth attached? And could we also expand the limited way in which we think about authorship, as we already do with memes? Is there room to appreciate, in at least some circumstances, the interest of the people in the photo, which copyright would not acknowledge? So, for instance, could we have envisioned simply paying Disaster Girl because we love the meme?

Such an idea might seem absurd. But so too is paying up to millions of dollars for NFTs, which have been characterized as merely "the idea of ownership,"[204] rather than real ownership. In the past, directly sponsoring creators by "patronizing" them was not absurd at all but one of the main ways for people to support creativity. For instance, during the Renaissance, artists like Michelangelo and Lenoardo daVinci were supported by wealthy families who sponsored their careers and gave them the ability to produce their art.[205] Some commentators have noted that the NFT craze could be the first step in moving from ownership back to patronage.[206] "[W]hat we are seeing with NFTs is the emergence of a new type of cultural economy built around one of the oldest forms of cultural production: patronage."[207] In other words, maybe we could consider supporting artists simply to support artists. The reward, as it was in the past, need not be a digital file; the reward could be the art created for us and future generations to enjoy.

Paying for creativity in support of a creative community is a growing part of the NFT world. As discussed, many of those active in the NFT space refer to it in terms of community, with the money at stake characterized as a curiosity at best.[208] Indeed, many NFTs do not even pretend to be about anything other than access to a community. For instance, the website

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[204] *See* Gottsegen, *supra* note 53; *see also* Rizzo, *supra* note 2 (describing one NFT marketplace's terms of service as reading that NFTs "exist only by virtue of the ownership record maintained in the Ethereum network. . . . [W]e do not guarantee that [anyone] can effect [sic] the transfer or title or right in any [NFTs]"); Kaczynski & Kominers, *supra* note 154 ("NFTs . . . giv[e] parties something they can agree represents ownership.").

[205] *See, e.g.*, Victoria L. Schwartz, The Celebrity Stock Market, 52 U.C. DAVIS L. REV. 2033, 2046 (2019) (describing the patronage model).

[206] *See* Rizzo, *supra* note 2.

[207] Berg, *supra* note 138.

[208] *See* Bruner, *supra* note 49; *see also* Kastrenakes, *supra* note 180 (observing that the "vibrant communities [that] have formed around" NFTs is one of the best things about them).

"Dreamverse" sells NFT tickets that give access to a party.[209] The Bored Ape Yacht Club bills itself as a "limited NFT collection where the token itself doubles as your membership to a swamp club for the apes."[210] This means that, for many people, NFTs function "as part of their personal identity," with the different NFT communities possessing "different personalities."[211] As one person in the NFT space explained, "It comes down to fandom."[212]

The fandom comparison is apt. Paris Hilton, in a primer on NFTs, praised them for "democratizing art" and "letting creators directly engage with fans."[213] She noted that "NFTs can give artists, even if they aren't well known, the opportunity to crowdfund their work."[214] Other observers echo this point: NFTs are "community-driven,"[215] Creators "who show up, respond to messages (NFT-related or not) and connect with individuals on a very human level make all the difference" to the success of an NFT.[216] This close interaction between creators and audience is similar to how fan communities have long operated. Fan creativity is intensely democratic, promoting "maximum inclusiveness" and allowing posting by anyone who wishes.[217] The main fanfiction archive on the internet, An Archive of Our Own, employs no algorithms, depending entirely on users' own choices of tags and indices of popularity such as hits, comments, and "kudos" to identify what they want to read.[218] The community itself rates the fics as they desire, and fan creators constantly engage with fans through social media, fic

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[209] *See, e.g.*, *Ticketing Options*, DREAMVERSE, https://dreamverse.life/ticketing.html (last accessed Mar. 12, 2022) ("Tickets to the Dreamverse Gallery are available only as NFTs, and tickets to Dreamverse Party are available as both NFTs and traditional tickets (non-NFTs).").

[210] *BAYC*, BORED APE YACHT CLUB, https://perma.cc/6WQP-XKEU (last accessed July 13, 2022); *see also* Kaczynski & Kominers, *supra* note 154 (noting that the Bored Ape Yacht Club "has grown to include high-end merchandise, social events, and even an actual yacht party").

[211] Kaczynski & Kominers, *supra* note 154.

[212] Krueger, *supra* note 181.

[213] *See, e.g.*, Jeff Wilser, *'I'm Obsessed': Paris Hilton on NFTs, Empowering Female Creators and the Future of Art*, COINDESK (Apr. 16, 2021), https://perma.cc/PW3V-AFNZ.

[214] Team Paris, *supra* note 193.

[215] Elspeth Taylor, *The Next Wave of NFTs is Starting With Community First*, DECRYPT (Nov. 15, 2021), https://perma.cc/EY2M-E3FM.

[216] Fan, *supra* note 174.

[217] *Terms of Service*, ARCHIVE OF OUR OWN, https://perma.cc/SK8Z-UMPL (last accessed Mar. 13, 2022).

[218] *See Terms of Service FAQ*, ARCHIVE OF OUR OWN, https://perma.cc/Q2SZ-AER6 (last accessed Mar. 13, 2022).

comments, Discords, and other means. Fanartists have crowdfunded their work for years without the necessity to give away NFTs to attract sponsors. For instance, an artist named Chekhov "creating comics, fanart and more!" enjoys 467 monthly patrons on Patreon, a popular crowdfunding platform for creators.[219] On the same platform, ov_fanarts "is creating Spooky Fan Comics," with over 300 monthly patrons.[220] On Patreon, fanartists usually give away perks like early access and bonus content[221] – incidentally, exactly what NFTs often use as enticements.

Fandom, like NFTs, is therefore about community at heart, not financial incentives. Stripped of their blockchain glamour, NFTs operate strikingly like a fanartist's Patreon. "[T]he community one builds around NFTs quite literally creates those NFTs' underlying value."[222] This is a phenomenon fan communities know well and whole-heartedly endorse.

The dark side of NFTs has revealed exactly how quickly tools welcomed as godsends for creative compensation become manipulated into investment tools that exploit creativity without compensation.[223] NFTs provide people with the ability to perform art theft "at a completely new scale," on platforms that are "barely moderated."[224] While the blockchain has been heralded as unassailable, its security works only to protect sellers (and sometimes uncertainly at that).[225] It offers little security to creators.[226] Given the dangers of NFTs, it is worth considering whether a more straightforward way of supporting artists exists: by directly patronizing them. If you want to support an artist, you can support them in ways more varied and interesting than merely buying something. Fan communities have been finding a way to encourage creativity without scarcity for decades. If we are open to it, NFTs could be another step toward embracing this idea.

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[219] *Chekhov*, PATREON, https://perma.cc/6KBZ-4FAN (last accessed Mar. 12, 2022).

[220] *Ov_fanarts*, PATREON, https://perma.cc/MMY3-8E26 (last accessed Mar. 12, 2022).

[221] *See id*.

[222] Kaczynski & Kominers, *supra* note 154.

[223] *See* Collier, *supra* note 41 ("While NFT proponents tout the technology as a way to revolutionize arts patronage, the rapidly growing digital marketplaces that enable those sales have so far done little to stop that piracy.").

[224] *Id*.

[225] *See* Shanti Escalante-De Mattei, *Thieves Steal Gallery Owner's Multimillion-Dollar NFT Collection: 'All My Apes Gone'*, ARTNEWS (Jan. 4, 2022), https://perma.cc/4ULU-CWSM.

[226] *See* Mitchell Clark, *Photoshop Will Get a 'Prepare as NFT' Option Soon*, THE VERGE (Oct. 26, 2021), https://perma.cc/5N82-U7V3 (discussing the necessity to invent new tools to try to protect creators better in the NFT marketplace).

NFTs have been hailed as a boon to artists, many of whom are enjoying massive windfalls.[227] However, NFTs are not primarily about compensating artists but about creating investment opportunities. Artists are a collateral beneficiary[228] and sometimes victims, given the increasing issue of fraud in the market.[229] Beyond NFTs' implications for artists, the environmental impact of NFTs is devastating.[230] Because of the amount of electricity used to power the blockchain on which NFTs depend, the sale of a single NFT can consume as much energy as an art studio might use in two years.[231] If Bitcoin, a type of cryptocurrency that also relies on the energy-gobbling blockchain, were a country, it would be "the 27th most energy-consuming country in the world."[232] And, as discussed, their justification for existence is shaky: the "one true original" gimmick is a little like "the emperor's new clothes": it falls apart upon close examination, when one realizes that the only thing being purchased is a token that points to a digital copy of a piece of art that could disappear at any time.[233] The volatility of the NFT market can be seen as a reflection of the inarticulateness of what its value actually is.[234] When it eventually collapses, artists will see their resale streams dry up.

However, what meme NFTs reveal about how copyright, authorship, and value are understood could be a boon to artists, even after the next fad arrives. NFTs ask the question of what we consider ourselves to get in exchange for supporting creators. The ownership myth of NFTs suggest a model of supporting creators we admire without expecting ownership of a

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[227] *See, e.g.*, Wilser, *supra* note 213 ("It gives the creator better economics. We're definitely living in the golden age of the creator, so I can't wait to see what the future holds.").

[228] Indeed, one NFT platform is consciously striving to find "collectors who appreciate the pieces" rather than "just bots who are trying to flip it on the secondary market." Eileen Kinsella, *A New NFT Venture Has an Innovative Idea: Make Buyers Prove They Know Something About an Artist Before They Bid*, ARTNET (Jan. 4, 2022), https://perma.cc/DTC6-4U39.

[229] *See* Collier, *supra* note 41.

[230] *See* Bruner, *supra* note 49; Roose, *supra* note 7; Wood, *supra* note 54.

[231] Gregory Barber, *NFTs Are Hot. So Is Their Effect on the Earth's Climate*, WIRED (Mar. 6, 2021), https://perma.cc/fsl9-rt2c.

[232] Niall McCarthy, *Bitcoin Devours More Electricity Than Many Countries*, FORBES (May 5, 2021), https://perma.cc/QJ49-4ALA.

[233] *See* Kastrenakes, *supra* note 180 ("As I left, he followed after me to make a suggestion for my article, imploring me to 'put in something about the emperor's new clothes.'").

[234] *See* "Cryptokitties", *supra* note 111, at 250-51 (describing the success of Cryptokitties, one of the first NFT projects, but also noting that the bottom fell out of the market fairly quickly); Bruner, *supra* note 49.

piece of their creativity in return. Perhaps more importantly, NFTs invite us to consider whether the creativity that financially supporting an artist generates in and of itself is something valuable that we get in exchange. After all, the underlying premise of the Copyright Clause of the Constitution is that there is value in creativity, period.

NFTs have allowed many people to be compensated in ways they never imagined in our existing copyright structure, and some have responded with awe and gratitude. After the sale of her meme NFT in 2021, the subject of the Overly Attached Girlfriend meme, Laina Morris, tweeted: "You guys are INSANE. Thank you to everyone who bid . . . . Truly, you have no idea how this is going to change my life. I mean it. I am so incredibly thankful and also still just BLOWN AWAY. So weird. So cool. Wtf. Thank you, internet."[235] This feels like what NFTs' marketing wants them to be: a digital exchange that brings us closer together as humans.[236] And it sounds like exactly what other creators want: "I was happy when I saw my dance all over . . . . But I wanted credit for it."[237]

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[235] Laina Morris (@laina622), TWITTER (Apr. 3, 2021), https://perma.cc/FH4D-WCUS.

[236] *See, e.g.*, *BAYC*, *supra* note 210 ("The club is open! Ape in with us.").

[237] Pruitt-Young, *supra* note 117.

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Time to *Tinker*: A New Standard for Protecting the First Amendment Rights of College Athletes

Brian L. Porto*

I. Introduction

As winter gave way to spring and summer in 2021, longstanding practices in the relations between college athletes and their respective institutions yielded to the shifting winds of dramatic, even historic, change. In April of 2021, the National Collegiate Athletic Association (NCAA) approved a rule change that enables athletes in all sports who have not yet transferred from one institution to another to do so once in a college career and be immediately eligible to play at the new institution.[1] The new rule took effect at the start of the 2021-22 academic year.[2]

On the heels of the new transfer rule came a decision of the Supreme Court of the United States, *NCAA v. Alston*,[3] which affirmed a ruling by the

* Professor of Law, Vermont Law School. J.D., Indiana University-Bloomington, 1987; Ph.D., Miami University (Ohio), 1979; B.A., University of Rhode Island, 1974.

[1] *See NCAA 1-Time Transfer Rule Clears Last Step, Starts with 2021-22 Academic Year*, ESPN (Apr. 28, 2021), https://www.espn.com/espn/print?id=31353578 [https://perma.cc/G9LM-L998]. The so-called one-time exception had previously been available to some college athletes, but not those who compete in football, men's and women's basketball, and men's ice hockey, to whom the exception now applies.

[2] *See id.* Athletes who have already transferred once and seek to do so again, and to be immediately eligible to play for the new institution, may be able to obtain a waiver allowing such immediate eligibility, but the waiver criteria are likely to be more stringent than they have previously been. *See* Ross Dellenger, *'It's Going to Change the Landscape': The NCAA's Transfer Revolution Is Here, and Its Impact Will Be Felt Far and Wide*, Sports Illustrated (Apr. 14, 2021), https://www.si.com/college/2021/04/14/ncaa-transfers-rule-change-football-basketball [https://perma.cc/F8QU-UQNY].

[3] 141 S. Ct. 2141 (2021).

United States Court of Appeals for the Ninth Circuit. The appeals court had held that the NCAA and its members were violating Section I of the Sherman Antitrust Act by capping the expenses institutions can incur on behalf of athletes for "academic-related costs," such as internships, computers, and study abroad programs.[4] In affirming that decision, the Supreme Court rejected the NCAA's traditional argument that its important interest in keeping college sports distinct from professional sports means that courts should give only a "quick look" to antitrust claims lodged against NCAA rules.[5] *Alston* will likely cause the NCAA to think twice about imposing new rules with economic implications because it can no longer expect such rules to receive judicial deference.[6]

Another big change to college sports in 2021 was a recognition, thus far by state law and NCAA acquiescence, of college athletes' right to earn income from the commercial use of their names, images, and likenesses (NIL), such as by signing autographs, endorsing products, and posting social media videos for a fee.[7] As of late May 2022, twenty-seven states had enacted statutes that, in general, prohibit institutions in those states from denying to their athletes opportunities to sign endorsement or sponsorship contracts with companies seeking the athletes' services. Such laws took effect in six states on July 1, 2021, with the remainder slated to follow by 2023.[8]

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[4] Michael McCann, *Supreme Court Rules Unanimously Against NCAA in Alston Case*, SPORTICO (June 21, 2021, 10:29 AM), https://www.sportico.com/law/analysis/2021/supreme-court-rules-unanimously-against-ncaa-in-alston-case-12346321821 [https://perma.cc/YV67-A96R].

[5] *Id.*

[6] *See id. See also* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021), which may also affect college sports in the future. The *Mahanoy* Court held that a school district violated the First Amendment when it punished a high school cheerleader for posting on a social media site a profane message that she sent from an off-campus location on a weekend. If courts apply this decision to the college context, they could enhance considerably the First Amendment rights of college athletes, which are the focus of this article.

[7] *See* Eben Novy-Williams & Emily Caron, *NIL Deals Arrive Quickly* as *NCAA Athletes Flex New Financial Freedom*, SPORTICO (July 1, 2021, 11:00 AM), https://www.sportico.com/leagues/college-sports/2021/nil-deal-examples-1234633234/ [https://perma.cc/JE36-NEQR].

[8] *See Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLL. SPORTS, https://www.businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/ [https://perma.cc/P5X5-H4D4] (last updated May 29, 2022). Instead of adopting its own NIL rule, the NCAA has settled for a "uniform interim policy suspending name, image and likeness rules for all incoming and current athletes in all sports." Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy [https://

A common theme underlies the recent changes in the transfer policy and the NIL policy: the NCAA and its member institutions will treat athletes like their nonathlete classmates, who have long been free to transfer if they wished and to earn income from their talents if so inclined. Still, many institutions treat athletes far more restrictively than their nonathlete classmates regarding the exercise of First Amendment rights. For example, coaches gave the following instructions to football players at Old Dominion University in Virginia: "Don't use Twitter—ever. Don't use Facebook unless you 'friend' the athletic department, so administrators can read what you are saying. Don't write anything that might reflect poorly on the university."[9]

Because ordinary college students are not subject to such restrictions on their speech, Professor Frank LoMonte asks: "Is there something so unique about the college/athlete relationship that it justifies discarding well-established constitutional principles?"[10]

This article will answer with a firm no; athletes are not so different from other college students as to warrant severe restrictions on their social media use or the policing of their social-media accounts by third-party vendors serving as monitors.[11] Neither are athletes so different from other students that coaches or administrators can require them to stand (or kneel)

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perma.cc/RC69-3USL]. The reason for the "interim" policy is that the NCAA awaits enactment by Congress of a uniform NIL law. NCAA president Mark Emmert has said, "We very much want, and frankly need, a preemption bill that would say that there's going to be a rule for the country, not 50." Haley Yamada, *NCAA Adopts Policy That Allows Athletes to Profit off Name, Image and Likeness*, ABC NEWS (June 30, 2021, 6:05 PM), https://abcnews.go.com/Sports/ncaa-vote-policy-allowing-athletes-profit-off-image/story?id=78582491 [https://perma.cc/XFL4-WWJ5].

[9] Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media*, 9 J. BUS. & TECH. L. 1, 2 (2014) [hereinafter LoMonte, *Fouling the First Amendment*]. *See also* Harry Minium, *ODU Football Twitter Ban Among Most Restrictive in U.S.*, VIRGINIAN-PILOT (Sept. 15, 2012), https://www.pilotonline.com/sports/college/old-dominion/article_a0fcc378-fef6-56cd-8128-3936d1f85b5e.html [https://perma.cc/T7XB-VV3A].

[10] LoMonte, *Fouling the First Amendment, supra* note 9, at 3.

[11] Several third-party vendors, such as UDiligence, Varsity Monitor, and Centrix Social, contract with institutions to monitor the social media accounts of athletes. *See* John Browning, *Universities Monitoring Social Media Accounts of Student Athletes*, 75 TEX. B.J. 840, 842 (2012).

before a game in support of a particular group or issue position[12] or to sing a school song linked to a history of racism.[13]

This article will contend that college athletes deserve the same treatment as their nonathlete classmates regarding not only transfer rules and compensation for NIL use, but also free-speech rights. Athletes should be free to speak or not speak, as they wish, subject only to limited restrictions. To advance these ideas, Part II will survey current First Amendment jurisprudence pertaining to student speech. Part III will examine this jurisprudence in the context of protest speech by college athletes, while Part IV will conduct the same examination for social-media speech. Part V will present a plan for protecting athletes' free-speech rights without sacrificing team cohesion or player confidentiality. Part VI will conclude that under this plan, athletes will have the same opportunity as their nonathlete classmates to hone the skills necessary to participate effectively in a democratic society. Unlike their athletic skills, the democratic-participation skills facilitated by freedom of speech will last a lifetime.

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[12] Former Virginia Tech women's soccer player Kiersten Hening has sued her former coach, alleging that after she refused to join teammates before games in kneeling in support of "Black Lives Matter," the coach engaged in a "campaign of abuse and retaliation" against her that caused her to leave the team. Mike Barber, *Former Virginia Tech Soccer Player Sues Coach, Claiming She Was Forced off Team for Refusing to Kneel Before Games*, RICHMOND TIMES- DISPATCH, (Apr. 19, 2021), https://richmond.com/sports/college/former-virginia-tech-soccer-player-sues-coach-claiming-she-was-forced-off-team-for-refusing/article_50b30056-bdb4-5418-9e27-abd18a761dc3.html [https://perma.cc/CA3U-XQ45].

[13] At the University of Texas at Austin, Black football players have refused to participate in the postgame ritual of singing "The Eyes of Texas Are Upon You," the institution's official alma mater song and an unofficial fight song, because of its history of being sung in minstrel shows in which white performers appeared in blackface. The University has declined the requests of Black athletes and others to drop the song and, in response to backlash from fans after players left the field during its singing in 2020, the athletic director ordered the players to remain standing on the field while the song is sung. Joe Levin, *The Damning History Behind UT's 'The Eyes of Texas' Song*, TEX. MONTHLY (June 17, 2020), https://www.texasmonthly.com/arts-entertainment/ut-austin-eyes-of-texas-song-racist [https://perma.cc/Y245-EQ7T]. *See also* Jim Vertuno, *Conflict Raging over 'The Eyes of Texas' School Song*, ASSOCIATED PRESS (Oct. 23, 2020), https://apnews.com/article/eyes-of-texas-controversy-school-song-ced5a2c90f2f847fb58be59971d7a494 [https://perma.cc/C8XW-G87B].

II. Student Speech Under the First Amendment

A. Forum Analysis and the Tinker Standard

Ordinarily, when considering a First Amendment issue, the initial step is to conduct a forum analysis. The aim of this inquiry is to determine whether the speech at issue has occurred or will occur in a traditional public forum, a limited public forum, or a nonpublic forum. That determination will dictate the level of scrutiny a court would apply to regulation of the speech.[14] The Supreme Court has explained that in the traditional public forum, which includes public streets, sidewalks, and parks, government may not restrict speech based on its content without a compelling state interest and a narrowly tailored regulation.[15] Nevertheless, government may impose content-neutral time, place, or manner restrictions, such as banning the use of bullhorns after a certain hour of the day.[16]

A limited public forum is defined by public property that government has opened for use by the public as the site of expressive activity, such as a state university campus, a municipal theater, or a school board's meeting room.[17] When a limited public forum is open—to university-sponsored student organizations, for example—the same jurisprudence that applies to a traditional public forum applies to the limited public forum. Absent a compelling state interest and a narrowly tailored regulation, content neutrality is required.[18]

The nonpublic forum is defined as public property that has not traditionally been a site for expressive activity nor has government designated it as a site for such activity. In this setting, government enjoys expanded regulatory authority, but its rules governing speech must, nevertheless, be reasonable and not merely reflect opposition to the speaker's viewpoint.[19] That is, the rules must be content (viewpoint) neutral.[20] Thus, under the forum

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[14] *See* Eric Bentley, *Unnecessary Roughness: Why Athletic Departments Need to Rethink Whether to Aggressively Respond to the Use of Social Media by Athletes*, 75 Tex. B.J. 834, 836 (2012) [hereinafter Bentley, *Unnecessary Roughness*].

[15] Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983).

[16] *See* Frank D. LoMonte, *The Key Word Is Student:* Hazelwood *Censorship Crashes the Ivy-Covered Gates*, 11 First Amend. L. Rev. 305, 312 (2013) [hereinafter LoMonte, *The Key Word Is Student*].

[17] *See id. See also* John Ryan Behrmann, Comment, *Speak Your Mind and Ride the Pine: Examining the Constitutionality of University-Imposed Social Media Bans on Student-Athletes*, 25 Jeffrey S. Moorad Sports L.J. 51 (2018).

[18] *See* Behrmann, *supra* note 17, at 54.

[19] *See id.* at 57.

[20] *See id.* at 55.

doctrine, although government property belongs to the public, not all government property is equally suitable for expressive activity. Therefore, different regulations apply to different types of public forums.[21]

Forum analysis applies to an act of student protest. Regulatory standards would vary, as noted above, depending on whether, for example, a student delivered a speech opposing a tuition increase, a campus statue of a Confederate general, or the institution's fight song in a public park, on the campus quadrangle, or in a French literature class in which the student's topic was not on the agenda. Courts analyze student speech on social media differently; such expression is "off-campus speech," not subject to location-based variations in regulation.[22] Instead, a court would uphold an institution's punishment of social-media speech only if the institution could show that the speech was a material disruption to institutional activities or fit into another category of unprotected speech.[23] Traditional categories of speech that the first Amendment leaves unprotected include: (1) fighting words or a "true threat"; (2) defamatory statements; (3) obscenity, such as the posting of a link to a hardcore pornographic website; (4) a violation of criminal law, such as a student posting a picture of himself committing a crime; (5) a violation by an athlete of reasonable team or NCAA rules (*e.g.*, violating curfew or accepting a gift from a team booster); and (6) harassing speech, such as a tweet that features sexually harassing conduct directed at another student.[24]

The "material disruption" standard noted above derives from the Supreme Court's landmark decision in *Tinker v. Des Moines Independent Community School District*,[25] in which the Court recognized, for the first time, that students (and teachers) in public schools are entitled, under the First and Fourteenth Amendments, to assert their freedom of speech in the classroom, in the cafeteria, on the athletic field, indeed anywhere on school grounds during school hours.[26] In *Tinker*, three Iowa schoolchildren wore black armbands to school in December 1965 to protest the Vietnam War and to express support for a truce. School authorities suspended them from attending classes until they returned without the armbands, which they did when the

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[21] *See* LoMonte, *The Key Word is Student*, *supra* note 16, at 312.
[22] *See* Bentley, *Unnecessary Roughness*, *supra* note 14, at 836.
[23] *See id.*
[24] *Id.* at 837-838.
[25] 393 U.S. 503 (1969).
[26] *See id.* at 512-513. *See also* Diane Heckman, *Does Being a Student-Athlete Mean Having to Say You're Sorry? First Amendment Freedom of Speech, Apologies, and Interscholastic Athletic Programs*, 293 EDUC. L. REP. 549, 556 (2013).

new year began.[27] Finding for the students, the Court explained that "First Amendment rights, applied in the light of the special characteristics of the school environment, are available to teachers and students."[28] "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[29]

It was significant that, in this instance, the students' wearing of black armbands did not interrupt the work of the school or intrude on the rights of other students.[30] It was, in the words of Justice Fortas's majority opinion, "closely akin to pure speech."[31] For the State to justify prohibiting expression by students at school, "it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[32] "Certainly," Justice Fortas continued, "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."[33] And a student's free-speech rights are not confined to the classroom. Justice Fortas explained,

> When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others."[34]

B. Exceptions to Tinker

But if, as one commentator has observed, the Court constructed "the bulwark of free speech rights for students"[35] in *Tinker*, it has since chipped away at that bulwark in three later cases: *Bethel School District v. Fraser*,[36] *Hazelwood School District v. Kuhlmeier*,[37] and *Morse v. Frederick.*[38] In *Fraser*, a

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[27] *See* 393 U.S. at 504.
[28] *Id.* at 506.
[29] *Id.*
[30] *See id.* at 508.
[31] *Id.* at 505.
[32] *Id.* at 509.
[33] *Id.* (quoting *Burnside v. Byers*, 363 F.2d 744, 749 (5th Cir. 1966)).
[34] *Id.* at 513, (quoting 363 F.2d at 749).
[35] Heckman, s*upra* note 26, at 561.
[36] 478 U.S. 675 (1986).
[37] 484 U.S. 260 (1988).

high school student delivered a speech nominating a fellow student for a class officer position during a high school assembly at which many attendees were as young as fourteen years old. Throughout the speech, the speaker "referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor."[39] In so doing, he violated a school rule against "obscene, profane language or gestures," whereupon he was suspended from classes for three days and removed from a list of candidates for graduation speaker.[40] The trial court held that these sanctions violated the First Amendment, and the Ninth Circuit Court of Appeals affirmed.[41]

The Supreme Court reversed, distinguishing this case from *Tinker* because "the penalties imposed [here] were unrelated to any political viewpoint."[42] "A high school assembly," the Court observed, "is no place for a sexually explicit message directed towards an unsuspecting audience of teenage students."[43] Moreover, "[t]he schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by [the speaker]."[44] Thus, the *Fraser* Court created an exception to the *Tinker* standard for "lewd, indecent, or offensive" student speech.[45]

The Court addressed student speech again two years later in *Hazelwood School District v. Kuhlmeier*, in which the issue was the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.[46] Three alumni—former editors of a high school newspaper—alleged that school officials violated their First Amendment rights by deleting two pages worth of articles from a particular issue of the newspaper.[47] The principal had objected to two articles scheduled to appear in the paper; one article described three students' experiences with pregnancy, and the other discussed the impact of divorce on students at the school.[48] In the principal's view, the pregnancy article's references to sex and birth control were inappropriate for younger students at the high school, and the divorce article's identification

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[38] 551 U.S. 393 (2007).
[39] Bethel Sch. Dist. v. Fraser, 478 U.S. at 677-678.
[40] *Id.* at 678.
[41] *See id.*
[42] *Id.* at 685.
[43] *Id.*
[44] *Id.* at 683.
[45] *See id.*
[46] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).
[47] *Id.*
[48] *Id.* at 263.

by name of a student of divorced parents, accompanied by criticisms of her father, violated the parents' privacy, especially because the student journalists had not interviewed the parents.[49]

The trial court found that no First Amendment violation had occurred, but the Eighth Circuit Court of Appeals reversed, reasoning that, under *Tinker*, school authorities could only suppress the articles upon a reasonable forecast of disruption of school activities if the articles were printed, and they could make no such forecast here.[50] The Supreme Court reversed the Court of Appeals, noting that *Tinker* did not govern because the school newspaper was not a "public forum," as the appellate court had viewed it, but rather, "a supervised learning experience for journalism students."[51] Therefore, school officials could regulate the newspaper's contents "in any reasonable manner," just as they could regulate the contents of the classes they offered.[52] In other words, *Tinker* was about whether a school had to *tolerate* particular student speech, but *Hazelwood* was about whether a school had to *promote* particular student speech; the school enjoys greater discretion in the latter circumstances.[53]

Thus, the Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[54] In this instance, considering the privacy concerns of the pregnant students and of the divorced parents of another student, and the principal's view that insufficient time existed to complete the necessary textual changes and still meet the printing schedule, the Court concluded that the principal had acted reasonably in omitting the pregnancy and divorce articles "so that students would not be deprived of the newspaper altogether."[55]

Almost two decades later, student speech again reached the Supreme Court in *Morse v. Frederick*.[56] As the Olympic Torch Relay passed through Juneau, Alaska in 2002 on its way to Salt Lake City, it passed by Juneau-Douglas High School, where the principal let students leave class to observe the event from either side of the street.[57] As the relay reached the school,

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[49] *Id.* at 265.
[50] *Id.*
[51] *Id.* at 270.
[52] *Id.* at 270–71.
[53] *See id.*
[54] *Id.* at 273.
[55] *See id.* at 275–76.
[56] 551 U.S. 393 (2007).
[57] *See id.* at 397.

Joseph Frederick, a senior, joined his friends in unfurling a fourteen-foot banner that proclaimed, "BONG HITS 4 Jesus," resulting in his suspension from classes for ten days.[58] After exhausting his administrative appeals without success, Frederick sued the principal, Morse, but the trial court granted summary judgment for Morse. The Ninth Circuit reversed, however, reasoning that the school had failed to show, as *Tinker* requires, that Frederick's speech created a substantial risk of disrupting school activities.[59]

Chief Justice Roberts, writing for the Court and citing *Fraser* for support, wrote that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings"[60] and that "the mode of analysis set forth in *Tinker* is not absolute."[61] For Roberts, the key fact in the case was that "Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one."[62] "The concern here," Chief Justice Roberts continued, "is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use," an activity to be deterred because "[d]rug abuse can cause severe and permanent damage to the health and well-being of young people. . .."[63] Thus, the Court added speech advocating the use of illegal drugs to the list of exceptions to the *Tinker* "material disruption" standard for regulating student speech.

Taken together, *Fraser*, *Hazelwood*, and *Morse* establish that students' free-speech rights "are not automatically coextensive with the rights of adults in other settings."[64] Indeed, students' free-speech rights are subject to restrictions because of the characteristics of the school environment, and school authorities need not tolerate student speech that threatens to "undermine the school's basic educational mission."[65] Still, as Professor Johnson has noted, despite the erosion in *Tinker's* bulwark of protection for student speech, *Tinker* "remains good and controlling law for the majority of student

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[58] *See id.* at 397–98.

[59] *See id*. at 398–99.

[60] *Id.* at 404–05 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S 675, 682 (1986)).

[61] *Id.* at 405.

[62] *Id.* at 401.

[63] *Id.* at 407–09.

[64] *Id*. at 409–10.

[65] Rebecca L. Zeidel, Note, *Forecasting Disruption, Forfeiting Speech: Restrictions on Student Speech in Extracurricular Activities*, 53 B.C. L. REV. 303, 306 (2012).

speech cases"[66] and its "material-disruption" standard still governs cases involving college athletes' speech.[67]

C. Alternative Free-Speech Standards in the College Setting

1. The *Hazelwood* Standard

That situation could change, though, absent a Supreme Court decision that specifically addresses the speech of college students generally or college athletes specifically, because some courts have rejected the *Tinker* standard in favor of the *Hazelwood* standard, even in the college setting. *Hazelwood* carved out an exception to *Tinker* for "curricular" speech—specifically, speech promoted by the school through its student newspaper—which is subject to regulation by school authorities.[68] Professor LoMonte has characterized the justifications for such regulation as (1) the "maturity" rationale, meaning that vulnerable listeners and readers need protection from speech on certain adult topics, and (2) the "disassociation rationale," meaning that schools should be free to separate themselves from speech that would align them with controversial political views or that sets a poor educational example. [69] Instead of the highly speech-protective *Tinker* standard, which requires the government to show a "material and substantial disruption" of regular school activities to warrant suppressing speech, the *Hazelwood* Court held that school authorities could suppress "school-sponsored expressive activities" merely by showing that "their actions are reasonably related to legitimate pedagogical concerns."[70] The Court did not specify in *Hazelwood*, though, whether its new standard should apply to college students.[71]

Nevertheless, several federal appellate courts have extended the *Hazelwood* standard to the college setting. In *Axson-Flynn v. Johnson*, the court concluded that speech used in college acting classes, as part of the curricu-

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[66] Noel Johnson, Tinker *Takes the Field: Do Student Athletes Shed Their Constitutional Rights at the Locker Room Gate?*, 21 MARQ. SPORTS L. REV. 293, 295 (2010).

[67] *See id.* at 306.

[68] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988).

[69] *See* LoMonte, *The Key Word Is Student*, *supra* note 16, at 306.

[70] *Id.* at 317 (citing *Hazelwood*, 484 U.S. at 273).

[71] *See id. at* 319. In *Hazelwood*, a footnote stated: "A number of lower federal courts have similarly recognized that editors' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference. We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." *Hazelwood*, 484 U.S. at 273–74, n.7 (citations omitted).

lum, supervised by faculty members and designed to impart knowledge or skills, was school-sponsored speech governed by *Hazelwood* and subject to regulation "in any reasonable manner."[72] A genuine issue of material fact existed as to whether university officials' requirement that an acting student use certain profane words prohibited by her Mormon faith was reasonable pedagogy or a pretext for religious discrimination.[73] Similarly, in *Hosty v. Carter*,[74] the court held that "*Hazelwood's* framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools."[75] The defendant Dean of Students was entitled to qualified immunity from damages in a suit arising from the refusal by student editors of a college newspaper to submit to prepublication review by the defendant.[76] And in *Ward v. Polite*,[77] the court observed that "[n]othing in *Hazelwood* suggests a stop-go distinction between student speech at the high school and university levels, and we decline to create one."[78] The court reversed a grant of summary judgment for the defendant and held that a reasonable jury could find (1) a professional counseling association's code of ethics did not bar the plaintiff graduate student's request for the transfer of a gay client to another counselor because of the plaintiff's religious opposition to homosexuality and (2) the university had used the request as a pretext for silencing the plaintiff by expelling her from the graduate program.[79] At either level, then, according to the *Hosty* court, public educators may limit student speech in school-sponsored expressive activities as long as their actions are "reasonably related to legitimate pedagogical concerns."[80]

Professor LoMonte has argued that the *Hazelwood* standard should not govern in the college setting because neither its maturity rationale nor its disassociation rationale is appropriate there.[81] The former is inappropriate because, in the college context, both the speakers and the listeners are old enough that neither need protection from "unsuitable" material.[82] The latter is also inappropriate because no reasonable listener would mistake the message of an individual college student for that of the student's institu-

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[72] *See* Axson-Flynn v. Johnson, 356 F.3d. 1277, 1284–85 (10th Cir. 2004) (citing *Hazelwood*, 484 U.S. at 270).
[73] *Id.* at 1293.
[74] 412 F.3d 731 (7th Cir. 2005)
[75] *Id.* at 735.
[76] *See id.* at 739.
[77] 67 F.3d 727 (6th Cir. 2012).
[78] *Id.* at 733–34.
[79] *See id*. at 735.
[80] *Id.* at 733 (citing *Hazelwood*, 484 U.S. at 273).
[81] *See* LoMonte, *The Key Word Is Student*, *supra* note 16, at 341–43.
[82] *See id.* at 341.

tion.[83] Thus, "[b]ecause the listening audience on a college campus is capable of handling mature subject matter and is not physically constrained to endure unwelcome speech, colleges have no need for the *Hazelwood* level of control over what their students say and write."[84]

According to this view, the *Tinker* and *Hazelwood* standards are separate and distinct because they concern fundamentally different varieties of speech. As suggested above, the *Tinker* standard concerns "speech that the government is asked to tolerate," whereas the *Hazelwood* standard concerns "speech that the government is asked to affirmatively promote."[85] Naturally, government should have more discretion to regulate speech it seeks to promote than speech it merely needs to tolerate. Thus, according to the above commentary, "courts that rely on *Hazelwood* to ratify the punishment of college students who question institutional policies are obliterating this distinction."[86]

2. The *Pickering*/*Connick*/*Garcetti* Standard

Whatever its benefits or burdens, though, *Hazelwood* is not the only alternative to the *Tinker* standard for governing the free-speech rights of college students. The speech rights of college students who participate in extracurricular activities, including athletics, are sometimes analogized to public employees' speech rights on the theory that, like public employees who represent the governments for which they work, students who participate in extracurricular activities represent their respective institutions.[87] Under this theory, a court could apply reasoning akin to that used by the Supreme Court in *Garcetti v. Ceballos*[88] to college athletes. The Court held in that case that a public employee whose speech results from his official job duties (i.e., a deputy district attorney whose office memorandum challenges alleged inaccuracies in a search warrant affidavit) lacks First Amendment protection for that speech. But when that same public employee speaks, as a private citizen, about a matter of public concern (i.e., whether state court judges should be elected or appointed), the employee's comments may enjoy First Amendment protection, unless the public employer has adequate justification for treating the employee differently from other members of the

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[83] *See id.* at 343–45.
[84] *Id.* at 358.
[85] *Id.* at 360.
[86] *Id.*
[87] *See* Zeidel, *supra* note 65, at 308.
[88] 547 U.S. 410 (2006).

public.[89] If a court applied the public-employee framework to college athletes, it could hold that an athlete who speaks as a private citizen about a matter of public concern, such as by engaging in a public protest on campus after practice, enjoys First Amendment protection.[90] Yet, the same court could hold that for an athlete who speaks as an athlete, such as by boycotting practices or games, no such protection is available.[91]

Professor Meg Penrose contends that the public-employee theory of *Garcetti* is more appropriate to college athletes than *Tinker's* material-disruption standard. In her view, "[c]ollege athletes are constitutionally unique" because they "regularly agree to rules and regulations that are not imposed on ordinary college students, including policies relating to grooming, gambling, drinking, pornography, taunting, cursing and even tobacco use."[92] "Simply put," she states, "college athletes are considered to be special and different, particularly when it comes to speech and expressive rights."[93] "This choice to voluntarily participate in athletics," she continues, "operates, at least partially, as a waiver of speech and expressive rights."[94] Accordingly, the appropriate standard under which to evaluate the speech of college athletes is that which courts apply to public employees who, like the athletes, surrender some of their speech rights in return for enjoying the benefits of their association with public entities.

The Supreme Court first addressed the free-speech rights of public employees in *Pickering v. Board of Education*,[95] holding that speech by government employees must pass a balancing test that weighs the public employee's right, as a citizen, to speak about "matters of public concern" against the right of the government, as employer, to conduct its business, which can necessitate restricting employee speech.[96] Therefore, unless the school board could show that the plaintiff, a teacher, had knowingly or recklessly made false statements in his letter to a local newspaper criticizing the board, the board could not fire him for his exercise of free speech.[97] Later, in

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[89] *See id*. at 418; Eric D. Bentley, *Fair Play?*, INSIDE HIGHER ED (Feb. 4, 2016), https://www.insidehighered.com/views/2016/02/04/do-college-athletes-have-first-amendment-right-strike-essay [https://perma.cc/65ZG-JVBV] [hereinafter Bentley, *Fair Play?*].

[90] *See* Bentley, *Fair Play?*, *supra* note 89.

[91] *See id*.

[92] Meg Penrose, *Outspoken: Social Media and the Modern College Athlete*, 12 J. MARSHALL REV. INTELL. PROP. L. 509, 510-11 (2013) [hereinafter Penrose, *Outspoken*].

[93] *Id*.

[94] *Id*. at 526.

[95] 391 U.S. 563 (1968).

[96] Heckman, *supra* note 26, at 562-63.

[97] *See* 391 U.S. at 574-75.

Connick v. Meyers,[98] the Court defined "matters of public concern" as "any matter of political, social, or other concern to the community."[99] It upheld the firing of a deputy district attorney for circulating a questionnaire among fellow employees concerning the district attorney's policy for transferring employees, among other internal issues, which the Court determined were not matters of public concern.[100]

More recently, in *Garcetti*, the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[101] Accordingly, the Justices upheld the punishment of another deputy district attorney, who wrote a memorandum to his superiors questioning the grounds for issuance of a search warrant and testified in favor of a defense motion challenging that warrant.[102]

According to Professor Penrose, although the *Pickering*/*Connick*/*Garcetti* framework "may not be ideal" for college athletes, it is "far superior" to *Tinker* because the former "appreciates the student-athlete's unique relation to a state [university's] athletic department as qualitatively distinct from a high school student's desire to attend class, [therefore] requir[ing] greater deference [to the institution] than the *Tinker* framework offers."[103] "If participating in college athletics" she writes, "means [athletes] receive a watered-down version of First Amendment rights, so be it. The experiences gained on and off the field or court [are] well worth this limited sacrifice."[104]

Applying the public-employee standard to the speech of college athletes, though, is problematic. The foundation of that standard is that "when the government is acting as employer, it should have the power to restrict speech that interferes with the proper and efficient function of the workplace."[105] But college athletes are not now, and have never been, "employees" of their institutions; rather, they are "students," even if subject to more regulation than their nonathlete classmates. Therefore, the *Pickering*/*Connick*/*Garcetti* standard is "a poor fit" for a college campus; whereas the prosecu-

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[98] 461 U.S. 138 (1983).
[99] *Id*. at 146-47.
[100] *See id*. at 154.
[101] 547 U.S. at 421.
[102] *See id.* at 414-17.
[103] Penrose, *Outspoken*, *supra* note 92, at 543.
[104] *Id.* at 550.
[105] Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1853 (2017).

tors' offices in *Connick* and *Garcetti* were not intended to be marketplaces for the exchange of ideas, the college campus surely is.[106]

D. The Supreme Court and College-Student Speech

Courts have often observed that the free speech rights of college students exceed those of students in the high-school setting.[107] Indeed, the Supreme Court has regularly invalidated colleges' attempts to regulate the content of student speech, whether by disciplining students,[108] not recognizing student organizations,[109] or withholding funds from student publications.[110]

In *Healy v. James*, a state college president refused to grant official recognition to a local chapter of the Students for a Democratic Society (SDS).[111] The students who sought official recognition brought a First Amendment claim in federal court. The district court ordered the college president to conduct a due process hearing on the matter, which resulted in another denial of the students' request; thereafter, the district court dismissed the case, and the Second Circuit affirmed.[112] The Supreme Court noted that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[113] Therefore, although "a college has a legitimate interest in preventing disruption on the campus" that could justify restraints on speech, "a 'heavy burden' rests on

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[106] *See id.*

[107] *See* Marcus Hauer, Note, *The Constitutionality of Public University Bans of Student-Athlete Speech Through Social Media*, 37 VT. L. REV. 413, 422 (2012).

[108] *See* Papish v. Board of Curators of Univ. of Mo., 410 U.S. 667 (1973).

[109] *See* Healy v. Jones, 408 U.S. 169 (1972).

[110] *See* Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

[111] *See* 408 U.S. at 170. The SDS was a radical political organization during the 1960s best known for its opposition to the Vietnam War, which it opposed with sit-ins, demonstrations, and marches. An SDS splinter group, the Weathermen (later known as the Weather Underground) was notorious for bombing government and corporate targets in the early 1970s. The activities of the Weather Underground may have persuaded the college president in *Healy* not to recognize an SDS chapter on his campus. *See* Todd Gitlin, *What Was the Protest Group Students for a Democratic Society? Five Questions Answered*, THE CONVERSATION (May 4, 2017), https://www.smithsonianmag.com/history/what-was-protest-group-students-democratic-society-five-questions-answered-180963138/ [https://perma.cc/AYG6-Q4DN].

[112] *See* 408 U.S. at 179.

[113] *Id.* at 180-81.

the college to demonstrate the appropriateness of that action."[114] Under that standard, the mere disagreement of a college president with a particular group's philosophy "affords no reason to deny it recognition."[115]

Still, a college would be justified in denying official recognition "to any group that reserves the right to violate any valid campus rules with which it disagrees."[116] In this instance, the record did not show whether the SDS was "willing to abide by reasonable rules and regulations," so the Court remanded the matter for reconsideration.[117]

Healy reflects the breadth of First Amendment prohibitions on the prior restraint of speech because the college's denial of official recognition to the SDS meant that the group was prevented from demonstrating, meeting, or even advertising its meetings, on campus or by means of institutional property, employees, or facilities. Although the students could meet or promote their group off campus, *Healy* showed that "even a regulation with only a secondary effect of burdening student speech can still be an unlawful restraint if its effect is to cut off the speaker from opportunities to be heard."[118]

In *Papish v. Board of Curators of the University of Missouri*, the defendant Board expelled a graduate student in journalism for distributing on campus a newspaper "containing forms of indecent speech" in violation of one of the Board's bylaws.[119] The newspaper featured a political cartoon that depicted the police raping the Statue of Liberty and an article titled "M-f Acquitted," which discussed the acquittal of a New York City youth who belonged to an organization called "Up Against the Wall, M-f."[120] The student brought a free speech claim against the Board, but the trial court denied relief and the Eighth Circuit affirmed.[121]

In a *per curiam* opinion, the Court explained that, as is clear from *Healy*, "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name of 'conventions of decency.'"[122] The Court acknowledged that speech can be subject to time, place, or manner restrictions, but in *Papish*, "petitioner was expelled because

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[114] *Id.* at 184.
[115] *Id.* at 187.
[116] *Id.* at 193-94.
[117] *Id.* at 194.
[118] Frank D. LoMonte & Virginia Hamrick, *Running the Full-Court Press: How College Athletic Departments Unlawfully Restrict Athletes' Rights to Speak to the News Media*, 99 NEB. L. REV. 86, 115 (2020).
[119] *Papish*, 410 U.S. at 667.
[120] *Id.* at 667-68.
[121] *See id.* at 669.
[122] *Id.* at 670.

of the disapproved content of the newspaper rather than the time, place, or manner of its distribution."[123] Thus, the Court reversed and remanded, directing the trial court to require the University to reinstate the student unless valid academic reasons barred her reinstatement.[124]

In *Rosenberger v. Rector and Visitors of University of Virginia*, the University withheld authorization to the petitioners for payment of their printing costs because their student newspaper "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality."[125] A Christian group, which had earlier been approved for payment of its printing costs from the Student Activities Fund, sought such payment but was rejected because of its religious status.[126] After exhausting its administrative remedies within the University, the group brought free speech and free exercise claims. The trial court granted summary judgment for the University. The Fourth Circuit affirmed, despite finding discrimination based on the newspaper's content, because such discrimination was necessary for the separation of church and state.[127]

The Supreme Court noted that the University's payment policy did not prohibit reimbursement for the printing of publications that discussed religion as a subject matter, but rather, only for "those student journalistic efforts with religious editorial viewpoints."[128] Such viewpoint discrimination, the Court observed, is especially dangerous in a university, "where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."[129] When the institution, by its regulations, disapproves of certain student viewpoints, the Court continued, it "risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses."[130] Thus, the Court reversed, holding that the payment regulation denied the petitioners' freedom of speech.[131]

Rosenberger was reminiscent of an earlier Supreme Court decision, *Widmar v. Vincent*,[132] although *Widmar* involved access to university facilities, rather than university funds, for a religious group. In 1977, the Univer-

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[123] *Id.*
[124] *See id.* at 671.
[125] *Rosenberger*, 515 U.S. at 822-23.
[126] *See id.* at 827.
[127] *See id.* at 828.
[128] *Id.* at 831.
[129] *Id.* at 835.
[130] *Id.* at 836.
[131] *See id.* at 837.
[132] 454 U.S. 263 (1981).

sity of Missouri-Kansas City (UMKC) informed a religious student group called Cornerstone that it could no longer meet in UMKC facilities because of a 1972 regulation that prohibited the use of UMKC buildings for worship or religious teaching.[133] Eleven members of Cornerstone sued to challenge that regulation, alleging violations of the Free Speech and Free Exercise Clauses of the First Amendment and of the Fourteenth Amendment's Equal Protection Clause.[134] The trial court upheld the regulation under the Establishment Clause of the First Amendment,[135] but the Eighth Circuit reversed, reasoning that the regulation was content-based discrimination against religious speech.[136]

The Supreme Court used "forum analysis" as its doctrinal framework in *Widmar*, noting that a State cannot constitutionally "enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place."[137] In this instance, because UMKC had accommodated meetings of student groups in its facilities in the past, it had created a forum generally open for student use, thereby "assum[ing] an obligation to justify its discriminations and exclusions under applicable constitutional norms."[138] Specifically, UMKC had to show that its regulation was "necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end."[139]

In the Court's view, UMKC failed to meet this requirement; the Court expressly rejected UMKC's claim that opening its facilities to religious groups would have the primary effect of advancing religion, thereby violating the Establishment Clause under the first prong of the well-established *Lemon* test.[140] On the contrary, the Court instructed, an open forum at a State university does not confer State approval on religious groups or prac-

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[133] *See id.* at 265.
[134] *See id.* at 266.
[135] *See id.*
[136] *See id.* at 267.
[137] *Id.* at 267-68.
[138] *Id.* at 267.
[139] *Id.* at 270.
[140] *See id.* at 272. The *Lemon* test derives from Lemon v. Kurtzman, 403 U.S. 602 (1971), which concerned state financial assistance to private, religious schools. Under the test, a state program that aids religious institutions is constitutional only when: (1) the program has a secular legislative purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion. Using this test, the *Lemon* Court struck down programs in two states that augmented with state funds the salaries of teachers in religious schools.

tices.[141] Besides, UMKC had more than 100 student groups, and the provision of benefits to such a broad array of groups "is an important indicator of a secular effect."[142] Thus, the primary effect of opening the forum to this wide spectrum of groups would not be to advance religion.[143] "In this constitutional context," the Court concluded, "we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against [Cornerstone's] religious speech."[144] Put simply, because UMKC's regulation discriminated on the basis of viewpoint in a forum broadly available to students, it could not stand.

E. Athletes and the Marketplace of Ideas

Taken together, *Healy*, *Papish*, *Rosenberger*, and *Widmar* reflect what one commentator has termed "the traditional role of the university as the quintessential marketplace of ideas," providing a forum for controversial, even offensive, speech without necessarily endorsing the viewpoints expressed.[145] Therefore, "[a]llowing universities to silence speakers who engage in speech other people find 'offensive' seems particularly incongruous with the university setting."[146] Indeed, a public university ordinarily cannot penalize students for their speech or prohibit them from using social media based on a concern about reputational harm to the institution or the students.[147] Yet, coaches have done both to college athletes.[148] The coaches' actions raise the question whether something in the relationship between college athletes and their institutions "is so unique as to override established constitutional principles."[149] Is that "something" the status of athletics as a privilege, not a

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[141] *See id.* at 274.

[142] *Id.*

[143] *See id.* at 275.

[144] *Id.* at 276.

[145] Papandrea, *supra* note 105, at 1803.

[146] *Id.* at 1825.

[147] *See* Frank LoMonte, *College Sports and Social Media: Leave Your Rights in the Locker Room?,* AM. BAR ASS'N: LITIG. GROUP (Apr. 21, 2014), https://www.americanbar.org/groups/litigation/committees/civil-rights/articles/2014/college-sports-and-social-media-leave-your-rights-in-the-locker-room/ [https://perma.cc/U8SH-ND6Z] [hereinafter LoMonte, *College Sports and Social Media*].

[148] *See* Jason Scott, *Do Social Media Bans Violate the First Amendment?,* ATHLETIC BUS. (Sept. 3, 2015), http://www.athleticbusiness.com/web-social/do-social-media-bans-violate-the-first-amendment.html [https://perma.cc/A8S5-3NCE]; Ken Paulson, *College Athlete Tweet Ban? Free Speech Sacks That Idea*, USA TODAY (Apr. 16, 2012), https://www.pressreader.com/usa/usa-today-us-edition/20120416/281779921113718 [https://perma.cc/7J95-LXMU].

[149] LoMonte, *College Sports and Social Media*, *supra* note 147.

right, or is it the scholarship agreements by which athletes accept greater institutional control than other students face? Alternatively, is the elusive "something" the similarity between college sports and employment, where the employer can limit the speech rights of a public employee?[150] Parts III and IV, which follow, will address these questions with respect to athlete protest and social-media use, respectively, concluding in both instances that public colleges and universities should treat all their students—athletes and non-athletes—identically for First Amendment purposes.

III. College Athletes' Right to Protest

A. Unsuccessful Litigation

Under the existing *Tinker* standard, when college athletes participate in a protest or demonstration, their First Amendment rights must be considered relative to their institution's interest in maintaining order and discipline in its athletic programs.[151] An athlete's protest that disrupts an athletic program would merit no more First Amendment protection than any other student protest that similarly disrupted institutional functions in a material way.[152]

College athletes have had only limited success, under this standard, in litigation related to their protest activities. The earliest case followed the announcement by Black football players to their coach at the University of Wyoming in 1969 that they planned to wear black armbands on their uniform jerseys at the next day's home game against Brigham Young University (BYU) to protest alleged racist policies by the Mormon Church, with which BYU is affiliated.[153] The players never had a chance to conduct the

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[150] *See id.*

[151] *See* William A. Kaplan & Barbara A. Lee, The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making § 11.4.3 (5th ed. 2013).

[152] *See id.*

[153] *See* Bentley, *Fair Play?*, *supra* note 89. The Black players at Wyoming wanted to protest the Mormon Church's prohibition on African Americans becoming Mormon clergy and the racial slurs they claimed they had heard from the BYU players the previous year during a game at BYU. The "Black 14" may have lost the "battle" in 1969, but they arguably won the "war" in 1970, when BYU integrated its football roster, and in 1978, when the Mormon Church began to accept African Americans into its clergy. Sean Keeler, *We Were Villains: How Wyoming's Black 14 Blazed the Trail for Missouri Protests,* The Guardian (Nov. 11, 2015), https://www.theguardian.com/sport/2015/nov/11/we-were-villains-how-wyomings-black-14-blazed-the-trail-for-missouri-protests [https://perma.cc/GF74-RSQJ].

protest. As soon as they announced their plans to Head Coach Lloyd Eaton, who had established a rule prohibiting his players from participating in protests, which the players knew about, he dismissed them from the team.[154] The fourteen dismissed players sued. The case, which had four iterations in federal court, was dismissed in the District of Wyoming for failure to state a claim for which relief could be granted.[155] The United States Court of Appeals for the Tenth Circuit, initially reversed and remanded[156] but later affirmed.[157]

When it first considered the case, the appellate court concluded that "[i]n light of the principles of the *Tinker* case, we cannot say that the complaint fails to state a claim on which relief could be granted or that summary judgment was proper."[158] But after a remand and a trial, it endorsed the trial court's conclusion that both the United States and Wyoming Constitutions required complete neutrality on matters of church and state, which the players' armband display would have violated by using state facilities to express—in public—opposition to the practices of the Mormon Church.[159]

Williams v. Eaton is unusual, if not unique, among cases of athlete protest; although it relied on *Tinker*, it "mix[ed] considerations of free speech and freedom of religion."[160] In the Tenth Circuit's view, both federal and state law provided "strong support for a policy restricting hostile expressions against religious beliefs of others by representatives of a state or its agencies."[161] The court stated, "We feel that the Trustees' decision [to uphold the coach's dismissal of the players] was a proper means of respecting the rights of others in their beliefs, in accordance with this policy of religious neutrality."[162] Notably, the appellate court held that "the Trustees' decision was lawful within the limitations of the *Tinker* case itself,"[163] but it did not find that the athletes' protest was likely to be disruptive; instead, it relied solely on the seldom-used 'interference with the rights of others' branch of the *Tinker* case."[164]

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[154] *See* Keeler, *supra* note 153.

[155] *See* Williams v. Eaton, 310 F. Supp. 1342 (D. Wyo. 1970); Williams v. Eaton, 333 F. Supp. 107 (D. Wyo. 1971).

[156] 443 F.2d 422 (10th Cir. 1971).

[157] 468 F.2d 1079 (10th Cir. 1972).

[158] 443 F.2d at 431.

[159] *See* 468 F.2d at 1080.

[160] KAPLAN & LEE, *supra* note 151, at § 11.4.3.

[161] 468 F.2d at 1083.

[162] *Id.* at 1083-84.

[163] *Id.* at 1084.

[164] KAPLAN & LEE, *supra* note 151, at § 11.4.3.

Almost a decade later, the Tenth Circuit again rejected a First Amendment claim by college athletes, this time women's basketball players at the University of Oklahoma. In *Marcum v. Dahl*, the plaintiffs were athletic scholarship recipients who had enrolled at Oklahoma as freshmen in the autumn of 1977.[165] During the 1977-78 season, a rift developed on the women's basketball team, with the scholarship players on one side and the nonscholarship players on the other. The scholarship players thought the assistant coach was more competent than the head coach but was being marginalized, with adverse consequences for the team's performance.[166] The nonscholarship players supported the head coach.[167]

In January 1978, the scholarship players met with the overall Athletic Director and the Athletic Director for Women's Sports, who told the players that the administrators would consider the players' claims.[168] In mid-March, after the season had ended, the scholarship players told the press that if the head coach were rehired for the next season, they would not play.[169] Three weeks later, the two athletic administrators informed the scholarship players that their scholarships would not be renewed for the next academic year "because of their attitudes and behavior."[170] Soon thereafter, following a hearing that the plaintiffs chose not to attend, a committee of Oklahoma's Athletic Council approved the nonrenewal decision.[171]

The plaintiffs then filed suit in federal court, alleging that the nonrenewal of their athletic scholarships had violated their freedom of speech.[172] After a trial, a jury rendered a verdict for each plaintiff in the amount of $5,100, which was the value of each athletic scholarship for three additional years of school.[173] Nevertheless, the trial court granted the defendants' motion for judgment notwithstanding the verdict and dismissed the plaintiffs' case.[174]

On appeal, the Tenth Circuit affirmed, using the *Pickering* standard (*Connick* and *Garcetti* had not yet been litigated) that analogized the plaintiff athletes to public employees.[175] Drawing on that analogy, the appellate court reasoned that the plaintiffs could not rely on their "postseason ultima-

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[165] *See* 658 F.2d 731, 733 (10th Cir. 1981).
[166] *See id.*
[167] *See id*.
[168] *See id.*
[169] *See id.*
[170] *Id.*
[171] *See id.* at 734.
[172] *See id.* at 733.
[173] *See id.*
[174] *See id.*
[175] *See id.* at 734.

tum" to protect them against being discharged for their behavior during the basketball season.[176] It noted that the controversy during the season about who should be the head coach "resulted in disharmony among the players and disrupted the effective administration of the basketball program."[177] The plaintiffs' participation in the controversy during the season therefore "provided a sufficient basis for the nonrenewal of their scholarships."[178] Moreover, "the comments of the plaintiffs to the press did not involve matters of public concern."[179] Instead, they involved "internal problems with which the defendants were required to deal in their official capacities."[180] Those problems were "not of general public concern and the plaintiffs' comments to the press did not invoke First Amendment protection."[181] Accordingly, the institution had not violated the plaintiffs' First Amendment rights when it revoked their scholarships.

More recently, in *Green v. Sandy*, the plaintiff, who had been dismissed from the women's soccer team at Eastern Kentucky University (EKU), failed in her claim brought under 42 U.S.C. § 1983 against the University and several of its officials.[182] The trial court dismissed her amended complaint, which alleged, among other things, that EKU officials had removed her from the women's soccer team in retaliation for her exercise of free speech in expressing her concerns about her coach's handling of internal team matters.[183]

The plaintiff played soccer at EKU in 2007-08 and 2008-09, respectively.[184] Late in 2009, she became concerned about her coach's management of the team because of attrition among the players. She met with the coach but felt the coach denied her a fair hearing. Later, she presented her concerns to the athletic director, who assured the plaintiff that her discussion with him was confidential and that he would investigate her concerns.[185] But no such investigation occurred until the late spring of 2010, when the president of EKU, at the request of the plaintiff's father, appointed an investigator. Near the end of June, the investigator contacted the plaintiff to schedule a second meeting with her. On that same day, though, the athletic

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[176] *Id.* at 734-35.
[177] *Id.* at 734.
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *See* Civil Action No. 5:10-cv-367-JMH, 2011 U.S. Dist. LEXIS 114718, at *1 (E.D. Ky. Oct. 3, 2011).
[183] *See id.* at *5.
[184] *See id.* at *1.
[185] *See id.*

director told the plaintiff she was dismissed from the team. He did not give her any reason for the dismissal.[186]

The trial court, in granting the defendants' motion to dismiss, appeared to lean on the *Tinker* "material disruption" standard, although it did not mention *Tinker* by name. Instead, the court explained that "[the plaintiff] has failed to identify a violation of any federal constitutional right" because the coach and the athletic director "could reasonably have forecast the Plaintiff's criticism of [the coach's] methods and decisions would disrupt the team, and they were well within their rights to dismiss Plaintiff from the team."[187] Because the defendants had not violated any of the plaintiff's constitutional rights, the doctrine of sovereign immunity barred her claims against the defendants in their individual capacities.[188]

In concluding that no constitutional right was violated, the *Green* court relied primarily on *Lowery v. Euverard*,[189] which addressed a protest by football players at a Tennessee high school. Eighteen players at the school signed a one-sentence petition saying they did not want to play for the defendant, who was their team's head coach. Another player revealed the existence of the petition.[190] The coach then tried to interview three of the plaintiffs individually, but they refused individual interviews, whereupon he dismissed them from the team. The dismissal of the fourth plaintiff occurred the next day.[191] Players who had signed the petition but later apologized to the coach and told him they wanted to play for him were permitted to remain on the team.[192] In the trial court, the defendants sought summary judgment based on sovereign immunity, which the court denied, explaining that an issue of fact remained about whether the petition had disrupted the team.[193]

On appeal, the defendants argued that their dismissal of the plaintiffs from the football team was permissible under *Tinker* because of the forecast of material disruption if the protest were permitted to proceed. The plaintiffs countered that their petition was protected speech in protest of alleged

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[186] *See id.* at *2.

[187] *Id.* at *6.

[188] *Id.* The court had previously noted that the Eleventh Amendment barred the plaintiff's claims against EKU. It also explained that to avoid the sovereign immunity bar, the plaintiff needed to show that (a) she had suffered the violation of a constitutional right, and (b) the right was clearly established when the defendants violated it. Here, the plaintiff failed part (a) because she could not show the defendants violated her right to free speech. *Id.* at *5.

[189] 497 F.3d 584 (6th Cir. 2007).

[190] *See id.* at 586.

[191] *See id.*

[192] *See id.*

[193] *See id.*

misconduct by Coach Euverard, including striking a player on the helmet, throwing away recruiting letters from colleges to players Euverard disfavored, humiliating individual players, using inappropriate language, and requiring a year-round physical conditioning program in violation of state rules for high school teams.[194]

The Sixth Circuit agreed with the defendants, noting that the players' petition "constituted a direct challenge to Coach Euverard's authority."[195] It presented an untenable situation, in the appellate court's view, because "[a] high school athletic team could not function smoothly with an authority structure based on the will of the players."[196] The appellate court added that the team's "plays and strategies are seldom up for debate" and that "[e]xecution of the coach's will is paramount."[197]

Besides, the appellate court continued, "*Tinker* does not require certainty, only that the forecast of substantial disruption be reasonable."[198] Therefore, in any case, the court "must evaluate the circumstances to determine if Defendants' forecast of substantial disruption was reasonable."[199] In determining reasonableness, the court continued, "restrictions that would be inappropriate for the student body at large may be appropriate in the context of voluntary athletic programs."[200] Perceiving an analogy between "the greater restrictions on student athletes" and "the greater restrictions on government employees," the court reasoned that "legal principles from the government employment context [we]re relevant to the [*Lowery*] case."[201] Using the *Pickering/Connick* standard to evaluate a forecast of "material disruption" under *Tinker*, the appellate court concluded that "[i]t was reasonable for Defendants to forecast that Plaintiffs' petition would undermine [Coach] Euverard's authority and sow disunity on the football team."[202] Accordingly, the appellate court concluded that the players' dismissal from the team was consistent with the First Amendment.[203]

A concurring opinion took issue with two aspects of the majority's reasoning. First, the concurrence criticized the majority for "grafting the public-concern requirement of *Connick v. Myers*, 461 U.S. 138 (1983) onto

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[194] *See id.* at 585.
[195] *Id.* at 591.
[196] *Id.*
[197] *Id.* (quoting Dambrot v. Cent. Mich. Univ., 55 F.3d 1177, 1190 (6th Cir. 1995)).
[198] *Id.* at 592.
[199] *Id.* at 593.
[200] *Id.* at 597.
[201] *Id.*
[202] *Id.* at 600-01.
[203] *See id.*

the *Tinker* test, an approach never before taken in student-speech cases by either the Supreme Court or any other federal court of appeals to consider the issue."[204] The concurring judge saw no reason for the grafting experiment "in the absence of Supreme Court case law instructing us to do so."[205] Second, the majority opinion failed to assert facts necessary "to support its forecast of substantial disruption."[206] "At most," the concurrence observed, "the defendants have asserted a generalized fear of disruption to team unity based on the students' critical opinion of Euverard's ability as a coach," which did not satisfy *Tinker's* "substantial disruption" standard.[207] Noting that "[n]o disturbance happened until Euverard found out about the petition and retaliated against the leaders," the concurrence concluded that the plaintiffs' First Amendment rights under *Tinker* were violated.[208]

Still, the concurrence reasoned that the plaintiff's free-speech right was not clear enough in the school-sports setting to have put Coach Euverard on notice at the time of the protest that his response violated the First Amendment. Besides, no case law existed in the Sixth Circuit at the time that applied the *Tinker* standard to athletes and identified the scope of their First Amendment rights.[209] Thus, the appellate court reversed the trial court's denial of the defendants' motion for summary judgment. Although it arose in the high-school context, *Lowery* will figure prominently in this article's subsequent discussion of an appropriate standard for protecting the First Amendment rights of college athletes.

Taken together, *Williams*, *Marcum*, *Green*, and *Lowery* show courts treating the speech of (mostly) college athletes as unprotected, whether it pertained to team management, as in *Marcum* and *Green*, or to larger, public issues, such as racial discrimination or coach misconduct, as in *Williams* and *Lowery.* A later section of this article will advocate for a modified *Tinker* standard that offers greater protection to the athlete speech featured in *Williams* and *Lowery* than that present in *Marcum* and *Green*, respectively.

F. Successful Litigation

College athletes' most noteworthy success in First Amendment litigation was *Hysaw v. Washburn University*, in which the plaintiffs were Black former football players who complained that coaches and administrators at

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[204] *Id.* at 601.
[205] *Id.*
[206] *Id.* at 603.
[207] *See id.*
[208] *See id.* at 605.
[209] *See id.*

the defendant institution were discriminating against them based on race.[210] As a result of the alleged discrimination, the plaintiffs boycotted practice sessions; the administration responded by removing them from the team.[211] The institution then sought an apology from the players; when the players refused to apologize, the institution prohibited them from returning to the team.[212]

The plaintiffs' First Amendment argument was that they were dismissed from the football team after protesting racial mistreatment.[213] The institution countered that the plaintiffs were dismissed for missing practice without a valid excuse, not for challenging racially biased behavior by coaches and administrators.[214] But the head coach undercut that argument when, in his deposition testimony, he acknowledged that if a player were to miss practice in protest against racial mistreatment, he would excuse the player's absence.[215] The deposition testimony also blunted the institution's argument that the players' dismissal was a reasonable time, place, or manner restriction on speech. Citing *Tinker*, the institution claimed that "the boycott severely disrupted the football team and infringed upon the rights of others participating in the football program."[216]

But the court was not persuaded. "It stretches the imagination," the court wrote, "to envision how an absence allegedly sanctioned by the coaching staff could be disruptive."[217] Furthermore, the plaintiffs' actions did not infringe on the rights of others. Reading the "rights of others" exception under *Tinker* narrowly, the court stated that it "will not place the interests of participants in a university extracurricular activity above the rights of any citizen to speak out against alleged racial injustice without fear of government retribution."[218] Accordingly, the court denied the institution's motion for summary judgment on the plaintiffs' First Amendment claim.[219]

Thus far, then, college athletes' prospects for success in free-speech litigation have rested precariously on the slender reed that is a coach's support for their protest; only in *Hysaw*, where that support was present, have they

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[210] *See* 690 F. Supp. 940, 942 (D. Kan. 1987).
[211] *See id.*
[212] *See id.* at 943.
[213] *See id.* at 946.
[214] *See id.*
[215] *See id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *See id.*

succeeded. The following section will argue that college athletes should not have to depend on such support to enjoy the freedom of speech.

B. The Need for a New Standard

Hysaw could have been a powerful ally for football players at the University of Missouri in 2015 if their protest had resulted in litigation. In November of that year, thirty Missouri football players refused to participate in practice or games until University President Timothy Wolfe resigned or was fired; the players charged that Wolfe had ignored racist behavior directed at Black students on campus.[220] The subtext of the Missouri protest was unlike that in *Hysaw* because Missouri competes in the Football Bowl Subdivision (FBS), where a forfeited game could cost the responsible team a substantial sum of money. Indeed, if the players had boycotted Missouri's next game—against Brigham Young University—the University of Missouri would have lost at least the one million dollars it was guaranteed for playing the game.[221]

Still, had President Wolfe not resigned, ending the threatened boycott, and had the players been penalized—resulting in litigation—they would have found a helpful precedent in *Hysaw*. Like the coach in that case, Missouri Head Coach Gary Pinkel indicated that he would not punish his players for boycotting practice or games in a protest of racist behavior against Black students.[222] Under these circumstances, a court might well have concluded, as the *Hysaw* court did, that so long as the coach would tolerate a boycott, the University could not show that the players' actions had caused a "material disruption" of its football program.[223]

In First Amendment matters, though, college athletes take a considerable risk in resting their hopes on that slender reed of a coach's support, as Black football players at the University of Texas at Austin (UT) have learned. During the summer of 2020, in the wake of nationwide protests over the killing of George Floyd, a Black man, by a Minneapolis police officer, the players learned that the song they were expected to sing after home football games—"The Eyes of Texas Are Upon You"—had a racist history.[224] Two UT students wrote "The Eyes of Texas" at the turn of the Twentieth Century and first performed it at a minstrel show in May 1903.

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[220] *See* Bentley, *Fair Play?*, *supra* note 89.
[221] *See id.*
[222] *See id.*
[223] *Id.*
[224] *See* Kate McGee, *Students Refuse to Work, Man Pulls out Gun as Tensions Rise at UT-Austin over 'The Eyes of Texas'*, HOUSTON CHRON. (May 5, 2021), https://

Minstrel shows were fundraisers organized by students that featured white performers singing and dancing in blackface. The following autumn, a student sang the song during a football game, and it eventually became integrated into student life at the University.[225]

Having learned this history, the football players asked the University administration to replace "The Eyes of Texas" as the *alma mater*; later in 2020, a group of former UT athletes made the same request.[226] University officials denied the requests but told the football players they would not be required to sing the song.[227] The controversy reignited when, after the first two home games of the 2020 season, the football team left the field before the song was sung. The negative reactions of fans prompted the athletic director to state that he expected the players to "stand in unison" during the song.[228] The football coach during the 2020 season—Tom Herman—appeared to side with his players, allowing them to decide for themselves whether to sing the alma mater.[229] But Coach Herman was fired after that season, and his replacement—Steve Sarkisian—emphasized early on that he would require all players to participate in the postgame singing of "The Eyes of Texas." "We're going to sing that song, proudly," he assured Longhorn fans.[230]

This example illustrates that the First Amendment rights of college athletes need a firmer foundation than the support of the current coach; a new standard is necessary for judging student speech in the context of intercollegiate athletics. That standard must appreciate that college athletes are students and must treat them as such, just as recent changes to transfer rules and rules surrounding NILs do. The new standard must also appreciate that institutions are expected to *tolerate, not promote*, athletic protest, which renders the *Hazelwood* standard discussed in Part II inapplicable to intercollegiate athletics. Neither the "maturity rationale" nor the "disassociation rationale," which undergird *Hazelwood*, applies to college students, including athletes.[231] As adults, college students are sufficiently mature to decide

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www.chron.com/news/houston-texas/article/eyes-of-texas-ut-austin-16151018.php [https://perma.cc/N9XC-DM6X].

[225] *See* Levin, *supra* note 13.

[226] *See id*.

[227] *See* Vertuno, *supra* note 13.

[228] *See id*.

[229] *See Group Led by Former University of Texas Athletic Director Weighs in on 'Eyes of Texas' Controversy*, SPORTS LITIG. ALERT (Mar. 26, 2021), https://sportslitigationalert.com/group-led-by-former-university-of-texas-athletic-director-weighs-in-on-eyes-of-texas-controversy/ [https://perma.cc/79MM-Q5JE].

[230] *Id*.

[231] *See* LoMonte, *The Key Word Is Student*, *supra* note 16, at 306.

for themselves what speech to embrace and what speech to reject. Therefore, institutions need not fear that allowing certain speech on campus will necessarily align the institutions with the views of the speaker in the minds of students.[232]

The *Pickering*/*Connick*/*Garcetti* theory should not underlie the new standard either. It is designed for a workplace in which the supervisor seeks to shape office communications and the employees understand that limited First Amendment rights are a condition of their employment, particularly regarding intraoffice matters. In contrast, the Supreme Court has long regarded a university campus as "peculiarly the marketplace of ideas,"[233] where circumscribing student speech "risks the suppression of free speech and creative inquiry in one of the vital centers of the Nation's intellectual life . . . ."[234]

Thus, the appropriate standard must derive from the "material disruption" guideline of *Tinker*. It should respect coaches' authority to manage their teams in pursuit of a successful season and recognize the importance of cohesion to team success. At the same time, it should balance those interests with the free-speech rights of a student on a college campus, where athletes deserve the same rights to challenge discrimination or official misconduct that their nonathlete classmates enjoy. Part V presents such an enhanced *Tinker* standard for athletic protest, but first, a discussion of the need for a new standard regarding college athletes' social-media speech is in order. Part IV, which follows, addresses the First Amendment implications of social-media use by college athletes.

IV. College Athletes' Right to Use Social Media

Another First Amendment issue that arises for athletes—indeed, more frequently than the right to protest—is their wish to communicate via various social-media platforms despite coaches' and athletic administrators' desire (and efforts) to restrict such communication. Professor Meg Penrose, who supports some limitation of social-media use by athletes, identifies the constitutional issue involved clearly. She asks the following questions: Can a coach or athletic department at a public university legally restrict a college

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[232] *See id.*

[233] Healy v. James, 408 U.S. 169, 180-81 (1972).

[234] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 836 (1995).

athlete's use of social media? If so, does the First Amendment provide any restraints on the type or length of restrictions that can be imposed?[235]

These questions are important because, as Professor Penrose notes, "[n]early every NCAA institution has a separate student-athlete code of conduct that supplements, not supplants, the more generic student codes of conduct governing the college experience."[236] For example, the Student Athlete Code of Conduct at Virginia Tech states:

> It is a privilege, and not a right, to participate in intercollegiate athletics. As a student who participates in intercollegiate athletics, you become a member of a team. With great privilege comes great responsibility. When you accept the privilege of being a Virginia Tech athletics team member, you also accept the responsibilities of representing the university as a student athlete. In addition to NCAA, ACC, institutional, and department rules, you are expected to follow team rules and practices set forth by your coaches.[237]

Besides such codes of conduct, most NCAA-member institutions have separate social-media policies for athletes that "[p]rohibit negative or offensive content that would be constitutionally suspect if not applied to athletes."[238] For example, under its social-media policy, the University of North Carolina at Chapel Hill reserves the right of "at least one" coach, administrator, or other staff member, or even an outside vendor to "hav[e] access to, regularly monitor[ ] the content of, and/or receiv[e] reports about team members' social networking sites and postings."[239] As the above language suggests, some institutions have hired third-party vendors (*e.g.*,

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[235] *See* Meg Penrose, *Sharing Stupid $h*t With Friends and Followers: The First Amendment Rights of College Athletes to Use Social Media*, 17 SMU SCI. & TECH. L. REV. 449, 451 (2017) [hereinafter Penrose, *Sharing Stupid $h*t with Friends and Followers*].

[236] *Id.* at 458.

[237] This quotation, which is virtually identical to the quotation Professor Penrose cites at p. 458 of her article, is from the 2021-22 edition of the Virginia Tech Student Athlete Handbook. *See 2021-22 Student-Athlete Handbook*, VA. TECH ATHLETICS, https://hokiesports.com/documents/2021/7/29/2021_2022_Student_Athlete_Handbook.pdf [https://perma.cc/9FUY-74YB] (last visited December 16, 2021). The acronym "ACC" refers to the Atlantic Coast Conference, the athletic conference of which Virginia Tech is a member.

[238] Penrose, *Sharing Stupid $h*t with Friends and Followers*, *supra* note 235, at 465.

[239] *Id.* at 466. *See also Department of Athletics Policy on Student-Athlete Social Networking and Media Use*, UNC ATHLETICS, https://goheels.com/documents/2018/8/2/Department_of_Athletics_Policy_on_Student_Athlete_Social_Networking_and_Media_Use.pdf [https://perma.cc/5C3V-6G4N] (last visited December 16, 2021).

UDiligence, Varsity Monitor, and Centrix Social) to monitor athletes' social-media accounts.[240] Under these arrangements, the athletes must "install the software applications on their computers and wireless devices, and the vendor monitors their activities, searching the social networking sites for key words that might point to discussion of drug or alcohol abuse, obscenities, offensive comments, or references to potential NCAA violations like agents or free gifts."[241] Using proprietary technology, the monitoring companies examine athletes' personal accounts for prohibited content and, when they find it, report their findings to the institutional client's athletic department.[242]

Professor Penrose cites two reasons to support her view that restraints on athletes' access to social media "are constitutional content-neutral limitations permitted under reasonable time, place, and manner restrictions" on speech.[243] First, though omitting the word "contract," she notes that college athletes accept increased institutional control over their lives in exchange for valuable benefits, particularly athletic scholarships. She writes:

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[240] *See* Browning, *supra* note 11, at 842.

[241] *Id.*

[242] *See id.*

[243] Meg Penrose, *Tinkering with Success: College Athletes, Social Media, and the First Amendment*, 35 PACE L. REV. 30, 42 (2014) [hereinafter Penrose, *Tinkering with Success*]. Professor Penrose does not cite a right/privilege distinction as a basis for restricting athletes' social-media use, but some universities do. For example, the 2021-22 Student-Athlete Handbook at Virginia Tech states: "It is a privilege, and not a right, to participate in intercollegiate athletics." *See 2021-22 Student-Athlete Handbook*, *supra* note 237. Similarly, the social-media policy of the Department of Athletics at the University of North Carolina at Chapel Hill states that "each student-athlete must remember that playing and competing for the University is a privilege, not a right." *See Department of Athletics Policy on Student-Athlete Social Networking and Media Use*, *supra* note 239. Despite this language, the right/privilege distinction no longer enjoys its former importance in American law. The distinction held that one enjoyed "rights" independently of the state, but that "privileges," such as a public-sector job or a license to operate a business, were creations of the state that the state could take away without violating civil liberties. Accordingly, government could condition receipt of a privilege on the recipient's willingness to surrender or limit the exercise of a constitutional right. As government grew larger and conferred more benefits, the threat to individual rights from the right/privilege distinction became clear, and the Supreme Court repudiated it in *Perry v. Sindermann*, 408 U.S. 593 (1972), articulating instead the doctrine of unconstitutional conditions. Under this doctrine, "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if government may withhold the benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989). Thus, the right/privilege distinction is an extremely weak rationale for restricting college athletes' social-media use.

> College athletes voluntarily agree to place themselves in heavily regulated, highly restrictive, and physically demanding environments. This choice to voluntarily participate in athletics operates, at least partially, as a waiver of speech and expressive rights. College athletes literally accept these limitations when they sign on to their governing athletic code of conduct.[244]

Under this contractual rationale, she concludes that "[i]f state-sponsored universities can degrade a student-athlete's privacy in the name of wholesome and safe competition, then so too can they limit a student-athlete's speech in the name of team unity and avoiding distractions."[245]

Second, Professor Penrose equates athletic participation at public universities to employment, noting that athletes are responsible for "furthering the state interest in fielding a successful athletic team on behalf of the university."[246] In this quasi-employment rationale, "[s]ocial media presents a significant distraction from successful athletic performance and a temporary ban during the competitive season provides a constitutionally effective way to curtail the distraction."[247] Accordingly, Professor Penrose supports the *Pickering*/*Connick*/*Garcetti* approach to evaluating college athletes' free-speech claims, or at least a variation of it. She argues that *Pickering*/*Connick*/*Garcetti* "offers a far superior approach than *Tinker.*" In her view, *Pickering*/*Connick*/*Garcetti* "appreciates the student-athlete's unique relation to a state [university] athletic department as qualitatively distinct from a high school student's desire to attend class, [thereby requiring] greater deference [to institutional authority] than the *Tinker* framework offers."[248]

In her view, "season-long bans, which require athletes to sign off their Twitter or Facebook accounts during their competitive season, are content-neutral" time, place, or manner restrictions on speech.[249] She recommends that such restrictions be evaluated according to "intermediate scrutiny," which requires "a demonstration of a narrow tailoring (or fit) to serve a significant governmental interest."[250] In this case, she argues, the significant governmental interest is "encouraging successful athletic performance,"[251] and the seasonal social-media ban satisfies the narrow-tailoring requirement because the governmental interest is more likely to be achieved with the ban

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[244] Meg Penrose, *Outspoken*, *supra* note 92, at 525-26.
[245] *Id.* at 538.
[246] Penrose, *Tinkering with Success*, *supra* note 243, at 61.
[247] *Id.* at 64.
[248] Penrose, *Outspoken*, *supra* note 92, at 543.
[249] Penrose, *Tinkering with Success*, *supra* note 243, at 58.
[250] *Id.* at 61.
[251] *Id.*

than without it.[252] The ban does not discriminate based on the message conveyed, the subject discussed, or the viewpoint expressed, but merely restricts the time (during the season) and the manner (social media platforms) of expression, like a ban on using a sound truck in a residential neighborhood after 8 p.m. Furthermore, the seasonal ban leaves open "alternative channels of communication," the final requirement for a time, place, or manner regulation.[253] Athletes may still communicate by text message, email, or more traditional means if they wish.

But a healthy skepticism prompts the question: "Can a coach at a public college condition participation in [a] sport on a promise not to engage in free speech via Twitter?"[254] The answer is most likely no. Assuming an athlete's financial-aid agreement with an institution is a contract, a constitutional restraint on social-media speech would run the risk of imposing an unconstitutional condition on that contract.[255] The doctrine of unconstitutional conditions holds that government may not deny a benefit to a person because that person exercises a constitutional right.[256] It would presumably apply when a public university conditions the receipt of an athletic scholarship on athletes giving up their right to free speech because the athletes would be "pressured to alter a choice about exercise of a preferred constitutional liberty in the direction the government [in the form of the university] favors."[257] Faced with an unconstitutional condition—restricted speech rights—a court would apply "strict scrutiny," meaning that to justify the restriction, the institution would have to show that it was narrowly tailored to achieve a compelling governmental purpose.[258] Even if the institution could show that the challenged rule was "narrowly tailored," namely, the least restrictive means available to achieve its goal, the rule would fail strict scrutiny if the court concluded that team unity and the avoidance of distractions did not constitute a "compelling" state interest.

A practical consideration would also take the wind out of the contractual argument's sails. Forty-six percent of the athletes at Division I institutions and thirty-nine percent of their counterparts at Division II institutions

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[252] *See id.* at 63.
[253] *See id.* at 66.
[254] Paulson, *supra* note 147.
[255] *See* LoMonte, *College Sports and Social Media*, *supra* note 147.
[256] *See* Davis Walsh, *All a Twitter: Social Networking, College Athletes, and the First Amendment*, 20 WM. & MARY BILL RTS. J. 619, 638 (2011) (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)).
[257] *Id.* at 640.
[258] *See id.* at 638.

are "walk-ons," who play without benefit of an athletic scholarship.[259] Despite lacking a contractual arrangement with their respective institutions, walk-ons enjoy no greater freedom of expression than their teammates who receive athletic scholarships.[260] The contractual rationale, then, would, at best, justify limiting the social-media access of only fifty-four percent of college athletes, while at worst, dragooning the remaining forty-six percent into compliance if they wished to continue playing their sport. The former would likely be ineffective, while the latter would be unfair. Thus, both constitutional theory and practical considerations counsel against restricting athletes' social-media access based on the contractual rationale. Put simply, Professor Penrose stretches the contractual rationale to the breaking point.

The quasi-employment rationale is also problematic. Despite arguments to the contrary by some commentators,[261] "college athletics is not in any traditional sense 'employment,' and . . . colleges themselves shrink from characterizing their student-athletes as employees."[262] Indeed, although the NCAA has grudgingly accepted athletes' new opportunity to profit from commercial use of their names, images, and likenesses, it remains adamantly opposed to a pay-for-play arrangement in which they would be considered employees.[263] Therefore, courts would likely be skeptical of institutions'

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[259] *See The Five Most Common Walk-On Questions*, SPORTS ENGINE (July 10, 2018), https://www.sportsengine.com/recruiting/five-most-common-college-walk-questions [https://perma.cc/H3S5-F5LE]; Drew Eastland, *Unsung Heroes Still Finding College Athletics Rewarding*, THE DAVIDSONIAN (Nov. 20, 2019), https://www.davidsonian.com/unsungheroes-still-find-college-athletics-rewarding/ [https://perma.cc/K7XC-BRKS].

[260] *See* LoMonte, *College Sports and Social Media*, *supra* note 147.

[261] For arguments that college athletes at Division I institutions are effectively employees because of their athletic scholarships and the coaches' control over their lives, *see* Richard T. Karcher, *Big-Time College Athletes' Status as* Employees, 33 A.B.A. J. LABOR & EMP. L. 31 (2018); Amy C. McCormick and Robert A. McCormick, *The Emperor's New Clothes*: *Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495 (2008); Amy C. McCormick and Robert A. McCormick, *The Myth of the Student-Athlete*: *The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006).

[262] LoMonte, *College Sports and Social Media*, *supra* note 147.

[263] The current NCAA Constitution includes Article 2.9, "The Principle of Amateurism," which states as follows: "Student-athletes shall be amateurs in intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental, and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2021-22 DIVISION I MANUAL 3 (2021). Similarly, the new NCAA Constitution that the membership approved on January 20, 2022, which took effect on August 1, 2022, states in Article 1, Part B: "Student-athletes may not be compensated by a member institution for participating in a sport but may

claims that they can control the speech of athletes, as "the legal equivalents of employees."[264] Besides, as long as institutions are unwilling to extend the full benefits of employment (*e.g.*, salaries, health insurance, etc.) to athletes, those institutions "should not be allowed to take advantage of employee status for speech-restricting purposes . . . ."[265] In the current environment, featuring rules changes (*e.g.*, transfer rule, NIL rule) designed to make college athletics fairer to the athletes, making them employees solely to restrict their speech rights is both bad law and bad policy. Thus, the quasi-employment rationale is as suspect as the contractual rationale. When applied to the free-speech rights of college athletes, both rationales are playing out of position, like the infielder forced to play the outfield or the offensive player shifted to the defense.

Another factor also counsels against seasonal (or longer) bans on social-media access for college athletes. Regardless of the underlying rationale used, the argument that a seasonal ban would be a time, place, or manner regulation that could withstand intermediate scrutiny is weak.[266] Admittedly, when courts review time, place, or manner regulations, they need not consider whether the regulations are the "least intrusive means of furthering [a] legitimate governmental interest."[267] And in such circumstances, as Professor Penrose observes, "[c]ourts will look for some demonstrated effort to properly constrain the restriction to not overly affect speech and expression."[268]

Still, the intermediate scrutiny to which time, place, or manner restrictions are subject requires them to be "narrowly tailored to serve a significant governmental interest" and to "leave open ample alternative channels for communication of the information."[269] Using this standard, the Supreme Court has upheld regulations that (1) prohibited demonstrators from sleeping in Lafayette Park and on the National Mall in Washington, D.C.;[270] (2) required performers in New York City's Central Park bandshell to use the

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receive educational and other benefits in accordance with guidelines established by their NCAA division. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA CONSTITUTION (2021), *available at* ncaaorg.s3.amazonaws.com/governance/ncaa/constitution/NCAAGov_Constitution121421.pdf [https://perma.cc/U9KQ-9BP3].

[264] LoMonte & Hamrick, *supra* note 118, at 127.

[265] LoMonte, *College Sports and Social Media*, *supra* note 147.

[266] *See* Penrose, *Sharing Stupid $h*t with Friends and Followers*, *supra* note 235, at 480; Penrose, *Tinkering with Success*, *supra* note 243, at 42.

[267] Penrose, *Sharing Stupid $h*t with Friends and Followers*, *supra* note 235, at 480 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 789-90 (1989)).

[268] *Id.*

[269] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[270] *See id.*

City's sound technician to control volume during their performances;[271] and (3) prohibited locating adult movie theaters within one thousand feet of a residential zone, church, park, or school to address the *secondary effects* (crime, reduced property values, etc.) of such theaters on the surrounding community.[272]

Even if social-media bans applied to college athletes are content-neutral because they extend to all speech, regardless of content, they are likely to fail intermediate scrutiny. Institutions will be at pains to show that a unified, focused athletic team is a "substantial governmental interest" and that banning social media is more likely than education or after-the-fact punishment to serve that interest.[273] Institutions may also have difficulty showing that social-media bans leave open ample alternative means of communication because many of them couple such bans with restrictions on athletes' contact with print and broadcast journalists.[274]

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[271] *See Ward*, 491 U.S. 781.

[272] *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47 (1986).

[273] Professor Penrose views athletic success at public universities as a substantial governmental interest. She writes that "success on the court or field leads to an enhanced academic reputation and greater alumni support, which generally raises a university's overall profile." Penrose, *Sharing Stupid $h*t with Friends and Followers*, *supra* note 235, at 481. But that statement conflicts with a massive literature on the governance of college sports that documents repeated financial and academic scandals at NCAA Division I institutions, originating in the athletic department, that have tarnished institutional reputations as much as athletic success has enhanced them. The same literature shows that data generally do not support broad claims like that of Professor Penrose that athletic success yields an improved academic reputation and greater alumni support. *See, e.g.*, GERALD GURNEY ET AL., UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT (2017); BRIAN L. PORTO, A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS (2003); ALLEN L. SACK AND ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH (1998); JAY M. SMITH AND MARY WILLINGHAM, CHEATED: THE UNC SCANDAL, THE EDUCATION OF ATHLETES, AND THE FUTURE OF BIG-TIME COLLEGE SPORTS (2015); MURRAY SPERBER, COLLEGE SPORTS, INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY (1990); JOHN R. THELIN, GAMES COLLEGES PLAY: SCANDAL AND REFORM IN INTERCOLLEGIATE ATHLETICS (1996); ANDREW ZIMBALIST, WHITHER COLLEGE SPORTS: AMATEURISM, ATHLETE SAFETY, AND ACADEMIC INTEGRITY (2021); ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS (1999).

[274] *See* LoMonte & Hamrick, *supra* note 118, at 97-100. A survey by the Brechner Center for Freedom of Information at the University of Florida asked the eighty-four largest state universities in the United States for copies of documents concerning their athletes' interactions with the media. The request yielded fifty-eight sets of documents, fifty-six from responses and two found online. The data showed that fifty institutions had restrictions in place regarding athletes' interactions with the

The answer to Professor Penrose's question whether a coach or athletic department at a public university can legally impose such restrictions is yes, but not to the extent of a seasonal ban, which she recommends. And the answer to her question whether the First Amendment limits the type or length of those restrictions, in turn, is resoundingly yes. Thus, just as athlete protest requires a new, or at least modified, legal standard, so too does athlete access to social media. Part V, which follows, will identify a standard to govern both issues.

V. THE *TINKER* COLLEGIATE STANDARD

A. As Applied to Athlete Protest

Examples abound of athlete protest as a catalyst to constructive change in college sports and beyond. Recall that at the University of Missouri, a threatened boycott of upcoming games and practices by athletes of color on the football team prompted the resignation of President Tim Wolfe, "who had mishandled instances of racial hostility" on the campus.[275] At Penn State, a gymnastics coach resigned after a member of the 2016 women's team told the campus newspaper that the coaching staff belittled and body-shamed athletes, pressuring them to practice despite injuries and to lose weight.[276] And at Grambling State University in Louisiana, football players boycotted a game in 2013 to protest the decrepit condition of their locker room and workout facilities and the firing of their popular head coach.[277] In contrast, an investigative report into the death of University of Maryland football player Jordan McNair in 2018 from heatstroke suffered during a team workout concluded that the team's culture caused problems to fester "because too many players feared speaking out."[278] In particular, the culture of silence allowed the team's strength coach, whom the report concluded had

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media. According to LoMonte and Hamrick, the restrictions "categorically prohibited speaking to the news media without approval from a coach or athletic department staff member." *Id.* at 97.

[275] *Id.* at 94.

[276] *See id.* at 96.

[277] *See id.*

[278] Rick Maese & Keith L. Alexander, *Report on Maryland Football Culture Cites Problems but Stops Short of 'Toxic' Label*, WASH. POST (Oct. 25, 2018), washingtonpost.com/sports/2018/10/25/report-maryland-football-culture-cites-problems-stops-short-toxic-label [https://perma.cc/335L-68AY].

"engaged in abusive conduct" toward players "many" times, to be "effectively accountable to no one."[279]

These examples, which underscore the value of speech and the danger of silence, illustrate the need for a *Tinker* collegiate standard that would protect athletes' exercise of their First Amendment rights while maintaining coaches' capacity to direct their teams. The new standard would derive from the foundational *Tinker* premise that institutions cannot prohibit or punish expression by college athletes without showing that the forbidden speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of" their athletic programs.[280] It would also reflect the Supreme Court's decisions recognizing the centrality of free expression in an academic community.[281]

Therefore, the *Tinker* collegiate standard would reject the Sixth Circuit's reasoning in *Lowery v. Euverard*[282] that "[t]he potential disunity and disrespect . . . the coach perceived the petition [some players circulated against him] to be creating was sufficient to satisfy the 'materially or substantially interfere' test articulated in *Tinker*."[283] Recall that the *Lowery* plaintiffs claimed their coach had struck a player on the helmet, thrown away recruiting letters from colleges to players the coach disfavored, humiliated individual players, and required a year-round physical conditioning program contrary to state athletic-association rules.[284] *Lowery* shows why the *Tinker* standard should be modified to protect athletes' freedom to challenge official misconduct or abuse of players by coaches: "the student-athletes' whistleblower conduct could be seen as beneficial to society."[285]

Furthermore, as the concurrence in *Lowery* noted, under *Tinker*, the institution "bears the burden of demonstrating sufficient facts to support its forecast of substantial disruption."[286] The high school in *Lowery* had not done so, instead merely "assert[ing] a generalized fear of disruption to team unity based on the students' critical opinion of Euverard's ability as a coach," which was "simply not enough to meet the 'substantial disruption'

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[279] *Id.*

[280] *Tinker*, 393 U.S. at 509.

[281] *See* Healy v. James, 408 U.S. 169 (1972); Papish v. Bd. of Curators of Univ. of Missouri, 410 U.S. 667 (1973); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995).

[282] 497 F.3d 584 (6th Cir. 2007).

[283] Edmund Donnelly, Comment, *What Happens When Student-Athletes are the Ones Blowing the Whistle? How* Lowery v. Euverard *Exposes a Deficiency in the First Amendment Rights of Student-Athletes*, 43 NEW ENG. L. REV. 943, 954 (2009).

[284] *See id.* at 960.

[285] *Id.* at 960.

[286] *Lowery,* 497 F.3d. at 603.

standard of *Tinker*.[287] Indeed, no disturbance had occurred until Coach Euverard learned of the players' petition and punished its organizers.[288]

The *Tinker* collegiate standard would maintain the "material disruption" requirement of the existing *Tinker* standard, but a generalized fear of disunity resulting from athlete dissent would not suffice. Courts would insist that institutions present "particular facts" to demonstrate that the disruption will materially and substantially interfere with "the educational goal of the particular activity (or other students' rights)," instead of relying on a generalized fear of disruption to routine operations.[289] Moreover, even assuming the institution could demonstrate such a material and substantial disruption, an exception would exist for whistleblower conduct designed, for example, to bring unethical or abusive coaching behavior to light.[290] This exception would apply, in a collegiate analogue to *Lowery*, to protect athletes' right to seek removal of a coach whose behavior was unethical or abusive.

Reflecting the tradition of broad free-speech rights for college students, the exception would extend to expressive conduct designed to highlight a particular social issue, such as kneeling on one knee in the locker room or on the field before competition in support of the Black Lives Matter Movement, or refusing to do so, or declining to sing "The Eyes of Texas" after a football game. Any institutional penalties imposed on athletes for whistleblower or other expressive conduct would trigger a judicial determination whether that conduct alone precipitated the punishment. If so, application of the *Tinker* collegiate standard would negate the penalty.[291] If not, then the court must determine whether the institution would have penalized the athlete absent the expressive conduct. If a penalty would have been imposed irrespective of the expressive conduct because the speech was unprotected or because illegal activity occurred, then the First Amendment would not protect the athletes from punishment. The new standard would keep faith with the *Tinker* decision by acknowledging the context in which the expression occurred (i.e., a college campus)[292] and honoring the statement in Justice Fortas's majority opinion that students' free speech rights extend beyond the classroom, to the cafeteria, *the playing field*, and the campus generally.[293]

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[287] *Id.*
[288] *See id.* at 605.
[289] Zeidel, *supra* note 65, at 341.
[290] *See* Donnelly, s*upra* note 283, at 964.
[291] *See id.*
[292] *See id.* at 965.
[293] *See Tinker*, 393 U.S. at 513.

Had the threatened boycott by the Missouri football players in 2015 materialized, been punished, and resulted in litigation, the *Tinker* collegiate standard would likely have vindicated the players' free-speech rights. The campus was roiled by protests over administrative inaction regarding harassment of African American students before the football players threatened a boycott, so the University would have struggled to show that the players' action materially disrupted the institution's work. The players acted only after a Black graduate student began a hunger strike over the incidents of harassment on campus.[294] And although nearly half of the players (60 of 124) on Missouri's roster were African American, it is unclear that all Black players would have participated in the boycott; even if they had, the team could still have played its three remaining games, albeit with a reduced roster.[295] Furthermore, the threatened boycott was not only expressive conduct concerning an important social issue—racial discrimination—but also an act of whistleblowing against a university administration that had allegedly failed to respond to incidents of racial intolerance and intimidation on campus. These known facts suggest that under the recommended standard, the players' right to protest would have prevailed.

Nevertheless, the *Tinker* collegiate standard recognizes coaches' authority to design game plans; decide who will play and who will sit on the bench; and, generally, to manage their teams as they see fit. That authority was at issue in *Marcum v. Dahl*; recall that in *Marcum*, a rift within a women's college basketball team led to the nonrenewal of scholarships for players who claimed they would not play the next season if the University

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[294] *See* Marc Tracy & Ashley Southall, *Black Football Players Lend Heft to Protests at Missouri*, N.Y. TIMES (Nov. 8, 2015), nytimes.com/2015/11/09/us/missouri-football-players-boycott-in-protest-of-university-president.html [https://perma.cc/A4RU-B599].

[295] *See id.* The inflated size of college football rosters is a frequent target of critics of big-time college sports. Missouri's 2015 roster was just slightly larger than the average roster size (120) for members of the Football Bowl Subdivision (FBS), the most competitive entity within college football. The critics charge that such roster sizes are unnecessarily large and deprive women's sports and men's nonrevenue sports of much-needed funds. They note that college teams commonly have eighty-five scholarship players and thirty-five walk-ons, whereas National Football League (NFL) teams have a maximum active roster of forty-five players and a maximum inactive roster of eight additional players. Instead, some critics recommend that the number of college football scholarships be reduced from eighty-five to sixty. Considering the smaller rosters and the longer seasons for NFL teams, Missouri could presumably have fielded a team for the last three games of the 2015 season had the Black players carried out a boycott. *See*, *e.g.*, GERALD GURNEY ET AL., UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT 219 (2017).

rehired the current head coach. The trial court granted the defendants' motion for judgment notwithstanding the verdict, and the Tenth Circuit affirmed, reasoning that the dispute was an internal team issue best resolved by athletic administrators.[296]

The *Tinker* collegiate standard would likely have reached the same result in *Marcum*, but without equating college freshmen to public employees. It would have first considered whether the players' rift materially and substantially disrupted their team during the 1977-78 season. The appellate court's observation that the rift "resulted in disharmony among the players and disrupted the effective administration of the basketball program" contrasts with *Lowery*, in which any disruption that occurred followed actions by a coach, not a player. In this case, the players had created the rift and perpetuated it themselves. Assuming a disruption, then, the recommended standard would have considered whether the plaintiffs were "blowing the whistle" on official misconduct or highlighting an important social issue, such as a form of discrimination. In *Marcum*, they were doing neither; the underlying dispute was about who should be the head coach, which is a matter for athletic administrators—not players or courts—to decide. Therefore, based on the available facts, the athletic administrators did not violate the plaintiffs' First Amendment rights.

Adopting the *Tinker* collegiate standard, then, would not cause athletes' free speech right to supersede coaches' authority to manage their teams in every instance. Athletes would have to show that their protest activity did not materially and substantially disrupt an institutional athletic program or that, if such disruption occurred, the players' right to blow the whistle on misconduct or highlight an important issue effectively negated it. Otherwise, as in *Marcum*, institutional authorities would prevail. Accordingly, this standard would protect athletes' right to protest while respecting coaches' authority and treating college athletes as students.

B. As Applied to Athletes' Social-Media Use

If the *Tinker* collegiate standard were applied to institutional bans on college athletes' use of social media, the bans would not pass constitutional muster. To be sure, private colleges and universities, along with other private entities, such as the National Football League (NFL), Major League Baseball (MLB), and the National Basketball Association (NBA), can establish strict social-media policies or punish an athlete for an indiscrete posting

[296] *See* Marcum v. Dahl, 658 F.2d 731 (10th Cir. 1981).

without being subject to a First Amendment claim.[297] But the decisions made by employees of public colleges and universities are "state action," making them subject to potential First Amendment and other constitutional claims, even though similar actions by employees of private institutions are not.[298] Moreover, courts customarily treat social-media postings as "off-campus speech," only upholding a public college's or university's social-media regulation if the institution can show the speech (1) materially disrupted its work and/or (2) fits within a category of unprotected speech, such as defamation or a true threat.[299]

A clear recent example of distinct treatment for off-campus speech is the Supreme Court's decision in *Mahanoy Area School District v. B.L.*, in which the Court invalidated a high school's suspension of a student from the cheerleading team for producing and transmitting to her friends, via Snapchat, vulgar language and gestures critical of the school and the team.[300] The "off-campus" nature of the speech was key to the Court's decision, as was its occurrence outside of school hours.[301] When speech occurs off campus, the Court reasoned, the customary discretion that schools have to regulate speech, in light of their duty to maintain a safe learning environment, "is diminished."[302] Besides, the student's speech lacked fighting words or obscenity, did not identify the school or target any member of the school community, was communicated via her own cellphone, and reached only a private audience of her Snapchat friends.[303]

The Supreme Court's protection for off-campus speech in a high school setting suggests that courts will find bans on social-media use by college athletes to be unconstitutional. Regrettably, though, as one commentator has noted, "these bans are implemented with little protest because, of all the parties involved, the student-athletes are in the weakest position to refuse

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[297] *See* Eric D. Bentley, *He Tweeted What? A First Amendment Analysis of the Use of Social Media by College Athletes and Recommended Best Practices for Athletic Departments*, 38 J. COLL. & UNIV. L. J. 451, 455 (2012) [hereinafter Bentley, *He Tweeted What?*].

[298] *See id.* at 453.

[299] *See id.* at 457 (citing Evans v. Bayer, 684 F. Supp. 2d 1365, 1372 (S.D. Fla. 2010) (holding that high school student's creation of Facebook group devoted to criticizing a teacher was protected speech because it was published off campus, did not cause a disruption on campus, was not lewd, vulgar, or threatening, and did not advocate illegal or dangerous behavior)).

[300] *See* 141 S. Ct. 2038, 2042-43 (2021).

[301] *See id*. at 2047.

[302] *Id.* at 2046.

[303] *See id.* at 2047.

these constitutional infringements."[304] Most athletic careers end when collegiate eligibility ends, so athletes are loath to jeopardize those careers, and alienate their teammates, by suing their coach or institution over a social-media ban.[305] Besides, even if an athlete sued, by the time the litigation was complete, the athlete's eligibility for competition would likely have ended.[306] Athletes' unwillingness to challenge social-media bans hardly validates the bans, though. Indeed, they fail as time, place, or manner regulations because they limit considerably more speech than is necessary to achieve the purpose that prompted their creation.[307] For example, a social-media ban imposed by a coach

> would ban a golf team from posting a nude team photo, a basketball player from posting insensitive comments about women, or a football player from posting comments on Twitter during the middle of a game, it would also ban a Facebook posting that an athlete and his roommate found a good pizza place, a posting that the athlete wants the president to be reelected, or a posting with his or her view on the war on terrorism."[308]

And it would put a red flag next to enough words that an athlete would think twice about posting news of her friend who was killed by a *drunk* driver[309] or that he planned to run in a 5K race to raise money for fighting *breast* cancer.[310] If challenged in court, such a ban would be vulnerable to a

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[304] J. Wes Gay, Note, *Hands off Twitter: Are NCAA Student-Athlete Social Media Bans Constitutional?*, 39 Fla St. U. L Rev. 781, 802-03 (2012).

[305] Hauer, *supra*, note 107, at 420. NCAA data show the slim odds of being drafted by a professional sports league. Just 4.2 percent of draft-eligible Division I men's basketball players were chosen in the 2019 NBA draft. That number improved to twenty-one percent when other professional leagues (the G-League and international leagues) were included in the calculation. In women's basketball, 2.8 percent of draft-eligible Division I players were chosen in the 2019 WNBA draft, although that number also improved to twenty-one percent when international leagues were added to the calculation. In football, the NCAA estimates that 3.8 percent of draft-eligible Division I players were chosen in the 2019 NFL draft. Opportunities in the Canadian Football League and the XFL were not included in the calculation, so the number of college players who played on professional football teams outside the NFL is unclear. Nevertheless, one can safely say that most college football and basketball players will not have a professional career in their respective sports. *See Estimated Probability of Competing in Professional Athletics*, NCAA (Apr. 8, 2020), ncaa.org/sports/2015/3/6/estimated-probability-of-competing-in-professional-athletics.aspx [https://perma.cc/5KFP-3Q38].

[306] *See id.* at 421.

[307] *See* Bentley, *He Tweeted What? supra* note 297, at 459.

[308] *Id.* at 460.

[309] *See* Browning, *supra* note 11, at 842.

[310] *See* Bentley, *Unnecessary Roughness*, *supra* note 14, at 837.

claim that it was overbroad, burdening more speech than necessary to realize the coach's goals.[311] The ban would also violate *Tinker*, which authorizes institutions to regulate "speech that impedes [them] from functioning in an operational sense, not speech reflecting discredit on the [institution] or its students."[312] Professor LoMonte observes that

> [n]one of the consequences that colleges' speech restrictions seek to avoid—that the college or its athletes might suffer reputational harm, that an athlete might be disqualified from competition, that a coach might feel his authority threatened, that locker-room dissent might result in losing a game—is of any great moment when weighed against the compromise of fundamental freedoms.[313]

Still, coaches and athletic administrators will not be powerless to prevent indiscreet postings if blanket and seasonal bans are lifted. Constitutionally sound alternatives exist. For example, professional sports leagues have adopted what amount to time, place, or manner restrictions that prohibit athletes from posting comments to social media shortly before, during, and immediately after games.[314] Such restrictions are narrowly tailored to prevent players from succumbing to distractions while limiting no more speech than necessary to achieve that goal.[315] Coaches could also make the team locker room, team meetings, and team study halls off-limits to social media for the same reason.[316] And they could prohibit players from posting information concerning injuries and game strategies.[317]

Along with such restrictions should come education of athletes in "what not to post and why certain kinds of posts can compromise their safety."[318] Education, after all, is what colleges and universities do, so they are well-placed to teach unsuspecting athletes about the risks of social-media use. Doing so would be an exercise in enlightened self-interest because an institution could simultaneously protect its brand and its athletes' brands from being tarnished by an ill-advised tweet, while "refraining from invasive, legally dubious conduct."[319] Besides, athletes are more likely to learn how to use social media responsibly—which will help them in their post-

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[311] *See id.*
[312] LoMonte, *Fouling the First Amendment*, *supra* note 9, at 32.
[313] *Id.* at 50.
[314] *See* Gay, *supra* note 304, at 803.
[315] *See* LoMonte, *Fouling the First Amendment*, *supra* note 9, at 48.
[316] *See* Hauer, *supra* note 107, at 433-34. *See also* Bentley, *He Tweeted What?*, *supra* note 297, at 461.
[317] *See* LoMonte & Hamrick, *supra* note 118, at 138.
[318] Hauer, *supra* note 107, at 434.
[319] Browning, *supra* note 11, at 843.

college lives—if institutions teach them how to do so instead of trying to silence them.[320] Thus, even if courts applied the *Tinker* collegiate standard to college athletes' social-media use, coaches could still prevent distractions to athletes and disruptions to teams by adopting narrow restrictions and educating their athletes about the power and the perils of social media.

No court will adopt the *Tinker* collegiate standard, though, until a college athlete challenges a social-media ban in court. In the meantime, in sixteen states, athletes may benefit from a "social media privacy" statute[321] that limits institutions' ability to require current or prospective students to provide login information for their social-media accounts.[322] But these statutes will not help athletes if institutions permit coaches to ask athletes to waive their statutory rights as a condition of athletic participation.[323] Such a request could well be an unconstitutional condition on an athletic scholarship, but no court can answer that question without a lawsuit. Thus, despite weak justifications for social-media bans and strong arguments against them, college athletes must depend on the good faith of coaches and administrators for freedom of expression because of the athletes' understandable reluctance to challenge the bans in court. Put another way, the *Tinker* collegiate standard could change the legal landscape to athletes' benefit regarding both the right of protest and social-media use, but only if athletes begin to challenge institutions in court.

VI. Conclusion

Recently, colleges and universities have begun to treat athletes like other students regarding the rights to transfer freely and to earn income from the commercial use of names, images, and likenesses. But they continue to treat athletes far more restrictively than other students regarding the exercise of free speech. Nothing about the relationship between athletes and institutions is so unique as to warrant disregarding traditional First Amendment principles. Coaches should not be able to require athletes to stand (or kneel) before a game in support of a particular group or viewpoint

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[320] *See* Paulson, *supra* note 147.

[321] *See* LoMonte, College Sports and Social Media, supra note 147.

[322] *See id.* Since 2012, twenty-seven states have enacted social-media-privacy statutes that apply to employers, and sixteen states have applied their statutes to educational institutions. *See State Social Media Privacy Laws*, Nat'l Conf. of State Legislatures (Nov. 18, 2021), https://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-prohibiting-access-to-social-media-user names-and-passwords.asp [https://perma.cc/NFG5-V5PP].

[323] *See* LoMonte, *College Sports and Social Media*, *supra* note 147.

or to sing an alma mater associated with a racist past. Neither should coaches be able to impose severe restrictions on athletes' social-media use or employ third-party vendors to monitor that use.

The antidote to such restrictive policies is for courts to modify the longstanding *Tinker* standard for judging the constitutionality of student speech and to apply this new standard—the *Tinker* collegiate standard—to college athletes. This change would honor the Supreme Court's recognition of a college campus as "peculiarly the marketplace of ideas."[324] Under the new standard, an institution could not silence student speech without showing that the speech would materially and substantially interfere with the educational goal of a particular activity or with the rights of other students. Even assuming such a showing, an exception would exist for whistleblower conduct intended to highlight official misconduct, such as abusive coaching behavior.[325] The exception would also cover expressive conduct designed to underscore a particular social issue, such as kneeling in support of the Black Lives Matter Movement. If, however, the dispute is about who should be the head coach, what style of offense or defense to play, or another internal team matter, the First Amendment would not protect the athletes' speech.

Under the *Tinker* collegiate standard, institutional bans on athletes' social-media use fail as time, place, or manner restrictions because they restrict more speech than necessary to achieve their purpose. And they violate even the existing *Tinker* standard, which permits institutions to regulate speech that prevents them from conducting their operations, but not speech that merely embarrasses them or their students.[326] Constitutionally sound alternatives include prohibiting social-media use shortly before, during, and immediately after games; prohibiting the posting of confidential information, such as injury reports and game strategies; and educating athletes about safe social-media use.

Thus, the *Tinker* collegiate standard would increase protections for college athletes' First Amendment rights, while still enabling coaches to conduct team operations without undue interference. It's time for *Tinker* to go to college.

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[324] *Healy*, 408 U.S. at 180 (internal quotation marks omitted).
[325] *See* Donnelly, s*upra* note 283, at 964.
[326] *See* LoMonte, *Fouling the First Amendment*, *supra* note 9, at 32.