

Volume 12, Number 2  
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Contents

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**ARTICLES**

Chopped & Screwed: Hip Hop from Cultural Expression to a Means of Criminal Enforcement <i>Taifba Natalee Alexander</i> .....	211
It's Worth a Shot: Can Sports Combat Racism in the United States? <i>David A. Grenardo</i> .....	237
A Defense of Public Financing in a Time of Economic Hardship, Social Unrest, and Athlete Advocacy <i>Ryan Gribbin-Burket</i> .....	319
#IAMAROBOT: Is it Time for the Federal Trade Commission to Rethink its Approach to Virtual Influencers in Sports, Entertainment, and the Broader Market? <i>Jim Masteralexis, Steve McKelvey, and Keegan Statz</i> .....	353



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Dear Readers,

I am Professor Peter Carfagna '79, the Harvard Law School Faculty Advisor to the Harvard Journal of Sports and Entertainment Law (JSEL). JSEL had another tremendous year, and I am incredibly proud to write the preface to Volume 12.

In the Special Issue published in August, JSEL published twelve essays on the issue of name, image, and likeness in college sports. The legal landscape for rights of publicity in college sports is rapidly evolving as many states have passed and introduced NIL laws and the federal government has made efforts to develop the structure for what national NIL legislation will look like, and these essays house welcome insights into potential issues and solutions. A special thank you goes to all the authors and editors who contributed to this special edition, including Steven Bank, Charles Grantham, Jeff Kessler, David L. Greenspan, Alicia Jessop, Darren Heitner, Nic Mayne, Max Forer, Tom O'Connell, Jeffrey F. Brown, James Bo Pearl, Jeremy Salinger, Annie Alvarado, Michael Feblowitz, Marvellous Iheukwumere, Thaddeus Kennedy, and Eli Nachmany.

In the Fall Issue, JSEL published five excellent articles.

- Authors Jeffrey F. Brown, James Bo Pearl, Jeremy Salinger, and Annie Alvarado expertly crafted *A Proposal for Group Licensing of College Athlete NILs*, in which they explore the economic efficiencies of group licensing, and provide a useful licensing entity framework for the NCAA and college-athletes.
- Professor Nanci K. Carr's *One, Two, Sort the Shoe; Three, Four, Win Some More: The Rhyme and Reason of Phil Ivey's Advantage Play at the Borgata* an excellent case study on the Phil Ivey and Cheung Yin "Kelly" Sun Borgata saga that ultimately ended in a settlement. Her critical analysis of the casino's legal argument holds broad implications for what types of play can and cannot be regulated through use of the courts.
- Christopher Deubert and Aaron Caputo's *Improving the Game: The Football Players Health Study at Harvard University and the 2020 NFL-NFLPA Collective Bargaining Agreement* is a deep dive into the content of the Harvard-led study and how its impact reflected in the 2020 CBA. They carefully highlight the specialist positions and programs created by the NFL and NFLPA and the gradual progression on NFL player health issues, and build upon Deubert's past monumental contributions to JSEL.
- Professor Stacey M. Lantagne's *Building a Better Mousetrap: Blocking Disney's Imperial Copyright Strategies* grapples with Disney's use of public domain works, potential copyright misuse, and how more

generally public domain ought to act as a balance to copyright monopolies. Her detailed account of Disney's ever-expanding copyright is exciting entertainment scholarship that offers necessary critiques.

- Finally, Professor Ray Yasser and Carter Fox's *Third-Party Payments: A Reasonable Solution to the Legal Quandary Surrounding Paying College Athletes* explores another potential solution to the NIL controversy, and explores implications for this solution and other proposed alternatives.

In the Spring issue, JSEL published four more articles:

- Professor David Grenardo's *It's Worth A Shot: Can Sports Combat Racism in the United States* is a timely and thought-provoking piece of scholarship on sports as a reflection of society, racism's role in society and in the sports industry, and solutions to combat racism. He masterfully translates his analysis to sports, and explicates the legal world's significant role in both the problem and the potential solutions.
- Ryan Gribbin-Burket's *A Defense of Public Financing in a Time of Economic Hardship, Social Unrest, and Athlete Advocacy* provides a refreshing new look at public financing through not only an economic, but social and cultural lenses as well. While acknowledging the shortcomings of past public finance deals, it successfully seeks to encourage public officials to continue pursuing such opportunities. Reimagining a sports stadium as something more than just an infrastructure project or place to play games offers a new way to assess all of the benefits and public good of public financing.
- Professor Jim Masteralexis, Steve McKelvey, and Keevan Statz's *#IAMARobot: Is it Time for the Federal Trade Commission to Rethink Its Approach to Virtual Influencers in Sports, Entertainment, and the Broader Market* is a piece of cutting-edge scholarship on the usage of CGI-generated celebrity influencers and FTC's efforts to rapidly evolve their regulations to catch up. He further succinctly critiques the regulations as applied and presents interesting questions on whether they should be applicable at all.
- Assistant Dean Taifha Alexander's *Chopped & Screwed: Hip Hop from Cultural Expression to a Means of Criminal Enforcement*, is a piece centered on criminal law and procedure and its utilization of hip hop and rap music in prosecuting criminal trials. She skillfully intertwines discussion of criminal procedure and cultural forces in



what is one of the few criminal law-focused pieces we have received since our inception

Moreover, the JSEL Online team worked throughout the academic year to publish a number of highlights and short articles with updates on the latest legal news in sports and entertainment, covering topics such as nonfungible tokens in sports, deepfake celebrity videos and their legal implications, and sports gambling controversies. I thank the students involved in JSEL, who worked tirelessly to ensure its success throughout what was an incredibly difficult year in many ways. Specifically, I would like to thank Madison Martin '21 and Will Lindsey '21 for their dedication and excellence as Editors-in-Chief. I would also like to convey my thanks to other graduating members of JSEL's Executive Board: Marvellous Iheukwumere, Ryan Gribbin-Burket, and Dixie Morrison. Finally, I would also like to welcome the incoming JSEL Masthead for Volume 13, including our new Editors-in-Chief Erin Savoie and Eli Nachmany.

With another fantastic year in the books, I look forward to next year's volume!

—Peter A. Carfagna



## Chopped & Screwed: Hip Hop from Cultural Expression to a Means of Criminal Enforcement

Taifha Natalee Alexander\*

### TABLE OF CONTENTS

INTRODUCTION .....	213
I. MASS INCARCERATION OF BLACK MEN .....	216
II. THE INTERSECTION OF CRIMINAL JUSTICE & HIP HOP .....	220
A. <i>Rap Lyrics as Evidence in Criminal Proceedings</i> .....	221
B. <i>The Criminal Justice System’s Perception of Black Men</i> .....	225
C. <i>Prison as Rite of Passage, Not Deterrent</i> .....	228
III. ISSUES WITH THE PROBATIVE VERSUS PREJUDICIAL BALANCING TEST .....	230
A. <i>Prosecutorial Reliance on Rap Lyrics Does Not Account for             the Reality that the Rappers’ Lyrics May Be Untrue or             Fabricated</i> .....	231
B. <i>Judges’ Inaccurate Interpretation of Generally Violent Lyrics             as Specific to a Crime</i> .....	232
IV. CALL FOR LEGISLATIVE INTERVENTION .....	235
CONCLUSION .....	235

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## ABSTRACT

Take the word “overseer” like a sample. Repeat it very quickly in a crew, for example. Overseer, overseer, overseer, overseer. Officer, officer, officer, officer. Yeah, officer from overseer. You need a little clarity? Check the similarity! The overseer rode around the plantation. The officer is off, patrollin’ all the nation. The overseer could stop you, “what you’re doing?” The officer will pull you over just when he’s pursuing. The overseer had the right to get ill. And if you fought back, the overseer had the right to kill. The officer has the right to arrest. And if you fight back they put a hole in your chest (woop)<sup>1</sup> – KRS-One, American Rapper and Producer.

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<sup>1</sup> KRS-ONE, *Sound of Da Police*, on RETURN OF THE BOOM BAP (Jive Records 1993). For lyrics see KRS-ONE, *Sound of Da Police*, GENIUS, <https://genius.com/Krs-one-sound-of-da-police-lyrics> [<https://perma.cc/28YW-2JAP>] (last visited Apr. 30, 2020).

## INTRODUCTION

In the mid-1970s, hip-hop was created in a predominately Black,<sup>2</sup> economically disenfranchised neighborhood in the South Bronx.<sup>3</sup> Since its inception, hip-hop artists have used their music to highlight, critique, and discuss the social, political, and cultural realities of contemporary Black issues while also crafting narratives and rhythm that resonate with an oftentimes voiceless audience.<sup>4</sup> Similar to scholars of Critical Race Theory and other outsider scholarship, hip-hop artists use stories to add context to the marginalized group history of the Black experience<sup>5</sup>. Specifically, for the

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<sup>2</sup> The term “Black” is a broad one, encompassing a diverse collection of cultural and national differences. Its unitary use in this article is not intended to diminish or ignore the significant differences that exist within the Black community. Rather, this article uses the term Black in recognition that while some people may identify with their African roots and prefer “African American,” many Black Americans cannot trace their lineage back to a specific African country due to the horrors of the transatlantic slave trade and resulting dominate legal and political culture of the United States, which includes mass incarceration of the same population. In using the term “Black,” this article refers to Black Americans to highlight the undeniable, historical uniqueness of the lingering effects of chattel slavery and Jim Crow segregation on Black Americans.

<sup>3</sup> For a detailed discussion on the origins of Hip Hop, see, e.g., Dick Hebdige, *Rap and Hip-Hop: The New York Connection*; in *THAT’S THE JOINT! THE HIP HOP STUDIES READER* 223, 224 (Murray Forman & Mark Anthony Neal eds., 2004); Tricia Rose, *BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA* (1994); Christopher Doval et. al, *Hip Hop and Other Professor’s Pedagogy*, 2 *ARIZ. ST. SPORTS & ENT. L.J.* 73, 73 (2012); Halifu Osumare, *Rap and Hip Hop*, in 1 *OXFORD ENCYCLOPEDIA OF AFRICAN THOUGHT* 272 (F. Abiola Irele & Biodun Jeyifo eds., 2010).

<sup>4</sup> See Tricia Rose, *THE HIP HOP WARS: WHAT WE TALK ABOUT WHEN WE TALK ABOUT HIP HOP – AND WHY IT MATTERS* 7 (2008); see also Osumare, *supra* note 3.

<sup>5</sup> See generally Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *MICH. L. REV.* 2411 (1989); see also Lisa R. Pruitt, *Who’s Afraid of White Class Migrants? On Denial, Discrediting and Disdain (and Toward a Richer Conception of Diversity)*, 31 *COLUM. J. GENDER & L.* 196, 202 (2015) [hereinafter *Who’s Afraid*]; *We Won’t Go Back*, 2 *NEW LAB. F.* 51 (1998) (quoting CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON’T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* (1997); Aderson Bellegarde Francois, *Acts of Meaning: Telling and Retelling the Narrative of Race-Conscious Affirmative Action*, 57 *HOWARD L.J.* 467, 474-75 (2014) (emphasizing the importance of storytelling in adding context to a marginalized group’s history). Outsider scholarship is being defined as the academic study of scholars that critiques the experiences of outgroups within the United States, like feminist legal theory, Asian American scholarship and LGBTQ legal theory. See Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 *ASIAN L.J.* 65, 66 (2003).

past forty years, hip-hop artists have described and challenged the American criminal justice system as racially biased and inequitable.<sup>6</sup>

Yet, with the commercialization of hip-hop into the mainstream as “gangsta rap”<sup>7</sup> over the past thirty years,<sup>8</sup> some rappers have been using their lyrics to glorify criminal activity within the Black community.<sup>9</sup> The evolution of hip-hop from a vehicle to depict the contemporary Black experience to a form of mainstream entertainment consumed by a global audience may be contributing to the mass incarceration of Black men.<sup>10</sup>

Many scholars have focused on the relationship between racial bias and criminality at each stage of the adjudication process.<sup>11</sup> This Article examines the relationship between hip-hop and legal actors’ attribution of criminality to Black men generally and Black men who are rappers, more specifically, as consumers and producers within the genre. I will argue that law enforcement officers, prosecutors, and judges have erroneously utilized and misinterpreted hip-hop to bolster society’s stereotypes of Black men as drug dealers and criminals. Prosecutors introduce and judges allow hip-hop lyrics as evidence against Black men in criminal proceedings via a legal balancing test that consistently tips the scale against Black men. As a result, prosecutors, judges, and juries contribute to the disproportionate mass incarceration of Black men in the American criminal justice system through the admission of rap lyrics – a form of artistic expression – as evidence of culpability in criminal proceedings.

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<sup>6</sup> See, e.g., N.W.A, *F—k Tha Police*, on STRAIGHT OUTTA COMPTON (Ruthless Records/Priority Records 1988) (describing to a Black audience that the criminal justice system would prefer young Black men in jail, regardless of their innocence); KANYE WEST, *Power*, on MY BEAUTIFUL DARK TWISTED FANTASY (Roc-A-Fella Records 2010) (recognizing that “the system broken, the school is closed, the prison open”); 2PAC, *Changes*, on 2PAC GREATEST HITS (Interscope Records 1998) (explaining that “instead of war on poverty, they got a war on drugs so police can bother me”).

<sup>7</sup> Gangsta rap is defined as lyrics that focus on selling drugs, shooting, killing and demeaning women. See Rose, *supra* note 4, at 35; Donald F. Tibbs, *From Black Power to Hip Hop: Discussing Race, Policing, and the Fourth Amendment Through the “War on” Paradigm*, 15 J. GENDER, RACE & JUST. 47, 57 (2012).

<sup>8</sup> See Rose, *supra* note 4, at 2.

<sup>9</sup> See *id.*

<sup>10</sup> But see Akilah Folami, *From Habermas to “Get Rich or Die Tryin’”*: Hip Hop, The Telecommunications Act of 1996, and the Black Public Sphere, 12 MICH. J. RACE & LAW 235, 253 (2007) (arguing that despite gangsta rap’s commercial successes, it must continue to be contextualized within its Hip-Hop beginnings because it gives voice to an otherwise invisible and marginalized group of Black and Latino male youth).

<sup>11</sup> See generally Paul Butler, *Locking up My Own: Reflections of a Black (Recovering) Prosecutor*, 107 CALIF. L. REV. 1983 (2019).

Part I of this Article will examine the mass incarceration of Black men in the United States. Part II will suggest that criminal justice officials use hip-hop to contribute to the mass incarceration of Black men in at least three ways. First, criminal prosecutors have been contributing to the mass incarceration of Black men by introducing rap lyrics into criminal proceedings against Black rappers. Second, judges and police officers may hold biases against Black men because rap music sensationalizes Black men as drug dealers and abusers. Third, legal actors' use of hip-hop as evidence contributes to mass incarceration, which has in turn created an obvious disconnect between how legal actors and Black men perceive prison. On the one hand, prosecutors, judges, and lawmakers view prison as a deterrent to crime. Contrastingly, Black men view imprisonment as a natural occurrence under the unfair, biased criminal justice system. As a result, hip-hop artists and many Black individuals consider imprisonment as a rite of passage. Such a disconnect may contribute to the introduction of rap lyrics as evidence against rappers, furthering this cycle. Part II will also briefly demonstrate that the biases of prosecutors, judges, and jurors against Black men are consistently perpetuated while similar biases are apparently not held against White rappers or artists in predominately White genres like country and rock. This culture of legal bias contributes to the view of prison as a rite of passage and not a deterrent. I will use lyrics from White rappers and artists from predominately White genres to demonstrate that the biases of prosecutors, judges, and juries impact Black men at a disproportionate rate and therefore contribute to mass incarceration.

Part III will critique two issues inherent in the current evidentiary balancing test, whereby judges admit evidence based on a weighing of probative value against prejudicial potential. The first issue relates to prosecutorial reliance on rap lyrics as true when in reality they may be entirely fictional. The second issue relates to judicial misinterpretation of generally violent lyrics as specific to a particular crime. The racial stereotype of hip-hop as a violent genre has contributed to the misuse of lyrics by both judges and prosecutors such that the creative expression of hip-hop artists has been weaponized by the law to criminalize Black men. Part IV is a call to both federal and state legislatures to promulgate laws that will create a different test for determining whether rap lyrics can be excluded from evidence. Finally, this paper will conclude that the evolution and current trend of hip-hop dictates that criminal justice officials are erroneously using hip-hop to contribute to the mass incarceration of Black men.

## I. MASS INCARCERATION OF BLACK MEN

Instead of war on poverty. They got a war on drugs so police can bother me. And I ain't never did a crime I ain't have to do. But now I'm back with the facts, giving it back to you. Don't let 'em jack you up, back you up, crack you up and pimp-smack you up. You gotta learn to hold your own. They get jealous when they see you with your mobile phone. But tell the cops they can't touch this.<sup>12</sup> - 2Pac, California-native and Death Row<sup>13</sup> rapper

Mass incarceration, reflected in the high incarceration rates among Black men, has resulted in the destabilization of incarcerated Black men's families, social citizenships, and economic opportunities.<sup>14</sup> Black men are six times more likely than White American men to be arrested.<sup>15</sup> Once arrested, Black people are more likely to be convicted and face harsher penalties.<sup>16</sup> Further, one in three Black men will be incarcerated in their lifetime.<sup>17</sup> To put this statistic into personal context, on average, within my three ten year-old nephews' lifetimes, at least one of them will be incarcerated.

Many scholars have explained that the racialized "war on drugs" policies and implicit racial biases and inequities in socioeconomic distribution amongst racial groups have caused legislatures, police officers, and other

<sup>12</sup> 2Pac, *supra* note 6. For lyrics see 2Pac, *Changes*, GENIUS, <https://genius.com/2pac-changes-lyrics> [<https://perma.cc/5WD3-YXGC>] (last visited Apr. 30, 2020).

<sup>13</sup> Death Row Records is a defunct record label that contributed to the birth of gangsta rap with artists like Suge Knight, Dr. Dre, and Snoop Dogg. See Luchina Fisher, *The Rise and Fall of Death Row Records*, ABC NEWS (July 21, 2008), <http://abcnews.go.com/Entertainment/SummerConcert/story?id=5406064&page=1> [<https://perma.cc/FG4Z-CWVP>].

<sup>14</sup> See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1304 (2004) (explaining mass incarceration as damaging Black social networks, distorting social norms and destroying social citizenship); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 129 (2017) (discussing the legalization of racial profiling in Fourth Amendment law); Robert D. Crutchfield, *Mass Incarceration*, 3 CRIMINOLOGY & PUB. POL'Y 265, 266 (2004); see, e.g., James Forman Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993 (2010). See Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 9 (2011) (noting that felon disenfranchisement laws prohibit many Black men from voting in the democratic process).

<sup>15</sup> See *Criminal Justice Facts*, SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> [<https://perma.cc/8W55-PGPD>] (last visited Apr. 29, 2020).

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*



decisionmakers within the criminal justice system to disproportionately target Black people, specifically Black men, for incarceration.<sup>18</sup> For example, the domestic portion of the Bush Administration's 1989 Bennett Plan<sup>19</sup> and similar racialized drug law enforcement policies<sup>20</sup> suspiciously focused street-level narcotics enforcement on the inner-city crack crisis, even though the typical drug user was identified as a White, male, high-school graduate living in a suburban neighborhood.<sup>21</sup> This targeted enforcement within predominately Black, poor neighborhoods could have been the result of the increase in inner-city drug trading, which left many poor, Black youth with no other viable, legitimate employment option other than participation in the illegal drug trade.<sup>22</sup> However, research shows that drugs were also used in White, suburban communities, but enforcement efforts were not focused on those areas.<sup>23</sup>

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<sup>18</sup> See generally andre douglas pond cummings, *Just Another Gang: When the Cops Are Crooks Who Can You Trust*, 41 HOWARD L.J. 383 (1998) (describing the "siege mentality" of Black men that permeates most large urban police departments while discussing the war on drugs on small scale, Black drug dealers, instead of focusing the war on the source countries and large drug cartels). See Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 46-57 (2011) (describing how the War on Drugs offered White people, opposed to racial reform, the opportunity to express hostility toward Black people and Black progress without being exposed as racist because the War on Drugs was presented as a race-neutral policy); Kevin R. Johnson, *It's the Economy, Stupid: The Hijacking of the Debate over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAP. L. REV. 583, 589-91 (2010) (finding that, when politicians use "tough on crime" rhetoric, minority incarceration rates have increased, and resulted in the over-representation of minorities in prisons).

<sup>19</sup> For a thorough discussion of the Bennett Plan and its successes and failures, see generally Michael Letwin, *Report from the Front Line: The Bennett Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate*, 18 HOFSTRA L. REV. 795 (1990).

<sup>20</sup> The mandatory minimum sentences for crack and powder cocaine created a sentencing disparity in the regulations that left Black people, the predominate users of crack, to be sentenced more harshly than cocaine users, who happened to be predominately White, even though the drugs were similar in substance. See, e.g., Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Anti-Drug Abuse Act of 1988, Pub. L. No 100-690, 102 Stat. 4181.

<sup>21</sup> See Letwin, *supra* note 19, at 795-796.

<sup>22</sup> See Bruce Western, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 225 (2009).

<sup>23</sup> See HAMILTON PROJECT, *RATES OF DRUG USE AND SALES, BY RACE; RATES OF DRUG RELATED CRIMINAL JUSTICE MEASURES, BY RACE* (2016), [https://www.hamiltonproject.org/charts/rates\\_of\\_drug\\_use\\_and\\_sales\\_by\\_race\\_rates\\_of\\_drug\\_related\\_criminal\\_justice](https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice) [https://perma.cc/4TRU-MMXY] (last visited Feb. 27, 2021) (finding that even though Black and White Americans sell and use drugs at

While the 1980s introduced the “War on Drugs” through drug enforcement policies that targeted Black communities and eventually led to mass Black incarceration, United States policymakers and law enforcement officials have been using drug prohibition and enforcement to lay the foundation of mass incarceration of Black people for at least one hundred years. In 1900, White, Southern legislatures moved to prohibit cocaine and alcohol because the drugs were popular among Black communities, and White lawmakers believed that continued use of the drugs among the Black community would lead it to revolt against the oppressive nature of the Jim Crow South.<sup>24</sup> During this time, White Southerners sensationalized the effects of cocaine on Black people.<sup>25</sup> Black people who consumed cocaine were believed to have improved marksmanship, increased cunning, and super human strength that would allow them to be immune to .32 caliber bullets.<sup>26</sup> These unsubstantiated claims resulted in the disproportionate lynching of Black people, legal segregation, and other mechanisms that restricted sociopolitical power and advancement in the Black community.<sup>27</sup>

Like Black people in the 1900s who were disenfranchised as a result of racialized drug prohibition policies, some incarcerated Black men today are restricted in their abilities to participate in political and social processes. Incarcerated Black men often become second-class citizens upon release from prison in numerous ways. For example, many Black men may be denied the right to vote upon release, automatically excluded from juries, and discriminated against in employment, housing, access to education, and public benefits.<sup>28</sup>

In addition to the disenfranchisement of Black men, mass incarceration has detrimental effects on the Black family. Research has shown that milestone transitions from childhood into adulthood, like obtaining a steady job and entering into a healthy marriage, build social relationships that function to deter individuals from becoming offenders.<sup>29</sup> Young Black men who are incarcerated before securing a career and building familial bonds are less likely to get married or be a present father figure.<sup>30</sup> For Black women who

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similar rates, Black Americans are more likely to be arrested for drug-related offenses).

<sup>24</sup> See David Musto, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 6 (Oxford Univ. Press 3d. 1999).

<sup>25</sup> See *id.* at 7.

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> See Alexander, *supra* note 14, at 10.

<sup>29</sup> See Western, *supra* note 22, at 229–30.

<sup>30</sup> See *id.*

are in committed relationships with incarcerated Black men, research has shown that their partners' incarceration can have deleterious socioeconomic effects on both spouses' families all while tearing family relationships apart.<sup>31</sup> A Black woman's financial stability is endangered during and after her partner's incarceration.<sup>32</sup> While he is in prison, she will likely have to earmark funds, accept collect calls, travel to the prison to visit him, and pay for packages to be sent to her incarcerated partner. My childhood memories include my mother's muffled cries as she explained to family and friends that she did not know where she was going to get the funds to put money on my father's "books,"<sup>33</sup> while still managing to keep food on our table. In addition to making financial sacrifices during their incarcerated partners' sentencing, many Black women become the main financial supporters in the Black household once their partners are released from prison as a result of the employment discrimination and stigma that felons face in the lawful employment market.<sup>34</sup> Research on the impacts of mass incarceration on the Black family is limited.<sup>35</sup> However, an anecdote from my dysfunctional relationship with my father may provide some insight on how mass incarceration contributes to disruption within the Black family.

I spent my eighth birthday in a federal corrections visitor's center in Maryland waiting to speak to my father through a two-way telephone and three inches of bulletproof glass. On the six-hour bus ride from New York to Maryland, I scribbled down all the things I wanted to tell him since I last saw him six months ago. I spent hours on the bus editing and re-editing my notes so my story would fit into the five-minute time allocation my mother assigned to me. When we finally arrived at the visitor's center, my mother told me through tear-filled eyes that we would not be able to see my father. Apparently, a fight erupted within his cell block and all visitations were cancelled as a result. Mass incarceration of Black men strip Black families of an additional support system that is integral to the success and growth of children. The loss of the Black father can be detrimental for teenagers as

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<sup>31</sup> See generally Hedwig Lee & Christopher Wildeman, *Things Fall Apart: Health Consequences of Mass Imprisonment for African American Women*, 40.1 REV. BLACK POL. ECON. 39 (2013).

<sup>32</sup> See *id.* at 44.

<sup>33</sup> Putting money on an inmate's "books" refers to depositing money into an inmate's account so the inmate can purchase items from the prison store like envelopes, stamps, shampoo, soap and candy. See *Inmate Commissary*, UNION COUNTY SHERIFF'S OFFICE, [http://unioncountysheriff.us/?page\\_id=644](http://unioncountysheriff.us/?page_id=644) [https://perma.cc/2XQ2-DWZD] (last visited Apr. 29, 2020).

<sup>34</sup> See Lee & Wildeman, *supra* note 31, at 44.

<sup>35</sup> See *id.* (explaining that there is small, but growing literature on the effects of mass incarceration on Black familial relationships).

they maneuver through adulthood and must bear the financial and emotional responsibilities of having one fewer adult with whom to discuss their issues and work through their problems.<sup>36</sup>

At least one hundred years of sensationalized fear, racialized drug law enforcement policies, and the lack of access to legitimate employment opportunities in the Black community have contributed to the mass incarceration of Black men. My story of loss, injustice, and trauma demonstrates how high the stakes are in addressing mass incarceration and the causes of it. Hip-hop's misplaced presence in the criminal justice process is partially responsible for mass incarceration because the genre of music is used by criminal justice officials to stereotype and depict Black men, like my father, as criminals.

## II. THE INTERSECTION OF CRIMINAL JUSTICE & HIP-HOP

You have the emergence in human society of this thing called the State. What is the State? The State is this organized bureaucracy. It is the police department. It is the Army, the Navy. It is the Prison System, the Courts, and what have you. This is the State; it is a repressive organization.<sup>37</sup> – Dead Prez

Chuck D, frontman for the nationally-recognized Public Enemy and one of the most politically influential hip-hop artists in the country, described hip-hop as “the Black CNN.”<sup>38</sup> In the late 1980s and early 1990s, hip-hop served to inform, connect, and provide information about the Black experience to a Black audience.<sup>39</sup> Songs like “Fight the Power”<sup>40</sup> and “The

<sup>36</sup> See *id.* at 44.

<sup>37</sup> DEAD PREZ, *Police State on LET'S GET FREE* (Loud Records 2000). For lyrics see Dead Prez, *Police State*, GENIUS, <https://genius.com/Dead-prez-police-state-lyrics> [https://perma.cc/ZD9F-PCFM] (last visited Apr. 29, 2020).

<sup>38</sup> See Elisabeth Mahoney, *The Black CNN – When Hip Hop Took Control*, THE GUARDIAN (June 25, 2010, 1:45 PM), <https://www.theguardian.com/tv-and-radio/2010/jun/25/black-cnn-hip-hop-took-control> [https://perma.cc/NT2R-YG7S].

<sup>39</sup> John Leland, *Armageddon in Effect*, 4 SPIN MAG. 46–48 (Sep. 1988) (quoting Chuck D noting that “Rap serves as the communication that they don’t get for themselves to make them feel good about themselves. Rap is [B]lack America’s TV station. It gives a whole perspective of what exists and what [B]lack life is about”).

<sup>40</sup> PUBLIC ENEMY, *Fight the Power, on FEAR OF A BLACK PLANET* (Def Jam Recordings 1990) (noting that “our freedom of speech is freedom or death. We got to fight the powers that be”). For full lyrics see Public Enemy, *Fight the Power*, GENIUS, <https://genius.com/Public-enemy-fight-the-power-lyrics> [https://perma.cc/EXK4-W8QE] (last visited Apr. 29, 2020).

Hate that Hate Produced”<sup>41</sup> became rallying cries for the Black community to raise awareness of injustices and incite Black men and women to do something about those injustices. In recent years, through the rise in the commercialization of hip-hop, artists have been divided into two categories: socially conscious rappers<sup>42</sup> and gangsta rappers. Since gangsta rap has proven to be more popular and lucrative than social conscious rap in the mainstream,<sup>43</sup> lyrics that depict Black men as drug dealers and criminals have been fed to a wide audience and may contribute to how society views Black men. Hip-hop as gangsta rap has contributed to the mass incarceration of Black men because such rap music can be used as evidence against gangsta rappers in criminal proceedings, skews how judges, police officers, and jurors perceive Black men, and provides a biased justification for the legal structure’s difference in treatment between rap lyrics and lyrics from other genres.

#### A. Rap Lyrics as Evidence in Criminal Proceedings

Like I talk to Shyste when I shot n—-as. Like you seen him twirl, then he drop, n—-a. And we keep them nine millis on my block, n—-a. And Monte keep it on him, he done dropped n—-as. And Trigger, he be wildin’, he some hot n—-a. Tones known to get busy with them Glocks, n—-a. Try to run down and you can catch a shot, n—-a.<sup>44</sup> – Bobby Shmurda, Brooklyn-native and former Sony Records rapper

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<sup>41</sup> SISTER SOULJAH, *The Hate that Hate Produced*, on 360 DEGREES OF POWER (Epic/SME Records 1992) (observing that “the time for scared, lip-trembling, word-changing, self-denying, compromising, knee-shakin’ black people is over.”). For full lyrics see Sister Souljah, *The Hate that Hate Produced*, GENIUS, <https://genius.com/Sister-souljah-the-hate-that-hate-produced-lyrics> [https://perma.cc/5PF8-KBUF] (last visited Apr. 29, 2020).

<sup>42</sup> Socially conscious rappers are defined as hip-hop artists who, like Common, Talib Kweli, Mos Def, and others, have used rap lyrics to bring light to social, political, and economic issues that plague the Black community. See Tibbs, *supra* note 7, at 57 .

<sup>43</sup> See *id.* at 58.

<sup>44</sup> BOBBY SHMURDA, *Hot N\*gga*, on SHMURDA SHE WROTE (Epic/Sony Records 2014). For lyrics see Bobby Shmurda, *Hot N\*gga*, GENIUS, <https://genius.com/Bobby-shmurda-hot-nigga-lyrics> [https://perma.cc/379D-T2MC] (last visited Apr. 29, 2020).

Prosecutors have been counseling each other on how to use rap lyrics against defendants in criminal trials.<sup>45</sup> Alan Jackson, former prosecutor at the Los Angeles County District Attorney's Office, has advised prosecutors to introduce juries to the "real defendant."<sup>46</sup> He further states that the "real defendant" is "a criminal wearing a du-rag and throwing a gang sign."<sup>47</sup> He further suggests that prosecutors introduce jurors to the "real defendant" through introduction of, amongst other things, music lyrics that "invade and exploit the defendant's true personality."<sup>48</sup> The prosecutorial tactic of admitting a defendant's rap lyrics into the criminal adjudicatory process is not novel. Rap lyrics authored by criminal defendants have been admitted into evidence against their authors for roughly as long as gangsta rap has been in prominence.<sup>49</sup> In 1991, prosecutors demonstrated a defendant's knowledge of and intent to distribute drugs carried in two suitcases by admitting the defendant's handwritten rap lyrics into evidence.<sup>50</sup> The lyrics were: "Key for Key, Pound for pound. I'm the biggest Dope Dealer and I serve all over town. Rock 4 Rock, Self 4 Self. Give me a key let me go to work more Dollars than your average business man."<sup>51</sup>

More recently, many courts have allowed rap lyrics to be introduced into evidence against criminal defendants to prove that the defendant committed or intended to commit the crime, and even to demonstrate the defendant's "bad character."<sup>52</sup> In 2014, the Supreme Court of New Jersey

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<sup>45</sup> See, e.g., ALAN JACKSON, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, AM. PROSECUTORS RES. INST., PROSECUTING GANG CASES: WHAT LOCAL PROSECUTORS NEED TO KNOW (2004).

<sup>46</sup> *Id.* at 15-16.

<sup>47</sup> *Id.* at 16.

<sup>48</sup> *Id.*

<sup>49</sup> In 1991, a federal court allowed rap lyrics written by the defendant to be admitted into evidence. See *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991). In 1994, prosecutors, and eventually the judge, relied on handwritten lyrics found in Francisco Calderon Mora's home to convict him of a crime. See *People v. Olguin*, 37 Cal. Rptr. 2d 596 (Cal. Ct. App. 1994); see also *United States v. Price*, 418 F.3d 771 (7th Cir. 1995); *State v. Deases*, 476 N.W.2d 91 (Iowa App. 1991).

<sup>50</sup> See *United States v. Foster*, 939 F.2d at 448-49.

<sup>51</sup> *Id.* at 449.

<sup>52</sup> See, e.g., *United States v. Whitten*, 610 F.3d 168, 215 (2d Cir. 2010) (upholding admissibility of rap lyrics dealing with gang violence); *United States v. Williams*, No. 05-13927, (11th Cir. Oct. 31, 2006) (upholding admission of rap lyrics that described defendants as drug dealers in RICO action); *Holmes v. State*, 608 S.E.2d 726 (Ga. Ct. App. 2004) (finding that the use of defendant's rap lyrics as evidence of defendant's bad character was admissible); *Cook v. State*, 45 S.W.2d 818 (Ark. 2001) (finding that rap lyrics by author were admissible as evidence to demonstrate intent to commit armed robbery); *Montague v. State*, 471 Md. 657

weighed in on the evidentiary admissibility of rap lyrics by aspiring rapper Vonte Skinner to demonstrate motive or intent to commit a crime.<sup>53</sup> During Skinner's jury trial, a state witness was allowed to read years-old lyrics to the jury in support of the case against the rapper for attempted murder.<sup>54</sup> The lyrics read:

On the block, I can box you down or straight razor ox you down, run in your crib with the four pound and pop your crown. Checkmate, put your face in the ground. I will drop your Queen and pawn, f—k – f—k wasting around. They don't call me Threat for nothin'.<sup>55</sup>

After the jury convicted Skinner, the Supreme Court of New Jersey reviewed the case on appeal and found that, no matter how repugnant some may consider gangsta rap, Skinner's lyrics could not be admitted into evidence if they did not demonstrate motive or intent, as such admission would otherwise be prejudicial.<sup>56</sup> Yet, the court did not go so far as to say that rap lyrics could not be admitted into evidence at all. Instead, the court held that rap lyrics and other forms of fictional prose can be admitted into evidence if the writings demonstrate a "strong nexus" between the specific details of the artistic writing and the criminal charges.<sup>57</sup> Further, the evidentiary value of the artistic writing must outweigh any prejudicial impact the writing will have on the jury's perception of the defendant.<sup>58</sup> The court's finding in *Skinner* demonstrates that lyrics should be excluded from evidence if the introduction of those lyrics biases the jury against the defendant, such that the probative value of the lyrics is outweighed by the high likelihood of the jury convicting the defendant on the basis of his "bad" character rather than the charged crime.

The New Jersey ruling might have contributed to at least two developments in the law. First, the ruling operates to redress some of the disparities that impact Black men. The court's interpretation of the law limits a prose-

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(Md. Ct. Spec. App. 2020), *reconsideration denied* (Jan. 29, 2021) (finding that defendant's rap lyrics are admissible as substantive evidence of defendant's guilt when there is a strong nexus between specific details of the artistic composition and circumstances of the offense for which the evidence is being adduced).

<sup>53</sup> See *State v. Skinner*, 95 A.3d 236 (N.J. 2014).

<sup>54</sup> See *id.* at 239.

<sup>55</sup> *Id.* at 241.

<sup>56</sup> See *id.* at 238.

<sup>57</sup> See *id.* at 239; see also *Hannah v. State*, 23 A.3d 192, 196-201 (Md. 2011) (excluding defendant's rap lyrics from evidence); *State v. Hanson*, 731 P.2d 1140, 1144-45 (Wash. Ct. App. 1987) (reversing a conviction obtained after the prosecutor inappropriately asked defendant about his violent, fictional writings).

<sup>58</sup> See *Skinner*, 95 A.3d at 239.

cutor's ability to introduce evidence of generally violent hip-hop lyrics without a strong nexus to a crime, which may contribute to ending mass incarceration. Second, the New Jersey justices may be aware of the disproportionate effects of mass incarceration and are interpreting the law to redress some of those disproportionalities. It would not be unusual for the justices in *Skinner* to have ruled in such a way to contribute to social change considering the impact of mass incarceration on Black rappers.<sup>59</sup> Scholars have analyzed the role of activist judges in ensuring that justice is truly just.<sup>60</sup> Justice Ginsburg often embodied such a legal philosophy. For example, she famously issued a dissent that compelled Congress to address the wage gap between men and women who engaged in similar work.<sup>61</sup> However, her dissent also encouraged women to champion their own causes, which ultimately led women on a legislative crusade to advocate for themselves.<sup>62</sup> Thus, like Justice Ginsburg who sought to draw attention to inequalities propagated by the legal system, it is conceivable that the justices of the Supreme Court of New Jersey may have interpreted the law to limit prosecutors' ability to use rap lyrics against Black men after considering the effects of such evidence on mass incarceration.

Further, the Supreme Court of New Jersey's ruling could have influenced prosecutors in other jurisdictions not to introduce rap lyrics into evidence against a criminal defendant.<sup>63</sup> However, a closer look at the national

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<sup>59</sup> See, e.g., Lani Guinier, Foreword, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 51 (2008) (explaining that, in certain circumstances judges are motivated to rule in ways allow judges to engage in activism on a social issue).

<sup>60</sup> See generally Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785 (2007) (describing judicial subversion as a phenomenon of judges intentionally framing the law to achieve a particular outcome).

<sup>61</sup> See Guinier, *supra* note 59, at 41.

<sup>62</sup> See *id.*

<sup>63</sup> On December 16, 2014, four months after the New Jersey court's ruling, Bobby Shmurda, a 20-year-old Brooklyn-native, and twelve of his friends were indicted on murder, assault, weapons possession, narcotics possessions and sales in the East New York and Flatbush areas. While Shmurda's rap lyrics may not have been introduced into evidence against him, there are parallels between Shmurda's lyrics and the indictment. Shmurda's lyrics boast about him "selling crack since like the fifth grade" and using assault rifles to shoot individuals, and claim that his friend Mitch, "caught a body like a week ago." See Zara Golden, *Everything You Need to Know About the Bobby Shmurda Indictment*, THE FADER, Dec. 19, 2014, <http://www.thefader.com/2014/12/19/everything-you-need-to-know-about-the-bobby-shmurda-indictment> [<https://perma.cc/4ZGA-KCTY>]; Gail Sullivan, *How Rapper Bobby Shmurda, Charged in Murder, Drug Trafficking Sting, Became an Alleged Gangster*, WASH. POST (Dec. 19, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/12/19/hip-hops-bobby-shmurda-charged-in-murder-drug-trafficking->



trend of both introducing and allowing rap lyrics as evidence demonstrates that the court ruling in *Skinner* is an outlier. Recent cases in New York,<sup>64</sup> California,<sup>65</sup> Florida,<sup>66</sup> Texas<sup>67</sup> and Maryland<sup>68</sup> demonstrate a pervasive, alternative view to the New Jersey court's interpretation. These kinds of rulings demonstrate that the evidentiary balancing test of admitting rap lyrics as evidence exacerbates the perception of Black men as inherently criminal.<sup>69</sup>

### B. *The Criminal Justice System's Perception of Black Men*

Young n—a move that dope. They move that dope, they move that dope.  
Young n—move that dope. Young enough to still sell dope. But old

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sting/?utm\_term=.3015bf10d687 [https://perma.cc/S92Z-8B29]. “To catch a body” refers to having murdered someone. See *Catch a Body definition*, URBANDICTIONARY, <http://www.urbandictionary.com/define.php?term=catch%20a%20body> [https://perma.cc/TF9Q-SK5K] (last visited Apr. 29, 2021).

<sup>64</sup> In a case involving Brooklyn rapper Tekashi 6ix9ine, prosecutors asked whether the lyrics in his hit song “GUMMO” included any threats against rivals of the Nine Trey Gangsta Bloods. See *United States v. Jones*, Trial Tr. Doc. 304, 166 – 180, Oct. 16, 2019 available at <https://www.courtlistener.com/docket/14608592/340/united-states-v-jones/> [https://perma.cc/CQ82-ELFC] (last accessed Feb. 3, 2021) (hereinafter *Jones* Trial Tr. Doc.).

<sup>65</sup> Drakeo the Ruler was charged for murder in December 2016 even though investigators learned that Drakeo was not the gunman and even further did not participate in any violence that ensued. See Sam Levin, *The Jailed LA Rapper Whose Songs Were Used To Prosecute Him*, THE GUARDIAN (Oct. 2, 2019), <https://www.theguardian.com/us-news/2019/oct/01/drakeo-the-ruler-los-angeles-rapper-songs> [https://perma.cc/QX6Y-EYG6].

<sup>66</sup> One such case involved a motion referencing rapper YNW Melly's lyrics to demonstrate evidence of his alleged role in the shooting deaths of two associates. See Victim's Objection and Response to Defendant's Emergency Motion for Victim's Release from Medical Care and Supplemental Emergency Motion for Release from Medical Care, *State v. Demons*, No. 19-001872CF10A (2020), available at <https://floridajustice.com/wp-content/uploads/2020/04/Demons.pdf> [https://perma.cc/WU2M-528L] (last accessed Feb. 3, 2021).

<sup>67</sup> In April of 2017, after accepting a plea deal for his role in a robbery, 19-year-old Texas rapper Tay-K's music video and rap lyrics were introduced during sentencing. The video showed the then-16-year-old rapper brandishing a gun. See *Rapper Tay-K's Video Used in Murder Sentencing*, BBC News (July 23, 2019), <https://www.bbc.com/news/newsbeat-49080656> [https://perma.cc/7D9F-YA8M].

<sup>68</sup> The Maryland Court of Appeals held that a defendant's rap lyrics are admissible as substantive evidence of the defendant's guilt when there is strong nexus between specific details of the artistic composition and circumstances of the offenses for which the evidence is being adduced. See *Montague v. State*, 243 A.3d 546 (2020), *reconsideration denied* (Jan. 29, 2021).

<sup>69</sup> See *infra* Part III.

enough that I knows better. When they saying it's 42 for that white powder, I knows better. Get it, n---a? I nose better, put a smile on the devil's face. Who don't want to sell dope forever?<sup>70</sup> – Future and Pusha T, commercial rappers

Scholars have diligently identified and challenged the implicit racial biases inherent in the criminal justice system that contribute to the mass incarceration of Black men.<sup>71</sup> Police practices often target Black people and other communities of color more than White individuals and communities.<sup>72</sup> Research also shows that police are more likely to target Black people for traffic and walking stops to search their person and car.<sup>73</sup> Once formally in the criminal justice system, Black people are exposed to additional racial biases. Research shows that prosecutors implicit biases can negatively influence prosecutorial discretion and lead to decisions that disproportionately impact Black people more than their White counterparts.<sup>74</sup> Black people are more likely to be detained pending trial due to high-set bails<sup>75</sup> and must rely on public defenders for legal representation.<sup>76</sup> Once convicted, Black defendants are sentenced to longer sentences than similarly situated White defendants. Further, research has found that juries are more likely to sentence Black defendants to death when the victim of the crime was a White person.<sup>77</sup> Undoubtedly, bias and stereotypes of Black men play a significant role in the racialization of the criminal justice system. Gangsta rap, which is predominately associated with the Black community, may contribute to how police officers, prosecutors, and jurors view Black defendants. In one study attempting to determine whether a song will evoke harsher reactions merely

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<sup>70</sup> FUTURE, *Move that Dope*, on HONEST (Epic Records 2014). For lyrics, see Future, *Move that Dope*, GENIUS, <https://genius.com/Future-move-that-dope-lyrics> [<https://perma.cc/XNX2-25RM>] (last visited Apr. 29, 2020).

<sup>71</sup> See generally PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 36-37 (2010); Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013); William Quigley, *Racism: The Crime in Criminal Justice*, 13 LOY. J. PUB. INT. L. 417 (2012).

<sup>72</sup> See Reginald T. Shuford, *Any Way You Slice It: Why Racial Profiling Is Wrong*, 18 ST. LOUIS U. PUB. L. REV. 371, 378-79 (1999).

<sup>73</sup> Quigley, *supra* note 71, at 418-19.

<sup>74</sup> See generally Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012).

<sup>75</sup> See Quigley, *supra* note 71 at 419-20.

<sup>76</sup> See *id.* at 420.

<sup>77</sup> See Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 575-77 (2011).

by being identified as rap,<sup>78</sup> researchers demonstrated that when White subjects believed lyrics were identified as rap, the lyrics were judged significantly more negatively<sup>79</sup> than when the White subjects thought the same lyrics were attributed to a predominately White genre, like folk or country music.<sup>80</sup> This may explain why I have been unable to find convictions of White artists after the submission into evidence of similarly violent lyrics. Even Eminem, a White rapper, has bragged about raping women,<sup>81</sup> but those lyrics have yet to be brought against him to establish his criminality or violent behavior in any legal proceedings. Further, it seems as though Black rappers are punished for lyrics praising the use of illicit drugs, while White artists are praised for similar lyrics. For example, Rock & Roll Hall of Famers Guns 'N Roses have celebrated heroin addiction.<sup>82</sup>

Stereotypes<sup>83</sup> can be reinforced when a person cannot challenge their preconceived notions about a group of individuals due to a lack of interaction with members of the stereotyped group.<sup>84</sup> The commercialization of gangsta rap provides a global audience, which includes judges, jurors and law enforcement with images of Black men as drug dealing, misogynistic criminals, while the separation of Black and White people in housing and education<sup>85</sup> serves to perpetuate those stereotypes. Americans are inundated

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<sup>78</sup> See Carrie B. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. APPLIED SOC. PSYCHOL. 2135, 2137-39 (1996).

<sup>79</sup> The subject believed that the lyrics were offensive and a threat to society. See *id.* at 2140.

<sup>80</sup> See *id.* at 2141.

<sup>81</sup> In Dr. Dre's song, *Medicine Man*, Eminem raps, "I even make the b\*tches I rape cum." For full lyrics, see Dr. Dre, *Medicine Man*, GENIUS, <https://genius.com/Dr-dre-medicine-man-lyrics> [<https://perma.cc/XC98-29CJ>] (last visited Apr. 29, 2020); see also *Eminem Gets 2 years' Probation for Gun Charge*, CNN, (Apr. 10, 2001) <http://www.cnn.com/2001/LAW/04/10/eminem.sentencing.02/index.html> [<https://perma.cc/SQ6E-4V6Z>]. Even when Eminem's lyrics were the basis of a slander case against the rapper, the case was dismissed because the lyrics convey signals to a reasonable person that the lyrics should not be taken literally. See *Bailey v. Mathers*, No. 252123, 2005 Mich. App. LEXIS 930 (Mich. Ct. App. 2005).

<sup>82</sup> For full lyrics, see Guns 'N Roses, *Mr. Brownstone*, GENIUS, <https://genius.com/Guns-n-roses-mr-brownstone-lyrics> [<https://perma.cc/UY83-VK8X>] (last visited Apr. 29, 2020).

<sup>83</sup> See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 191 (1954) (discussing stereotypes as favorable or unfavorable exaggerated beliefs associated with a category intended to justify an individual's conduct toward that category).

<sup>84</sup> See GARY W. POTTER & VICTOR E. KAPPELER, *CONSTRUCTING CRIME: PERSPECTIVES ON MAKING NEWS AND SOCIAL PROBLEMS* (Waveland Press 2006).

<sup>85</sup> See Greg Toppo, *GAO Study: Segregation Worsening in U.S. Schools*, USA TODAY (May 17, 2016), <http://www.usatoday.com/story/news/2016/05/17/gao-study-segregation-worsening-us-schools/84508438/> [<https://perma.cc/R3XL-35BR>]; U.S.

with lyrics that boast of Black men being savages,<sup>86</sup> “sell[ing] work,”<sup>87</sup> “f—k[ing] b—ches”<sup>88</sup> and “getting money,”<sup>89</sup> but are not exposed to Black men at school or in their neighborhoods who are not dealing drugs or disrespecting women. As a result, the stereotype of the Black man as a deviant permeates American society and contributes to the negative perception that juries and criminal justice officials have of Black men, resulting in the group’s mass incarceration.

### C. Prison as Rite of Passage, Not Deterrent

You know they got me trapped in this prison of seclusion. Happiness, living on the streets is a delusion. Even a smooth criminal one day must get caught. Shot up or shot down with the bullet that he bought. Nine-millimeter kickin’, thinkin’ about what the streets do to me.<sup>90</sup> – 2Pac

There are at least four theories of punishment – retribution, deterrence, incapacitation, and rehabilitation.<sup>91</sup> The United States’ criminal justice philosophy is largely based on retribution and incapacitation intended to prevent criminal activity.<sup>92</sup> However, the unfair and racially biased mass

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GOV’T ACCOUNTABILITY OFFICE, GAO-16-345, K – 12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY RACIAL DISPARITIES AND ADDRESS DISCRIMINATION (Apr. 2016); Stephen L. Ross & Margery Austin Turner, *Housing Discrimination in Metropolitan America: Explaining Changes Between 1989 and 2000*, 57 SOC. PROBLEMS 152 (2005).

<sup>86</sup> See Migos, *Bad and Boujee*, on CULTURE (300 Entertainment 2020) (noting that their “n—-as is savage, ruthless.”). For full lyrics see Migos, *Bad and Boujee*, GENIUS, <https://genius.com/Migos-bad-and-boujee-lyrics> [https://perma.cc/E5W4-8QAE] (last visited Apr. 29, 2020).

<sup>87</sup> Migos, *T-Shirt*, on CULTURE (300 Entertainment 2020). Selling work is interchangeable with the term moving work and is defined as selling narcotics like marijuana or cocaine. See *Moving Work*, URBANDICTIONARY, <http://www.urbandictionary.com/define.php?term=moving%20Work> [https://perma.cc/5RLA-48HL] (last visited Apr. 29, 2020).

<sup>88</sup> See Jr. M.A.F.I.A., *Get Money*, on CONSPIRACY (Big Beat Records 1995). For full lyrics see Jr. M.A.F.I.A., *Get Money*, GENIUS, <https://genius.com/Jr-mafia-get-money-lyrics> [https://perma.cc/HZV9-LZ8H] (last visited Apr. 29, 2020).

<sup>89</sup> *Id.*

<sup>90</sup> 2Pac, *Trapped*, on 2PACALYPSE NOW (Interscope Records 1991). For full lyrics see 2Pac, *Trapped*, GENIUS, <https://genius.com/2pac-trapped-lyrics> [https://perma.cc/MKE7-PFJ2] (last visited Apr. 29, 2020).

<sup>91</sup> See, e.g., Paul Butler, *Much Respect: Toward A Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 984 (2004).

<sup>92</sup> See andre douglas pond cummings, *Thug Life: Hip-Hop’s Curious Relationship with Criminal Justice*, 50 SANTA CLARA L. REV. 515, 515-16 (2010).

incarceration of Black men greatly limits that supposed deterrent effect. In the song *Do Your Time*, Ludacris declares that “the justice system’s f—d up” because it disproportionately impacts half of his Black brothers who are still incarcerated.<sup>93</sup> Similarly, Phife Dawg, a member of the renowned rap group A Tribe Called Quest, expresses that many Black men believe their only available options are death or life in prison.<sup>94</sup> Unfortunately, some Black men may not be deterred from engaging in criminal activity because they already have a heightened chance of being incarcerated at some point in their life anyway. As a result, incarceration does not operate to deter crime in the Black community or stigmatize ex-prisoners to the extent that it does in other racial groups.<sup>95</sup> In my neighborhood of South Jamaica, Queens, individuals released from prison are viewed as survivors of war.<sup>96</sup> They are not stigmatized, but instead honored for their survival. This celebration of incarceration operates to make an individual feel proud and showcases the recently incarcerated individual as someone to be emulated. This may have the unintended consequence of contributing to a young, Black man’s willingness to participate in criminal activity because he believes he will be celebrated for surviving incarceration.

Hip-hop artists reinforce incarceration as a rite of passage by “shouting out”<sup>97</sup> prisoners in correctional facilities.<sup>98</sup> Shouting out incarcerated men also acknowledges that they are in prison partly because of the racial bias and inequities inherent in American society.<sup>99</sup> Specifically, rappers view the

<sup>93</sup> See LUDACRIS, *Do Your Time*, on *RELEASE THERAPY* (Def Jam Recordings 2006). For full lyrics see Ludacris, *Do Your Time*, GENIUS, <https://genius.com/Ludacris-do-your-time-lyrics> [<https://perma.cc/BY9X-9QQS>] (last visited Apr. 29, 2020).

<sup>94</sup> See A TRIBE CALLED QUEST, *Whateva Will Be*, on *WE GOT IT FROM HERE. . . THANK YOU 4 YOUR SERVICE* (Epic Records 2016). For full lyrics see A Tribe Called Quest, *Whateva Will Be*, GENIUS, <https://genius.com/A-tribe-called-quest-whateva-will-be-lyrics> [<https://perma.cc/G452-7LHA>] (last visited Apr. 29, 2020).

<sup>95</sup> See Butler, *supra* note 91, at 985 (explaining that because the American criminal justice system is unfair, law breakers are glorified or not viewed as criminals).

<sup>96</sup> In his song, *A Ballad for the Fallen Soldier*, Jay Z identifies incarcerated individuals as “P.O.W.’s that still in the war for real.” JAY Z, *A Ballad for the Fallen Soldier* on *THE BLUEPRINT 2: THE GIFT & THE CURSE* (Def Jam/Island Def Jam 2002). For full lyrics see Jay Z, *A Ballad for the Fallen Soldier*, GENIUS, <https://genius.com/Jay-z-a-ballad-for-the-fallen-soldier-lyrics> [<https://perma.cc/SE3L-YWXJ>] (last visited Apr. 29, 2020).

<sup>97</sup> Shout-out is defined as a public expression of gratitude or thanks. See *Shout-out definition*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=shout-out> [<https://perma.cc/8FZ6-7SPB>] (last visited Apr. 29, 2020).

<sup>98</sup> See Cummings, *supra* note 92, at 542.

<sup>99</sup> See Butler, *supra* note 71, at 998.

rampant poverty and joblessness within Black communities as an intentional construct that incarcerated individuals rightly rebel against in an effort to survive.<sup>100</sup> Viewing prison as a rite of passage is problematic for lawmakers because prison is not intended to serve as a ceremonious stage in an individual's life. Yet, the racial inequities in housing, employment, education, and criminal justice that were created and reinforced by lawmakers have caused the Black community to perceive the function of incarceration differently than any other racial group.

### III. ISSUES WITH THE PROBATIVE VERSUS PREJUDICIAL BALANCING TEST

Mass incarceration, the perception of hip-hop and Black men as inherently violent, and the view of prison as a natural occurrence in an unfair criminal justice system all contribute to the imbalance of the current test used to determine whether rap lyrics should be excluded as evidence of a rapper's guilt in the commission of a crime. Many state evidence rules are derived from the Federal Rules of Evidence.<sup>101</sup> State and federal courts have established rules that involve a balancing test to determine the exclusion of evidence.<sup>102</sup> Essentially, under many state and federal courts' current Rules of Evidence, if prosecutors can show that a rapper's lyrics establish his motive, intent, or identity, then most judges will deem the lyrics admissible as evidence of the rapper's involvement in the crime. However, state and federal courts have held that a probative versus prejudicial balancing test can be used to ensure a criminal conviction does not hinge on a rapper's lyrics alone, as demonstrated in *Skinner*. Under the balancing test, a rapper's lyrics can be excluded if admission of the lyrics is unfairly prejudicial when

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<sup>100</sup> See *id.*

<sup>101</sup> See Fed. R. Evid. 403. See generally Alan D. Hornstein, *The Maryland Rules of Evidence - the New Maryland Rules of Evidence: Survey, Analysis and Critique*, 54 MD. L. REV. 1032, 1033 (1995) (describing that by late 1988 thirty-five states, the military, Guam and Puerto Rico adopted rules based on the Federal Rules of Evidence).

<sup>102</sup> See *United States v. Pierce*, 785 F.3d 832, 841 (2d Cir. 2015) (finding that rap lyrics and tattoos are properly admitted where they are relevant, and their probative value is not substantially outweighed by the danger of unfair prejudice); *United States v. Carpenter*, 372 F. Supp. 3d 74, 76-77 (E.D.N.Y. 2019) (holding that the defendant's rap music videos and lyrics were relevant, and the probative value of videos and lyrics was not substantially outweighed by danger of unfair prejudice). State courts have also defined "unfair prejudice" in describing circumstances when evidence, like rap lyrics, would be ruled inadmissible. See generally *State v. Logue*, 436 P.3d 136 (Utah Ct. App. 2018); *State v. Hernandez*, 911 N.W.2d 524 (Neb. 2018); *Pierce v. State*, 807 S.E.2d 425 (Ga. 2017); *State v. Thompson*, 802 S.E.2d 623 (S.C. Ct. App. 2017).

weighed against the lyrics' probative value. There are at least two issues with this test: (A) prosecutorial reliance on rap lyrics operates under the false assumption that the lyrics are actually true and (B) judges inaccurately interpret generally violent lyrics as specific to a crime.

*A. Prosecutorial Reliance on Rap Lyrics Does Not Account for the Reality that the Rapper's Lyrics May Be Untrue or Fabricated*

First, some judges fail to recognize that prosecutorial reliance on lyrics to establish rappers' guilt operate from the mistaken assumption that the lyrics are actually true. In a case brought by the United States Attorney for the Southern District of New York, Brooklyn rapper Tekashi 6ix9nine admitted that his rap lyrics were fictitious and based on an arrangement struck between himself and the Nine Trey Gangsta Bloods.<sup>103</sup> In exchange for a portion of Tekashi's royalties, the Nine Trey Gangsta Bloods granted Tekashi protection and allowed him to present the persona of a violent, drug-selling Blood.<sup>104</sup> More plainly, even though Tekashi was never initiated into any recognized Blood set,<sup>105</sup> and therefore never a Blood, his viral lyrics consistently made reference to being a Blood,<sup>106</sup> using Blood language<sup>107</sup> and living a Blood lifestyle.<sup>108</sup> In essence, Tekashi's rap lyrics were fictitious. While Tekashi's lyrics were not ultimately used against him to establish his criminality, other rappers' appeals to exclude lyrics as evidence on the basis of fictionality have been denied.<sup>109</sup> In accepting rappers' lyrics as true, prosecutors and courts do not account for the reality that a defendant's lyrics are, in fact, purely fictional, which would certainly lead to the exclusion of such evidence since its probative value would be substantially outweighed by unfair prejudice against the rapper. Few would argue that Bob Marley actually "shot the sheriff,"<sup>110</sup> or that Johnny Cash really "shot a

<sup>103</sup> See *Jones Trial Tr. Doc.*, *supra* note 64.

<sup>104</sup> See *id.* at 185.

<sup>105</sup> See *id.*

<sup>106</sup> See 6IX9INE, *Billy*, on DAY69 (Sony Music Group 2018).

<sup>107</sup> See 6IX9INE, *Blood Walk* (Tenthousand Projects 2018).

<sup>108</sup> See *id.*

<sup>109</sup> See *Montague v. State*, 243 A.3d 546 (Md. 2020), *reconsideration denied* (Jan. 29, 2021).

<sup>110</sup> BOB MARLEY & THE WAILERS, *I Shot the Sheriff*, on BURNIN (Island Records 1973). For lyrics, see Bob Marley & The Wailers, *I Shot the Sheriff*, GENIUS, <https://genius.com/Bob-marley-and-the-wailers-i-shot-the-sheriff-lyrics> [https://perma.cc/9B6G-LH3V] (last visited Apr. 29, 2020).

man in Reno just to watch him die.”<sup>111</sup> In relying on rappers’ lyrics to establish guilt, prosecutors are failing to recognize that those lyrics are more likely a reflection of fictional stories that the artist deems aesthetically pleasing or appealing to hip-hop consumers.

*B. Judges’ Inaccurate Interpretation of Generally Violent Lyrics as Specific to a Crime*

Second, the probative versus prejudicial balancing test poses an issue for the defendant when judges interpret a rapper’s generally violent lyrics as specific to the charged crime. In this section, I will analyze a case from Maryland’s highest court to demonstrate that inaccurately interpreting generally violent rap lyrics as specific to a crime can tip the scale to prejudice the defendant and therefore should be excluded. Recently, in *Montague v. State*, the Maryland Court of Appeals upheld the admissibility of Lawrence Montague’s jailhouse rap lyrics as substantive evidence in establishing his alleged guilt in a murder case.<sup>112</sup> In January 2017, George Forrester was shot and killed by a drug dealer after Forrester attempted to buy cocaine with a counterfeit \$100 bill.<sup>113</sup> Relying on the testimony and identification provided by a single witness, the decedent’s cousin, a grand jury indicted Montague for Forrester’s murder.<sup>114</sup> Three weeks before trial, Montague made a call from the Anne Arundel County Detention Center to an unidentified male and recorded the following rap, which was later uploaded to Instagram:

Listen, I said YSK / I ain’t never scared / I always let it spray /  
 And, if a n—-a ever play / Treat his head like a target /  
 You know he’s dead today / I’m on his ass like a Navy Seal /  
 Man, my n—-s we ain’t never squeal /  
 I’ll pop your top like an orange peel / You know I’m from the streets /  
 F.T.G. / You know the gutter in me /  
 And I be always reppin’ my YSK shit / Because I’m a king /  
 I be playin’ the block bitch / And if you ever play with me /

<sup>111</sup> JOHNNY CASH, *Folsom Prison Blues*, on AT FOLSOM PRISON (Columbia Records 1968). For lyrics see Johnny Cash, *Folsom Prison Blues*, GENIUS, <https://genius.com/Johnny-cash-folsom-prison-blues-lyrics> [<https://perma.cc/68SK-EXGN>] (last visited Apr. 29, 2020).

<sup>112</sup> See *Montague*, 243 A.3d at 552.

<sup>113</sup> See *id.*

<sup>114</sup> See *Montague*, 243 A.3d at 551, *reconsideration denied* (Jan. 29, 2021); see also Phil Davis, *Man Found Guilty of Murder in Annapolis Shooting* (Nov. 2, 2017, 1:20 PM), <https://www.capitalgazette.com/news/crime/ac-cn-annapolis-murder-guilty-1103-story.html> [<https://perma.cc/K6N7-CVC4>].



I'll give you a dream, a couple shots snitch /  
 It's like hockey pucks the way I dish out this /  
 It's a .40 when that bitch goin' hit up shit / 4 or 5, rip up your body  
 quick /  
 Like a pickup truck / But you ain't getting picked up/  
 You getting picked up by the ambulance /  
 You going to be dead on the spot /  
 I'll be on your ass.<sup>115</sup>

After Montague recorded his rap, the person on the other end of the telephone cautioned Montague against publishing the lyrics on social media.<sup>116</sup> However, Montague insisted and even stated “I’m Gucci.<sup>117</sup> It’s a rap. F—k they can do for – about a rap?”<sup>118</sup> Montague’s usage of the phrase, “I’m Gucci” is relevant here and can be interpreted to mean that his rap could not possibly be interpreted in connection to the murder charges he was facing at the time. After all, his lyrics do not refer to any specific aspects of the murder charges brought against him. He does not claim to be a drug dealer. Nor does he claim to have shot or killed anyone. Instead, the lyrics in the jailhouse rap speak to general violence, which the court in *Skinner* viewed as not enough to tip the scale in favor of admitting such lyrics as evidence of rappers’ guilt. Unlike the lyrics in *Holmes v. State*, in which the defendant’s lyrics mirrored the details of a robbery and murder in which the assailants wore ski masks, turned out the victim’s pockets, and tore a necklace from the victim’s throat, Montague’s lyrics do not detail selling drugs to Forrester, receiving a counterfeit \$100 bill from Forrester, or shooting him as a result.<sup>119</sup> Similarly, Montague’s case is unlike that of *Greene v. Commonwealth*, in which the rapper was charged with the murder of his wife and was found to have released the following eerily descriptive rap immediately after her death:

B—— made me mad, and I had to take her life. My name is Dennis  
 Greene and I ain’t got no f—ing wife. I knew I was gonna be givin’ it to  
 her . . . when I got home. I cut her motherf—in’ neck with a sword . . .<sup>120</sup>

<sup>115</sup> See *Montague*, 243 A.3d at 554.

<sup>116</sup> See *id.*

<sup>117</sup> “I’m Gucci” is a slang term, based on the luxury fashion brand, meaning okay. See *Gucci definition*, URBANDICTIONARY, <https://www.urbandictionary.com/define.php?term=gucci> [https://perma.cc/6HPE-V6P2 ] (last visited Feb. 3, 2021).

<sup>118</sup> See *Montague*, 243 A.3d at 554.

<sup>119</sup> See *Holmes v. State*, 129 Nev. 567, 306 P.3d 415, 417 (Nev. 2013). See also *Montague*, 243 A.3d at 554.

<sup>120</sup> *Greene v. Commonwealth*, 197 S.W.3d 76, 86 (Ky. 2006).

Even though Montague's jailhouse rap speaks of violence in generalities, like the lyrics in *Skinner*, Montague's lyrics were deemed admissible at trial<sup>121</sup>. On appeal of the trial court judge's decision to admit Montague's lyrics into evidence, the Maryland Court of Appeals did not focus on the general language in Montague's lyrics, but on the closeness in time between the composition of the lyrics and the commission of the crime<sup>122</sup>. The court reasoned that because Montague's rap was composed three weeks before trial, the probative value of the lyrics was high and would overcome any concerns about prejudicing the jury.<sup>123</sup> The court further demonstrated that the rap lyrics in *Skinner* were composed before the crime took place and possessed a weak temporal nexus with the alleged crime, whereas in Montague's case the lyrics provided much more reliable evidence of guilt.<sup>124</sup> Therefore, despite the lack of any specific details in the lyrics relating to the charged crime, the court applied the balancing test and admitted the evidence.

The Court of Appeals of Maryland seemed unwilling to heed the New Jersey Supreme Court's advice<sup>125</sup> in *Skinner* to approach rap lyric evidence with "caution." Instead, the Maryland court rushed to the conclusion that there was a temporal nexus that increased the lyrics' probative value. A more cautionary approach to the lyrics in *Montague*, like that applied in *Skinner*, would likely have resulted in a lack of finding a temporal nexus due to the absence of any specific admissions in the rap. Further, such an approach would not have to rely on an alternative, unconvincing argument that the "stop snitching" references in Montague's lyrics were intended to intimidate witnesses because the trial was scheduled to take place in three weeks. The Court of Appeals of Maryland mistakenly found a nexus, between general lyrics and a specific crime, that did not exist. The only evidence establishing criminality against the rapper was the witness testimony and identification of a woman related to the deceased who only identified Mr. Montague after she was apprehended for unrelated warrants.<sup>126</sup> Mr. Montague, as a result, was essentially on trial for his lyrics, which tipped the scales to prejudice the defendant and, therefore, should have been excluded. The Maryland court's decision in *Montague* is a catastrophic legal blow to hip-hop as art and those of us who are avid consumers of it.

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<sup>121</sup> Compare *Montague*, 243 A.3d at 554 with *State v. Skinner*, 95 A.3d 236, 241 (N.J. 2014).

<sup>122</sup> *Montague*, 243 A.3d at 557.

<sup>123</sup> See *Montague*, 243 A.3d at 565.

<sup>124</sup> See *id.* at 561-67.

<sup>125</sup> See *Skinner*, 95 A.3d at 253.

<sup>126</sup> See *Montague*, 243 A.3d at 551.

#### IV. CALL FOR LEGISLATIVE INTERVENTION

Current sociopolitical and legal regimes continue to perpetuate mass incarceration through an attack on hip-hop, its consumers, and Black men, thereby also impacting Black families and communities. Lyrics that reveal the first-hand experience of how one survives violent, poverty-stricken, predominately black neighborhoods can be completely foreign to judges, jurors, and prosecutors who were not raised in similar environments. These lyrics can distort a rapper's innocence by painting him as a bad individual to a judge and jury instead of a survivor of his or her socio-economic circumstances. Intervention is necessary to ensure a genre sculpted and consumed by Black people is not weaponized against the community it was designed to serve. The calls for racial justice and equity during the summer of 2020 demanded that federal legislatures analyze every way in which the criminal justice system is disproportionately impacting Black Americans.<sup>127</sup>

One potential solution to address the gross imbalance inherent within the probative versus prejudicial balancing test is to abandon the test and replace it with a subjective standard. Specifically, when determining whether rap lyrics are admissible, an inquiry into the meaning of the lyrics to the rapper should be considered. This approach to the lyrics centers the rapper's lyric within the community that the genre was intended to serve. Additionally, the ease with which rap lyrics can be admitted into evidence should be analyzed. Further, courts should raise the bar for admission of generally violent rap lyrics to account for the disparate treatment of Black men, especially in cases in which the jury relies on only a few pieces of evidence to convict a defendant.

#### CONCLUSION

Unfortunately, KRS-One's 1993 lyrics from *Sounds of Da Police*<sup>128</sup> are still largely true. Due to systematic injustices, Black men are concentrated in poverty-stricken, war-torn public housing complexes in densely populated, metropolitan areas. They are restricted in educational opportunities, which contributes to the lack of gainful and legitimate employment in the

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<sup>127</sup> Following George Floyd's murder, Black Lives Matter and the Movement for Black Lives began the process of drafting the BREATHE Act, a federal bill that calls for divestment from current policing systems and the investment in new forms of public safety. See Electoral Justice Project, *What is the Breathe Act*, MOVEMENT FOR BLACK LIVES (last accessed Apr. 12, 2021), <https://breatheact.org/learn-more/> [<https://perma.cc/J6RT-46B6>].

<sup>128</sup> See KRS-ONE, *supra* note 1.

future. As a result, many Black men are relegated to either using or selling illicit drugs, which is the first link in the never-ending chain of mass incarceration. Law enforcement officers begin to target these predominately Black neighborhoods and arrest Black men at higher rates than they arrest White people, even though research suggests that illegal drug use is just as prevalent in White communities. Prosecutorial discretion allows for the introduction of rap lyrics, a poetic outlet for many men, as evidence, which contributes to mass incarceration. Then, even after being released from prison, Black men are faced with institutional barriers to successful re-entry.

The current legal scheme of probative versus prejudicial treatment continues to tip the scales against rappers, which reinforces biased views of Black men and hip-hop. Prosecutors' reliance on lyrics as true and judges' interpretations of general lyrics to establish a connection to a specific crime contribute to the legal assault on hip-hop. To attain justice, state and local legislatures must act to ensure that either the balancing test is replaced with a more subjective assessment of rap lyrics or that the bar to admit rap lyrics as evidence is raised. Until then, I am dreaming of "better days, better days. Hey, better days. Got me thinking about better days"<sup>129</sup> for the contemporary Black man and, ultimately, the country as a whole.

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<sup>129</sup> 2PAC, *Better Dayz*, on BETTER DAYZ (Insomniac/Interscope Records 2002). For lyrics, see 2Pac, *Better Dayz*, GENIUS, <https://genius.com/2pac-better-dayz-lyrics> [<https://perma.cc/D9MV-KRQ4>] (last visited Apr. 29, 2020).

## It's Worth a Shot: Can Sports Combat Racism in the United States?

David A. Grenardo\*

### ABSTRACT

Racism has stained this country throughout its history, and racism persists today in the United States, including in sports. Sports represent a reflection of society and its ills, but they can also provide a powerful means to combat racism. This article examines the state of racism in society and sports both historically and today. It also provides background on how racism develops and how it can be countered. Further, the article analyzes what is currently being done to address racism through sports in the United States, and it provides practical and tangible ways sports can be used to battle racism. Several opportunities exist to utilize sports in the battle against racism. Since racial biases can begin in children as young as age four, the article promotes the three Es to fight racism using sports—education and experi-

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ence that occur *early* in one's life. Education and experiences through sports for young children of different races that allow meaningful interaction will help overcome implicit biases and racial stereotypes. Sports can also subvert racism by providing opportunities and access to jobs for minorities in leadership positions. This article concludes that if sports can create any type of positive impact in combatting racism, which it can, then those efforts are shots worth taking.

"Sport has the power to change the world. . .It has the power to unite people in a way that little else does. . .Sport can create hope where once there was only despair. It is more powerful than government in breaking down racial barriers." — Nelson Mandela<sup>1</sup>

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<sup>1</sup> *Celebrating the Legacy of Our Patron on Mandela Day*, LAUREUS (July 18, 2019), <https://www.laureus.com/news/celebrating-the-legacy-of-a-hero-on-mandela-day> [<https://perma.cc/WN44-B3KL>].

## TABLE OF CONTENTS

I.	INTRODUCTION .....	240
II.	IDENTIFYING THE DIFFERENT TYPES OF RACISM ..	246
III.	THE STATE OF RACISM IN SOCIETY AND SPORTS....	250
	<i>A. The State of Racism in America</i> .....	251
	<i>B. Racism in Sports</i> .....	265
IV.	THE DISEASE OF RACISM: HOW IT STARTS AND HOW TO CURE .....	273
	<i>A. How Racism Develops</i> .....	273
	<i>B. How Racism Can Be Countered</i> .....	275
V.	CURRENT EFFORTS AT TAKING A SHOT AT RACISM THROUGH SPORTS .....	279
	<i>A. The RISE Model</i> .....	280
	<i>B. Professional Leagues' Efforts</i> .....	284
	<i>C. Combatting "Overt" Racism</i> .....	289
	<i>D. Rooney Rule</i> .....	291
VI.	COMBATTING RACISM THROUGH SPORTS: THE THREE Es AND OPPORTUNITY .....	295
	<i>A. Education</i> .....	295
	<i>B. Experience</i> .....	303
	<i>C. Early</i> .....	309
	<i>D. Opportunity</i> .....	310
VII.	COUNTER-ARGUMENTS .....	312
	<i>A. The Proposals Fail to Overcome or Address Each Type of     Racism</i> .....	313
	<i>B. Some People Will Not Change</i> .....	313
	<i>C. Forcing People to Interact with Each Other Will Create     Resentment or Lack of Excellence</i> .....	314
VIII.	CONCLUSION .....	315

## I. INTRODUCTION

Racism is the worst stain in our country's history. This United States economy grew on the backs of slaves.<sup>2</sup> After the emancipation of slaves in the United States, lynching, Jim Crow laws of segregation,<sup>3</sup> the emergence and proliferation of the Ku Klux Klan (KKK),<sup>4</sup> and social unrest further tainted our country's short history. Even though the federal government has enacted a plethora of laws to protect minorities — the Civil Rights Act of 1964 (relating to employment and education),<sup>5</sup> the Fair Housing Act,<sup>6</sup> and the Voting Rights Act of 1965<sup>7</sup>—racism endures.<sup>8</sup> Modern events and issues such as the August 2017 Unite the Right rally in Charlottesville,<sup>9</sup> police brutality against Black people,<sup>10</sup> and White<sup>11</sup> people calling the police

<sup>2</sup> See Gerald A. Foster, *American Slavery: The Complete Story*, 2 CARDOZO PUB. L., POL'Y, & ETHICS J. 401, 420 (2004) (“Economically, slavery was the foundation upon which America’s international power was developed.”).

<sup>3</sup> See, e.g., *Jim Crow Laws*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws/> [<https://perma.cc/8ECU-B5A3>] (last visited Apr. 23, 2021).

<sup>4</sup> *Birth of a Nation* ushered in the motion picture industry in Hollywood in 1915 and was the first movie ever screened at the White House (by President Woodrow Wilson). See IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 305 (2016). The movie revitalized the KKK by glorifying the KKK as a heroic organization, and it depicted Black people during the Reconstruction era as Black supremacists and rapists. See *id.* at 306. The movie held the title as the highest grossing movie for two decades after its release. See *id.* Part II of this article discusses lynching and Jim Crow laws.

<sup>5</sup> Pub. L. No. 88-352, 78 Stat. 241 (1964).

<sup>6</sup> Pub. L. No. 90-284, 82 Stat. 73 (1968).

<sup>7</sup> Pub. L. No. 89-110, 79 Stat. 437 (1965).

<sup>8</sup> See Robette Ann Dias, *Racism Creates Barriers to Effective Community Policing*, 40 S. ILL. U. L. J. 501, 508 (2016) (“Changing laws 60 years ago did not heal the collective harm that systemic racism has wrought.”).

<sup>9</sup> See *Unrest in Virginia*, TIME, <https://time.com/charlottesville-white-nationalist-rally-clashes/> (last visited Apr. 22, 2021).

<sup>10</sup> See Wenei Phillimon, *Not Just George Floyd: Police Departments Have 400-year History of Racism*, USA TODAY (last updated June 7, 2020), <https://www.usatoday.com/story/news/nation/2020/06/07/black-lives-matters-police-departments-have-long-history-racism/3128167001/>.

<sup>11</sup> It is worth noting that this article capitalizes the words “Black” and “White” because they each describe race. See Nell Irvin Painter, *Opinion: Why ‘white’ Should be Capitalized, Too*, THE WASH. POST (Jul. 22, 2020), <https://www.washingtonpost.com/opinions/2020/07/22/why-white-should-be-capitalized/> [<https://perma.cc/5U35-J8Y4>] (discussing the reasoning behind the decisions to capitalize the words “Black” and “White”); Ann Thúy Nguy?n & Maya Pendleton, *Recognizing Race in Language: Why We Capitalize “Black” And “White”*, Cent. for Study of Soc. Pol’y.



on Black people for doing everyday things (such as napping<sup>12</sup> or hanging out at Starbucks<sup>13</sup>) provide reminders that racism unequivocally exists today in the United States.<sup>14</sup> The needless killing of George Floyd by a police officer in Minnesota, which sparked nationwide protests calling for an end to police brutality and social injustice, is yet another glaring example of racism in this country.<sup>15</sup>

Racism and racialized issues also surfaced during the coronavirus pandemic.<sup>16</sup> Asian-Americans faced racial discrimination as a result of politicians and others blaming China for the pandemic,<sup>17</sup> which included verbal and physical attacks on Asian Americans, as well as former President Donald

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(Mar. 23, 2020), <https://cssp.org/2020/03/recognizing-race-in-language-why-we-capitalize-black-and-white/> [<https://perma.cc/ADK5-UBPB>] (same); *but cf.* David Bauder, *AP Says it Will Capitalize Black But Not White*, AP (Jul. 20, 2020), <https://apnews.com/article/7e36c00c5af0436abc09e051261fff1f> (explaining decisions to capitalize the word “Black” but not the word “white”).

<sup>12</sup> Christina Caron, *A Black Yale Student Was Napping, and a White Student Called the Police*, N.Y. TIMES (May 9, 2018), <https://www.nytimes.com/2018/05/09/nyregion/yale-black-student-nap.html>.

<sup>13</sup> Errin Haines Whack, *2 Black Men Arrested at Starbucks Get an Apology from Police*, AP NEWS (Apr. 20, 2018), <https://apnews.com/article/45547c3ae5324b679e982c4847ee1378>.

<sup>14</sup> See Part II of this article for a discussion on these topics; *see also* L. Darnell Weeden, *Race-Conscious Equality Confronts America, President Obama, Justice Sotomayor, Professor Gates, and Sergeant Crowley*, 35 T. MARSHALL L. REV. 113, 136–37 (2009) (asserting that, after President Obama’s election, this country did not transcend race and, therefore, is not post-racial).

<sup>15</sup> See Michael T. Heaney, *The George Floyd Protests Generated More Media Coverage Than Any Protest in 50 Years*, WASH. POST (July 6, 2020), <https://www.washingtonpost.com/politics/2020/07/06/george-floyd-protests-generated-more-media-coverage-than-any-protest-50-years/> [<https://perma.cc/4UCU-AD8B>]; *ACLU of NC Statement on the Police Murder of Andrew Brown in Elizabeth City, North Carolina*, ACLUOFNORTHCAROLINA.ORG (Apr. 21, 2021), <https://www.acluofnorthcarolina.org/en/news/aclu-nc-statement-police-murder-andrew-brown-elizabeth-city-north-carolina> [<https://perma.cc/J3QF-MWFC>] (listing a number of the Black individuals and other minorities who were shot and killed by police in 2021, including Duante Wright, Ma’Khia Bryant, Adam Toledo, and Andrew Brown, Jr.).

<sup>16</sup> See Sabrina Tavernise & Richard A. Opper, *Spit on, Yelled at, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES (last updated Apr. 10, 2020), <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html> [<https://perma.cc/RQV2-CM39>].

<sup>17</sup> See Jonathan Martin & Maggie Haberman, *A Key G.O.P. Strategy: Blame China. But Trump Goes Off Message.*, N.Y. TIMES (last updated Oct. 6, 2020), <https://www.nytimes.com/2020/04/18/us/politics/trump-china-virus.html>.

Trump referring to the virus as the “China Virus” and “kung flu.”<sup>18</sup> Moreover, when the Centers for Disease Control and Prevention initially recommended face masks to protect against contracting the virus, Black people became hesitant to abide by that recommendation because of this country’s history of viewing Black people as criminals,<sup>19</sup> fearing that masks would help foster and perpetuate that view.<sup>20</sup> Also, at a rally to protest stay-at-home orders in Michigan, protestors wore swastikas and waved the Confederate flag.<sup>21</sup> Moreover, during a peaceful Black Lives Matter protest, two men wearing KKK hoods and holding Donald Trump flags confronted the protestors.<sup>22</sup>

<sup>18</sup> *Id.*; Jose A. Del Real, *With the ‘Kung Flu,’ ‘Thugs,’ and ‘Our Heritage,’ Trump Leans on Racial Grievance as He Reaches for a Campaign Reset*, WASH. POST (June 21, 2020), [https://www.washingtonpost.com/politics/with-kung-flu-thugs-and-our-heritage-trump-leans-on-racial-grievance-as-he-reaches-for-a-campaign-reset/2020/06/21/945d7a1e-b3df-11ea-a510-55bf26485c93\\_story.html](https://www.washingtonpost.com/politics/with-kung-flu-thugs-and-our-heritage-trump-leans-on-racial-grievance-as-he-reaches-for-a-campaign-reset/2020/06/21/945d7a1e-b3df-11ea-a510-55bf26485c93_story.html) [https://perma.cc/8XWG-FVZH]; see also Anh Do, *‘You Started the Corona!’ As Anti-Asian Hate Incidents Explode, Climbing Past 800, Activists Push for Aid*, L.A. TIMES (July 5, 2020), <https://www.latimes.com/california/story/2020-07-05/anti-asian-hate-newsom-help> [https://perma.cc/SSH2-YHJV] (noting over 800 anti-Asian hate incidents after the coronavirus pandemic began as some people mistakenly blame Asian-Americans for the pandemic that started in Wuhan, China).

<sup>19</sup> See Mary Beth Oliver, *African American Men as “Criminal and Dangerous”: Implications of Media Portrayals of Crime on the “Criminalization” of African American Men*, 7 J. AFR. AM. STUD. 2, 3 (Sept. 2003).

<sup>20</sup> See Fernando Alfonso III, *Why Some People of Color Say They Won’t Wear Homemade Masks*, CNN (Apr. 7, 2020), <https://www.cnn.com/2020/04/07/us/face-masks-ethnicity-coronavirus-cdc-trnd/index.html> [https://perma.cc/G95X-KPKY]; Jorge L. Ortiz, *Black and Asian Americans Report Increased Discrimination During Pandemic, Survey Says*, USA TODAY (July 1, 2020), <https://www.usatoday.com/story/news/nation/2020/07/01/coronavirus-black-asian-americans-report-increased-discrimination/5356563002/> [https://perma.cc/ZW94-2Y6P] (showing increased discrimination against Black people and Asian-Americans during the coronavirus pandemic).

<sup>21</sup> Quint Forgey, *‘Inexcusable’: Debbie Dingell Slams Michigan Protesters*, POLITICO (Apr. 16, 2020), <https://www.politico.com/news/2020/04/16/debbie-dingell-michigan-protest-190312> [https://perma.cc/6AZV-S8VK].

<sup>22</sup> Ewan Palmer, *Men in KKK Hoods Carrying Trump Flags Interrupt Black Lives Matter Protest in Nevada*, NEWSWEEK (June 11, 2020), <https://www.newsweek.com/kkk-black-lives-matter-protest-fallon-nevada-1510130> [https://perma.cc/695C-GWYV]. Black Lives Matter (BLM) was founded after Trayvon Martin, a 17-year-old Black youth, was killed by George Zimmerman, a neighborhood watch coordinator. *About*, BLACK LIVES MATTER (Jan. 12, 2021), <https://blacklivesmatter.com/about/> [https://perma.cc/D6KA-HPRZ]. BLM seeks “to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes.” *Id.*

Sports provide a reflection of society and its many facets, which include racism.<sup>23</sup> The United States' history of racism in sports includes the exclusion of minorities from all levels of sports, segregation of athletes,<sup>24</sup> and exclusion of minorities from coaching opportunities.<sup>25</sup> For example, even though nearly seventy percent of the National Football League (NFL) players are people of color, the NFL includes only three Black NFL head coaches.<sup>26</sup> Howard Bryant, a Senior ESPN Writer and an award-winning author and journalist, views the Southeastern Conference (SEC) in college football as a system of modern day slavery in which the value of Black people lies in the Black body.<sup>27</sup> He asserts, “[T]here is not a progression from the Black body to the Black brain. . . . That what is really taking place here is we simply shifted from the Black body being used in the fields, to the [basketball] courts, to the football fields.”<sup>28</sup> Similarly, some coaches and players see a “double standard” in how Black players are treated.<sup>29</sup> For example,

<sup>23</sup> Telephone Interview with N. Jeremi Duru, Professor of Law, Am. U. Wash. College of Law, (Mar. 3, 2020) [hereinafter “Duru Interview”] (on file with author).

<sup>24</sup> See, e.g., Mitchell Kiefer, *Racial Segregation in American Sports*, SPORTS CONFLICT INST., <https://sportsconflict.org/racial-segregation-american-sports/> [https://perma.cc/2K4K-G77H] (last visited Apr. 23, 2021); *Negro League Baseball*, HISTORY (last updated Dec. 16, 2020), <https://www.history.com/topics/sports/negro-league-baseball> [https://perma.cc/NZP8-82FS].

<sup>25</sup> See, e.g., Timothy Davis, *Race and Sports in America: An Historical Overview*, VA. SPORTS & ENT. L.J. (2008).

<sup>26</sup> RICHARD E. LAPCHICK, THE 2020 RACIAL AND GENDER REPORT CARD: NATIONAL FOOTBALL LEAGUE 27 (stating that 57.5% of players in the NFL identified as Black, and 9.4% of players identified as two or more races, and nearly 70% of the players are people of color); *Pittsburgh Steelers' Art Rooney II Says NFL Will Consider More Ways to Improve Rooney Rule*, ESPN (Jan. 29, 2021), [https://www.espn.com/nfl/story/\\_/id/30802182/pittsburgh-steelers-art-rooney-ii-says-nfl-consider-more-ways-improve-rooney-rule](https://www.espn.com/nfl/story/_/id/30802182/pittsburgh-steelers-art-rooney-ii-says-nfl-consider-more-ways-improve-rooney-rule) [https://perma.cc/N22T-KC6W] (providing that as of spring 2021 the NFL has only three Black NFL head coaches, one Latino head coach, and one Lebanese American head coach) [hereinafter *Rooney II Says*].

<sup>27</sup> Telephone Interview with Howard Bryant, Senior ESPN Writer, (March 3, 2020) [hereinafter “Bryant Interview”] (on file with author).

<sup>28</sup> See *id.* (stating that colleges should develop Black athletes as citizens, as they have “value beyond the final score”).

<sup>29</sup> See, e.g., Joseph Zucker, *Texas HC Tom Herman Discusses Fans' “Double Standard” with Black Players*, BLEACHER REPORT (June 1, 2020), <https://bleacherreport.com/articles/2894453-texas-hc-tom-herman-discusses-fans-double-standard-with-black-players> [https://perma.cc/KV4W-9YYU]; Adam Rittenberg & Michele Steele, *Iowa Football and Kirk Ferentz See Black Players Speak Out on Program's Racial Inequities*, ESPN (July 27, 2020), [https://www.espn.com/college-football/story/\\_/id/29517486/iowa-football-kirk-ferentz-see-black-players-speak-program-racial-inequities](https://www.espn.com/college-football/story/_/id/29517486/iowa-football-kirk-ferentz-see-black-players-speak-program-racial-inequities) [https://perma.cc/D4P4-UKGM] (discussing how Black players were treated differently than White players on the University of Iowa football team).

predominantly White fans will cheer on Black players during a game, but will discriminate against those same Black players off the field or off the court.<sup>30</sup> Racism also reared its ugly head throughout the Colin Kaepernick kneeling controversy, which involved the former NFL player kneeling during the national anthem at games to protest social inequity and police brutality against minorities.<sup>31</sup> Despite Kaepernick's insistence that his protest was not directed at the United States military, which he respects, he earned scorn and hatred for his alleged lack of respect for the military, including from former President Trump.<sup>32</sup> Kaepernick also became "the target of racial slurs and blatant racist attacks" as his message was twisted by some to be anti-American despite his intent and efforts to help the most marginalized Americans.<sup>33</sup> Kaepernick was eventually ostracized from the NFL and has not played in the NFL since those protests.<sup>34</sup>

Sports can also reflect the beauty of society through healing and transforming the world in a positive manner. After the tragedy of the 9/11 terrorist attacks, sports helped bring back normalcy for the United States, gave people a distraction from the sadness, provided entertainment, and united Americans.<sup>35</sup> Even at the beginning of the coronavirus pandemic, sports leagues looked for ways to restart or continue their sports to unite the country, provide something for Americans to cheer about, entertain, and give a

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<sup>30</sup> See *id.*

<sup>31</sup> See Steve Wyche, *Colin Kaepernick Explains Why He Sat During National Anthem*, NFL (Aug. 27, 2016), <https://www.nfl.com/news/colin-kaepernick-explains-why-he-sat-during-national-anthem-0ap3000000691077> [<https://perma.cc/9SKU-K4LJ>].

<sup>32</sup> See *Trump Says NFL Should Fire Players Who Kneel During National Anthem*, L.A. TIMES (Sept. 22, 2017), <https://www.latimes.com/nation/nationnow/la-na-trump-nfl-anthem-20170922-story.html> [<https://perma.cc/3H2P-S49Q>] (quoting Trump saying "Wouldn't you love to see one of these NFL owners, when somebody disrespects our flag, you'd say, 'Get that son of a b— off the field right now. Out!'").

<sup>33</sup> Khaled A. Beydoun, *Colin Kaepernick: Mix of Racism, Anti-Islam Rhetoric are Increasingly Toxic*, THEUNDEFEATED.COM (Sept. 2, 2016), <https://theundefeated.com/features/colin-kaepernick-mix-of-racism-anti-islam-rhetoric-are-increasingly-toxic/> [<https://perma.cc/U7V5-AP2R>].

<sup>34</sup> See Kevin B. Blackstone, *The NFL Has Effectively Blackballed Colin Kaepernick*, CHI. TRIBUNE (Mar. 23, 2017), <https://www.chicagotribune.com/sports/ct-nfl-has-blackballed-colin-kaepernick-20170323-story.html> [<https://perma.cc/EGD6-X8QW>]; Ken Belson, *Athletes' Outpouring on Civil Unrest Rekindles Kaepernick Debate in N.F.L.*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/sports/football/colin-kaepernick-george-floyd.html> [<https://perma.cc/FW4Y-62WF>].

<sup>35</sup> See Tom Junod, *A Small, Good Thing After 9/11*, ESPN (Sept. 11, 2018), [https://www.espn.com/espn/story/\\_/id/24588052/anniversary-9-11-attacks-re-minds-us-healing-power-sports](https://www.espn.com/espn/story/_/id/24588052/anniversary-9-11-attacks-re-minds-us-healing-power-sports) [<https://perma.cc/K6W2-ZHEX>].

distraction to a world weary of quarantining inside their homes.<sup>36</sup> ESPN aired a documentary series on Michael Jordan and the 1997-1998 Chicago Bulls season throughout April and May of 2020 instead of June 2020 because “viewers [we]re still looking to the sports world to escape and enjoy a collective experience,” and ESPN hoped the series could “serve as a unifying entertainment experience to fill the role that sports often play in our lives.”<sup>37</sup>

Strife and triumph permeate sports and society in the United States. This article examines how racism manifests itself today in society and sports in the United States, and it provides practical ways sports can help combat or overcome racism. In particular, this article contends that sports can help combat racism with the “three Es”: *education* and *experiences* through sports that occur *early* in one’s life.<sup>38</sup> Efforts to educate individuals about the negative effects of racism and the benefits of diversity and inclusion via sports, along with experiences that allow Whites and minorities to interact with each other to break down barriers (both conscious and subconscious) in the sports context, remain critical.<sup>39</sup> Also, given that studies indicate people can demonstrate racial bias as early as four years old,<sup>40</sup> shaping peoples’ minds at a young age through education and experiences becomes crucial.

Sports can also be used to attack institutionalized racism through opportunity.<sup>41</sup> Howard Bryant, interviewed for this article because of his expertise and indelible work relating to racism and sports, believes that shaping or changing the behaviors of racist individuals is meaningless, and

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<sup>36</sup> See Dan Wetzel, *President Trump’s Call with Sports Leagues Was Wishful in Sentiment but Wistful in Reality*, MSN (Apr. 4, 2020), <https://www.msn.com/en-us/sports/more-sports/president-trumps-call-with-sports-leagues-was-wishful-in-sentiment-but-wistful-in-reality/ar-BB12azhO?li=bbnba9I> [<https://perma.cc/3C5F-MD25>].

<sup>37</sup> *‘The Last Dance’ Documentary Set to Air April 19 on ESPN*, NBA (Mar. 31, 2020), <https://www.nba.com/article/2020/03/31/last-dance-chicago-bulls-release-date-moved> [<https://perma.cc/EQH8-TGYU>].

<sup>38</sup> See Rochaun Meadows-Fernandez, *Four Ways Youth Sports Can Combat Racism*, GOOD (Aug. 1, 2019), <https://www.good.is/sports/youth-sports-racism-study> [<https://perma.cc/FL62-9HML>] (citing a University of Toronto study indicating children develop implicit bias regarding race as young as four years old and that exposure to diversity among teammates and coaches can combat that bias); Matthew Halen Specht, *Faster, Higher, Wronger: International Development and the Olympic Games*, 14 VA. SPORTS & ENT. L.J. 300, 302, 308 (2015) (stating that “[s]port is a socially significant tool of inclusion” that can help combat discrimination and stereotyping, and “[t]he international community has also recognized sports as an important avenue for countering racism in young people worldwide”).

<sup>39</sup> See *infra* note 265 and accompanying text.

<sup>40</sup> *Id.*

<sup>41</sup> Bryant Interview, *supra* note 27.

jobs are what will make a difference.<sup>42</sup> Whether a White person today likes Black people more than his ancestors liked Black people is not the right question.<sup>43</sup> Bryant thinks the question should be, “[A]re we[, Black people,] getting jobs? Because who is getting hired will solve a lot of your problems. Name me an affluent Black community that’s got a murder problem.”<sup>44</sup> One potential way, then, to confront racism is to provide opportunities and access to jobs for minorities.

Part I of this article briefly discusses the different types of racism in our culture. Part II sets forth the current state of racism in society and in sports in the United States. Part III provides background on how racism develops and how it can be countered. Part IV analyzes what is currently being done to address racism through sports in the United States.<sup>45</sup> Part V describes practical and tangible ways sports can be used to battle racism, and how more generally this effort can create residual positive effects for society at large. Part VI explains and responds to the counterarguments against those proposed measures. This Article concludes that sports can have a positive impact with respect to combatting racism, and thus any efforts that attempt to make such an impact are shots worth taking.<sup>46</sup>

## II. IDENTIFYING THE DIFFERENT TYPES OF RACISM

Before discussing racism in the United States, a brief explanation of the types of racism is appropriate. Racism can take the form of prejudice and overt racial bias, such as calling someone a racial slur. Racism also includes implicit or unconscious racial bias, as well as institutional racism and White supremacy.

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See, e.g., *Tackling Racism and Discrimination in Sport: Guide of Promising Practices, Initiatives and Activities*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS. [https://fra.europa.eu/sites/default/files/guide-tackling-racism-in-sport\\_en.pdf](https://fra.europa.eu/sites/default/files/guide-tackling-racism-in-sport_en.pdf) [<https://perma.cc/Q23P-C2P5>] (highlighting European Union attempts to combat racism through various football club initiatives).

<sup>46</sup> As the legendary National Hockey League star Wayne Gretzky once said, “You miss 100% of the shots you don’t take.” Paul B. Brown, ‘*You Miss 100% Of the Shots You Don’t Take. You Need to Start Shooting at Your Goals*,’ FORBES (Jan. 12, 2014), <https://www.forbes.com/sites/actiontrumpseverything/2014/01/12/you-miss-100-of-the-shots-you-dont-take-so-start-shooting-at-your-goal/?sh=36220eac6a40> [<https://perma.cc/7C3C-BBKN>].

Unconscious racism and implicit racial bias involve attitudes and beliefs held unintentionally by individuals.<sup>47</sup> Charles Lawrence produced seminal work on equal protection law and unconscious discrimination.<sup>48</sup> He poignantly stated, “[W]e are all racists,” but “most of us are unaware of our racism.”<sup>49</sup> Bias is defined as “a positive or negative preference for a group of people based on social cognitions.”<sup>50</sup> Since “[b]ias links to behavior, [. . .] a positive bias toward a group may lead a person to treat members of that group favorably while a negative bias against a group may incline a person toward negative treatment.”<sup>51</sup> One author, Emile Loza de Siles, argues that regardless of whether explicit bias has decreased in this country, which is debatable, implicit bias remains pervasive in the United States.<sup>52</sup>

Several studies suggest that Americans maintain implicit biases against Black people and prefer White people,<sup>53</sup> including a study in which employ-

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<sup>47</sup> Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 354–55 (2007); see Palma Joy Strand, *Racism 4.0, Civility, and Re-Constitution*, 42 HASTINGS CONST. L.Q. 763, 772 (2015) (providing that “[h]umans are hardwired to take cognitive shortcuts based on prior personal experiences and cultural messages and norms that we internalize through socialization”).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Anastasia M. Boles, *The Culturally Proficient Law Professor: Beginning the Journey*, 48 N.M. L. REV. 145, 159 (2018).

<sup>51</sup> *Id.*

<sup>52</sup> Akin to implicit bias, aversive racists perceive themselves as egalitarian and non-prejudiced, but they “repress their negative feelings and beliefs about Black people.” Emile Loza de Siles, *History’s Calling: Today’s Racism and the Elevation of Lawyers and Legal Practice*, 60 ADVOCATE 46, 47 (2017). This prejudice remains hidden and unconscious. *Id.*

<sup>53</sup> See Anastasia M. Boles, *supra* note 50 at 157–58 (2018) (noting that “eighty-eight percent of whites displayed an anti-black (or pro-white bias) compared to forty-eight percent of Black people”); see also William Wan & Sarah Kaplan, *Why Are People Still Racist? What Science Says About America’s Problem*, WASH. POST (Aug. 14, 2017), <https://www.washingtonpost.com/news/speaking-of-science/wp/2017/08/14/why-are-people-still-racist-what-science-says-about-americas-race-problem/> [<https://perma.cc/R6UY-ZKPF>] (finding that in studies seeking reaction to the fact that Whites will no longer be the majority in the United States one day and minorities will, “young white subjects responded just as strongly as older white ones with anxiety and uncertainty, expressing more negative explicit and implicit racial bias in tests”); Sheryll Cashin, *Shall We Overcome? “Post-Racialism” and Inclusion in the 21st Century*, 1 ALA. C.R. & C.L.L. REV. 31, 34 (2011) (stating experimental psychology studies “demonstrate unconscious bias [by] whites and minorities against racial minorities, especially African-Americans,” and according to Harvard University’s anonymous implicit association test (IAT), “seventy percent of the thousands of people who have taken the Black-White IAT registered an automatic preference

ers preferred one applicant over another based solely on their names, as the preferred applicant possessed a name that sounded White and the less-preferred applicant had a name that “sounded” Black.<sup>54</sup> Moreover, research and social science studies indicate that people of many races associate Black people with criminal behavior, violence, and aggression.<sup>55</sup>

Implicit racial bias manifests itself in disparate outcomes throughout society, including in the criminal justice system, housing, health care, and employment.<sup>56</sup> For example, according to a 2014 study, almost three quarters of White families live in owner-occupied homes, while less than 50% of Latinx and Black families do;<sup>57</sup> White people have a longer life span than Black people, Black infants die twice as much as do White infants, and Black people are “25% more likely to die of cancer than Whites.”<sup>58</sup> Black, Latinx, and Native American people in the United States die from COVID-19 at 2.7 times the rate of White Americans and suffer hospitalizations from COVID-19 at almost four times the rate of White Americans.<sup>59</sup> By way of further example, the tech company Google once stated that its lack of mi-

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for whites over black”); John Dovidio, *Speaking of Psychology: Understanding Your Racial Biases*, AM. PSYCH. ASS'N, Episode 31 (2015), <https://www.apa.org/research/action/speaking-of-psychology/understanding-biases> [<https://perma.cc/7NZF-X648>] (discussing “research that shows that only a small proportion of Americans today have old-fashioned kind of racism, explicit kind of racism,” but “about two-thirds to three-quarters [of white Americans], have the unconscious, implicit, racial biases”); Darren Hutchinson, *Continually Reminded of Their Inferior Position: Social Dominance, Omplicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23, 29-30 (2014)(stating that implicit bias research indicates that White Americans view persons of color as savages, violent, promiscuous, slaves, and foreigners today).

<sup>54</sup> See Eva Paterson & Luke Edwards, *Implicit Injustice: Using Social Science to Combat Racism in the United States*, 2015 HARV. J. RACIAL & ETHNIC JUST. ONLINE 1, 17–18 (2015) (finding in study “that identical resumes that bore traditionally Anglo names, such as Emily or Greg, received fifty percent more calls to interview than resumes with typically African-American names, such as Lakisha and Jamal”).

<sup>55</sup> *Id.* at 15–18.

<sup>56</sup> Strand, *supra* note 47.

<sup>57</sup> IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 18 (2019) [hereinafter ANTIRACIST].

<sup>58</sup> *Id.* at 22.

<sup>59</sup> *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, AMP RSCH. LAB (Jan. 7, 2021), <https://www.apmresearchlab.org/covid/deaths-by-race> [<https://perma.cc/G8JB-JXKW>] (citing the statistics on death); Nicole Chavez & Jacqueline Howard, *Covid-19 Is Sending Black, Latino and Native American People to the Hospital at About 4 Times the Rate of Others*, CNN HEALTH (Jan. 12, 2021), <https://www.cnn.com/2020/11/16/health/cdc-black-hispanic-native-american-coronavirus-hospitalizations/index.html> [<https://perma.cc/S63M-6VZF>] (citing the hospitalization rates).



nority and women employees, including Black and Latinx employees, may have been due to implicit bias.<sup>60</sup>

Finally, racism also consists of institutional racism and White supremacy. Institutional racism, which has been defined in many ways, involves “the maintenance of institutions that systematically advantage whites.”<sup>61</sup> It amounts to a “modern social contract” that “exploit[s] people of color to the material, mainly economic but also political, advantages of white people.”<sup>62</sup> Similarly, White supremacy is defined as “[a] political, economic and cultural system in which whites overwhelmingly control power and material resources, and in which white dominance and non-white subordination exists across a broad array of institutions and social settings.”<sup>63</sup> Institutional racism and White supremacy result in Whites “own[ing] a disproportionate share of resources” and “exercis[ing] a significant amount of power.”<sup>64</sup> A couple of examples include the racial wealth gap, which indicates that White families make ten times more than Black families on average, and leadership in Congress, as 89% of United States Senators are White, compared to their 60.1% population share for non-Hispanic Whites.<sup>65</sup> One author asserts that White racism entails “all our insti-

<sup>60</sup> See Paterson & Edwards, *supra* note 54, at 15–16.

<sup>61</sup> Emerson Beishline, *An Examination of the Effects of Institutional Racism and Systematic Prejudice on Intimate Partner Violence in Minority Communities*, 4 WM. MITCHELL L. RAZA J. 2, 9 (2013) (citing RICHARD DELGADO & JEAN STEFANCIC, CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 630 (1997)); see also ELIZA TSAI BISHOP ET. AL., RACIAL DISPARITIES IN THE MASS. CRIMINAL SYSTEM 64 (2020) (reporting the results of a study by Harvard Law School’s Criminal Justice Policy Program published in September 2020 finding that racism, namely institutional racism, served as the cause for the high number of incarcerated Black people and Latinx individuals in Massachusetts); Micheal Harriot, *A Judge Asked Harvard to Find Out Why So Many Black People Were in Prison. They Could Only Find 1 Answer: Systemic Racism*, THE ROOT (Jan. 12, 2021), <https://www.theroot.com/a-judge-asked-harvard-to-find-out-why-so-many-black-peo-1845017462> [https://perma.cc/B2JT-4SGV].

<sup>62</sup> Beishline, *supra* note 61 (citing Marissa Jackson, *Neo-Colonialism, Same Old Racism: A Critical Analysis of the United States’ Shift Toward Colorblindness as a Tool for the Protection of the American Colonial Empire and White Supremacy*, 11 BERKELEY J. AFR.-AM. L. & POL’Y 156, 166 (2009)).

<sup>63</sup> Erika K. Wilson, *The Legal Foundations of White Supremacy*, 11 DEPAUL J. FOR SOC. JUST. 1, 3 (2018) (citing Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n. 129 (1989)).

<sup>64</sup> *Id.*

<sup>65</sup> See Katharina Buchholz, *How Diverse is U.S. Congress?*, STATISTA (Jan. 7, 2021), <https://www.statista.com/chart/18905/us-congress-by-race-ethnicity/> [https://perma.cc/NS53-6Y4Y] (showing 89 out of 100 Senators are White); U.S. CENSUS BUREAU, QUICK FACTS, <https://www.census.gov/quickfacts/fact/table/US/PST0452>

tutions of education and information — political and civic, religious and creative — which either knowingly or unknowingly, ‘provide the public rationale to justify, explain, legitimize, or tolerate racism.’<sup>66</sup>

Sometimes more than one type of racism explains a particular manifestation of racism. For example, health disparities between White and Black people, which include “higher rates of infant mortality, heart disease, and an advanced aging process for Black people,” can be the result of both institutional racism and also implicit bias.<sup>67</sup> Similarly, White families owning more homes than Black families on average, Black people being hired less than Whites because Whites make hiring decisions, and Black people suffering from higher incarceration rates than Whites because most police chiefs and officers are White, can also be explained by the combination of institutional racism, White supremacy, and implicit bias.<sup>68</sup>

### III. THE STATE OF RACISM IN SOCIETY AND SPORTS

Racism remains alive and well in society and sports in the United States.<sup>69</sup> Some may argue that racism is increasing in one or both of those arenas, but the fact that racism persists today is undisputed.<sup>70</sup>

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19 [<https://perma.cc/TT27-CJ6X>] (last visited May 12, 2021) (providing the percentage of the non-Hispanic White population in the United States).

<sup>66</sup> See Beishline, *supra* note 61 (citing Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 90 (1994)).

<sup>67</sup> Maanvi Singh, ‘Long Overdue’: Lawmakers Declare Racism a Public Health Emergency, *GUARDIAN* (June 12, 2020), [https://www.theguardian.com/society/2020/jun/12/racism-public-health-black-brown-coronavirus?CMP=oth\\_b-aplnews\\_d-1](https://www.theguardian.com/society/2020/jun/12/racism-public-health-black-brown-coronavirus?CMP=oth_b-aplnews_d-1) [<https://perma.cc/5F7B-5KGB>]. (discussing how several city and county lawmakers declared racism a public health emergency stemming from, among other things, institutional racism); Strand, *supra* note 47, at 778 (attributing the disparate health issues to implicit bias).

<sup>68</sup> See, e.g., Wilson, *supra* note 63 (discussing how White supremacy results in Whites possessing more resources and positions of power in the United States); Strand, *supra* note 47 (discussing several of those topics through the lens of implicit bias).

<sup>69</sup> Howard Bryant asserts that the United States “is a really angry racist country.” Bryant Interview, *supra* note 27.

<sup>70</sup> See, e.g., Shayanne Gal et al., 26 *Simple Charts to Show Friends and Family Who Aren’t Convinced Racism Is Still a Problem in America*, *BUS. INSIDER* (July 8, 2020), <https://www.businessinsider.com/us-systemic-racism-in-charts-graphs-data-2020-6> [<https://perma.cc/T4FK-4U2J>].

### A. *The State of Racism in America*

The myth that “[w]e just have to wait for racists to die out” is simply that: a myth.<sup>71</sup> Dylann Roof believed Black people were raping White women and taking over the United States.<sup>72</sup> As a result, in 2015, Roof walked into the Mother Emanuel AME Church, a Black church in Charleston, South Carolina, where twelve of its members were praying with their eyes closed, and opened fire with his Glock handgun.<sup>73</sup> Roof killed nine people after being radicalized as a White supremacist merely by what he read on the Internet.<sup>74</sup> Perhaps most stunningly, Roof was just twenty-one years old.<sup>75</sup>

Similarly, in 2015, three White men in Mississippi received sentences for nearly 50 years collectively for hate crimes that included beating a Black man and then killing him by running him over in a car.<sup>76</sup> In the spring of 2011, the same three men were part of a mob that attacked and harassed Black people in Jackson, Mississippi with beer bottles and sling shots.<sup>77</sup> According to prosecutors, the group also went after homeless and drunk Black people whom they believed would not report the mob’s activities to the police.<sup>78</sup> After the mob ambushed and beat James Craig Anderson, a 47-year-old Black man, one of the three White men shouted, “White power,” and then ran Anderson over in a truck.<sup>79</sup> The three White males committed these heinous hate crimes as teenagers.<sup>80</sup>

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<sup>71</sup> See Jenée Desmond-Harris, *Stop Waiting for Racism to Die Out with Old People. The Charleston Shooting Suspect is 21.*, VOX (June 22, 2015), <https://www.vox.com/2015/6/22/8810539/racism-generational-american-views> [<https://perma.cc/W9VH-KN4M>] (positing that people should “[s]top waiting for racism to die out with old people”); see also Wan & Kaplan, *supra* note 53 (quoting a Yale University social psychologist who asserted “[i]t’s simply not true that we just need to wait for the few old racist men left in the South to die off and then we’ll be fine”).

<sup>72</sup> See Rachel Kaadzi Ghansah, *A Most American Terrorist: The Making of Dylann Roof*, GQ (Aug. 21, 2017), <https://www.gq.com/story/dylann-roof-making-of-an-american-terrorist> [<https://perma.cc/Z6B5-Y8RW>].

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See Desmond-Harris, *supra* note 71.

<sup>76</sup> See Therese Apel, *Mississippi Men Sentenced for Hate Crimes*, HUFFPOST (Apr. 12, 2015), [https://www.huffpost.com/entry/three-white-mississippi-men-hate-crimes\\_n\\_6655904](https://www.huffpost.com/entry/three-white-mississippi-men-hate-crimes_n_6655904) [<https://perma.cc/R2KA-HCWV>].

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See Desmond-Harris, *supra* note 71.

While some argue racism has decreased over the decades,<sup>81</sup> others argue racism has increased in recent years, citing dog whistle politics, instances of people calling the police to complain about Black people doing everyday activities, and the Charlottesville incident.<sup>82</sup> Although these phenomena indicate racism is pervasive throughout the United States, they are far from new.<sup>83</sup> Statistics show that hate crimes reached record highs in recent years.<sup>84</sup>

Dog whistle politics represent a manifestation of racism today. Dog whistle politics are defined as “coded racial appeals that carefully manipulate hostility toward nonwhites.”<sup>85</sup> They are statements that on the surface seem benign, similar to how a dog whistle sounds like nothing to a human, but they send a White nationalist into a frenzy just as a dog whistle does to a dog.<sup>86</sup> The recent administration consistently employed these tactics, such as when former President Trump stated, “Send her back,” referring to four minority Congresswomen who criticized him; Trump recommended those non-White legislators return to their supposed countries of origin while dismissing their allegiance to the United States.<sup>87</sup> Trump also referred to the COVID-19 coronavirus as the “China Virus,” as previously discussed.<sup>88</sup> Dog

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<sup>81</sup> See *id.* (citing a 2013 Gallup poll finding approval of interracial marriage is inversely proportional to age, and interviews with Oprah Winfrey and Charles Krauthammer supporting the idea that racism is tied to older generations of people).

<sup>82</sup> See Susan Ayres, *Claudia Rankine's Citizen: Documenting and Protesting America's Halting March Toward Racial Justice and Equality*, 9 ALA. C.R. & C.L.L. REV. 213, 214 (2018) (discussing how the United States entered a post-racial society after the election of President Obama, but this ended once the Ferguson shooting occurred).

<sup>83</sup> See, e.g., Hannah Allam, *FBI Report: Bias-Motivated Killings at Record High amid Nationwide Rise in Hate Crime*, NPR (Nov. 16, 2020), <https://www.npr.org/2020/11/16/935439777/fbi-report-bias-motivated-killings-at-record-high-amid-nationwide-rise-in-hate-c> [https://perma.cc/5M4Z-93NZ].

<sup>84</sup> See *id.*

<sup>85</sup> See Ian Haney Lopez, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014).

<sup>86</sup> See *White Nationalist*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/white-nationalist> [https://perma.cc/4D7S-MHMZ] (last visited July 12, 2020).

<sup>87</sup> See Michael A. Cohen, *Trump Has Turned the Racial Dog Whistle into a Steam Whistle*, BOSTON GLOBE (July 19, 2020), <https://www.bostonglobe.com/opinion/2019/07/19/trump-has-turned-racial-dog-whistle-into-steam-whistle/oxjxn-NaShQmLg71sHCsSK/story.html> [https://perma.cc/3QUV-L4MC].

<sup>88</sup> See Sabrina Tavernise & Richard A. Opper, *Spit On, Yelled At, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html> [https://perma.cc/RQV2-CM39].

whistle tactics, though, were introduced in the United States in the 1960s and have been continually employed since.<sup>89</sup>

After George Wallace lost the race for governor of Alabama in 1958, having been endorsed by the NAACP because of his civil treatment and support of Black people while his opponent was endorsed by the KKK, Wallace told friends, “No other son-of-a-b—— is going to out-n—— me again.”<sup>90</sup> After winning the 1962 election, his inaugural speech in 1963 included the infamous line, “Segregation now, segregation today, segregation forever.”<sup>91</sup> Some of the phrases over the years that also fall under dog whistle politics include the following: “states’ rights” (referring to the states’ ability to allow slavery and later their purported rights to fight integration and continue laws allowing segregation), “freedom of association” (right of business owners to exclude Black people from their premises), “law and order” (used to justify police force and violence against racial activists and protestors), “colorblindness,” “inner city,” “welfare queen,” and “illegal alien.”<sup>92</sup> During the Reagan era, “cutting taxes” was used, and that dog whistle phrase made the connection between demonizing government and minorities in the following manner: “liberal government wastes money on undeserving minorities . . . in the form of welfare, but also in the form of public education or mortgage relief.”<sup>93</sup>

Calling the police to complain about Black people doing everyday tasks represents another manifestation of racism in society.<sup>94</sup> The following are

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<sup>89</sup> See Lopez, *supra* note 85 (stating, for example, “Wallace, Goldwater, and Nixon recognized and sought to take advantage of existing bigotry in the voting public, bigotry they did not create but which they stoked, legitimized, and encouraged”). When Vice President Kamala Harris earned selection as the running mate for President Joe Biden, the mayor of a small Virginia town referred to her as Aunt Jemima, which many denounced as racist. See Janelle Griffith, *Virginia Mayor Urged to Resign After Saying Biden Picked ‘Aunt Jemima as His VP’*, NBC NEWS (Jan. 12, 2021), <https://www.nbcnews.com/news/us-news/virginia-mayor-urged-resign-after-saying-biden-picked-aunt-jemima-n1236601> [<https://perma.cc/CJD3-VEZK>].

<sup>90</sup> *Id.* at 13-14.

<sup>91</sup> Susan Smith Richardson & Lorraine Forte, *‘Dog Whistle’ Is GOP’s Longtime Political Weapon of Choice*, CHI. REP. (Aug. 29, 2016), <https://www.chicagoreporter.com/dog-whistle-politics-is-gops-longtime-political-weapon-of-choice> [<https://perma.cc/4Z6E-S9KE>]; Lopez, *supra* note 85.

<sup>92</sup> See Lopez *supra* note 85.

<sup>93</sup> See generally Richardson & Forte *supra* note 91.

<sup>94</sup> Brandon Griggs, *Here Are All the Mundane Activities for Which Police Were Called on African-Americans This Year*, CNN (Dec. 28, 2018), <https://www.cnn.com/2018/12/20/us/living-while-black-police-calls-trnd/index.html> [<https://perma.cc/L27G-7MDP>].

just some of the instances reported by CNN in which someone called the police on a Black person engaged in benign activities:

- Golfing too slowly;<sup>95</sup>
- Waiting for a friend at Starbucks (resulted in arrest);<sup>96</sup>
- Working out at a gym;<sup>97</sup>
- Moving into an apartment;<sup>98</sup>
- Shopping for prom clothes;<sup>99</sup>
- Napping in a university common room at Yale (the person napping was a Yale graduate student);<sup>100</sup>
- Not waving while leaving an Airbnb;<sup>101</sup>
- Redeeming a coupon;<sup>102</sup>
- Eating lunch on a college campus;<sup>103</sup>
- Riding in a car with a White grandmother;<sup>104</sup>
- Babysitting two White children;<sup>105</sup>

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<sup>95</sup> See *id.*

<sup>96</sup> See Amir Vera, *A Video of Black Men Being Arrested at Starbucks. Three Very Different Reactions.*, CNN (Apr. 15, 2020), <https://www.cnn.com/2018/04/14/us/philadelphia-police-starbucks-arrests/index.html> [https://perma.cc/XWQ8-E2TJ].

<sup>97</sup> *Gym Apologizes After Profiling Allegation*, CNN (Apr. 15, 2018), <https://www.cnn.com/videos/cnnmoney/2018/04/20/la-fitness-incident-apology-orig-vstop-bdk.cnn> [https://perma.cc/NX4U-HL9T].

<sup>98</sup> Holly Yan, *This Is Why Everyday Racial Profiling Is So Dangerous*, CNN (May 11, 2018), <https://www.cnn.com/2018/05/11/us/everyday-racial-profiling-consequences-trnd/index.html> [https://perma.cc/2Q9K-ZRHF].

<sup>99</sup> Aaron Smith & Marlena Baldacci, *Nordstrom Rack Apologizes for Falsely Accusing Black Teens of Stealing*, CNN (May 8, 2018), <https://money.cnn.com/2018/05/08/news/companies/nordstrom-rack-shoplifting/index.html> [https://perma.cc/3LDG-V48P].

<sup>100</sup> Yan, *supra* note 98.

<sup>101</sup> Dakin Andone, *Woman Says She Called Police When Black Airbnb Guests Didn't Wave at Her*, CNN (May 11, 2019), <https://www.cnn.com/2018/05/10/us/airbnb-black-rialto-california-trnd/index.html> [https://perma.cc/XE6N-KV56].

<sup>102</sup> Nina Gologowski, *CVS Employees Fired After Calling Cops on Black Woman Over a Coupon*, HUFFPOST (July 18, 2018), [https://www.huffpost.com/entry/cvs-calls-cops-over-coupon\\_n\\_5b4df7abe4b0fd5c73bf355d](https://www.huffpost.com/entry/cvs-calls-cops-over-coupon_n_5b4df7abe4b0fd5c73bf355d) [https://perma.cc/EM33-LLF4].

<sup>103</sup> Daniel Victor, *'All I Did Was Be Black': Police Are Called on College Student Eating Lunch*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/us/black-smith-college-student-oumou-kanoute.html> [https://perma.cc/Q9H7-RMX7].

<sup>104</sup> *Police Detain Black Teen Riding with His White Grandmother After Reports of Robbery Attempt*, CBS (Sep. 7, 2018), <https://www.cbsnews.com/news/wisconsin-police-handcuff-black-teen-riding-with-his-white-grandmother/> [https://perma.cc/S2JP-FH6C].

<sup>105</sup> Kate Redding & Saphora Smith, *Georgia Woman Calls Police on Black Man Babysitting 2 White Kids*, NBC (Oct. 10, 2018), <https://www.nbcnews.com/news/>

- Working as a home inspector;<sup>106</sup>
- Working as a firefighter;<sup>107</sup>
- Swimming in a pool;<sup>108</sup>
- Shopping while pregnant;<sup>109</sup>
- Driving with leaves on a car;<sup>110</sup> and
- Trying to cash a paycheck.<sup>111</sup>

These types of incidents became so common that the name “Karen” now refers to a privileged, White woman who, among other things, calls the police unnecessarily on Black people.<sup>112</sup> Nevertheless, these occurrences are not novel.

Prominent Harvard Professor of African-American Studies, Henry Louis Gates, Jr., was arrested by the police after they mistakenly believed he was breaking into a house.<sup>113</sup> The problem was that he was arrested after he allegedly broke into his *own* house.<sup>114</sup> A White female called the police after

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us-news/georgia-woman-calls-police-black-man-babysitting-2-white-kids-n918476 [https://perma.cc/6BRP-3J6G].

<sup>106</sup> Doug Criss, *A White Woman Sees a Black Man Inspecting a House and Calls the Cops. But There's a Twist to This Incident*, CNN (May 16, 2018), <https://www.cnn.com/2018/05/16/us/investor-memphis-police-trnd> [https://perma.cc/9UAR-8GXH].

<sup>107</sup> Dan Simon, *Oakland Resident Reports Black Firefighter to Police During Routine Inspection*, CNN (June 28, 2018), <https://www.cnn.com/2018/06/27/us/oakland-firefighter-racial-profiling> [https://perma.cc/G73V-6KKF].

<sup>108</sup> Alisha Ebrahimji, *Hotel Employee Calls Police on Black Family Using the Pool as Guests*, CNN (last updated July 1, 2020), <https://www.cnn.com/2020/07/01/us/hampton-inn-black-family-pool-trnd/index.html> [https://perma.cc/EYT4-9G2G].

<sup>109</sup> Elise Solé, *Pregnant Shopper Says Target Called Police after Shouting Match over Beauty Coupon*, YAHOO! (Aug. 27, 2019), <https://www.yahoo.com/lifestyle/pregnant-shopper-says-target-called-police-after-shouting-match-over-beauty-coupon-225300210.html> [https://perma.cc/BMJ2-WSE2].

<sup>110</sup> Isabella Gomez & Justin Lear, *Police in Kansas Handcuff Black Motorist over 'Vegetation' in His Car Window*, CNN (May 23, 2018), <https://www.cnn.com/2018/05/22/us/police-kansas-detain-man-vegetation-trnd> [https://perma.cc/WD53-P985].

<sup>111</sup> Griggs, *supra* note 94.

<sup>112</sup> Sarah Maslin Nir, *White Woman Is Fired after Calling Police on Black Man in Central Park*, N.Y. TIMES (May 26, 2020) <https://www.msn.com/en-us/news/us/white-woman-is-fired-after-calling-police-on-black-man-in-central-park/ar-BB14BDW8?li=bbnbcL> [https://perma.cc/J7HP-68MX] (describing an incident where a White woman called the police on a Black man because he asked the White woman to leash her dog in Central Park where the law required she leash her dog).

<sup>113</sup> Abby Goodnough, *Harvard Professor Jailed; Officer Is Accused of Bias*, N.Y. TIMES (July 20, 2009), <https://www.nytimes.com/2009/07/21/us/21gates.html> [https://perma.cc/8RU7-UHPR].

<sup>114</sup> *Id.*

seeing two Black men on the porch of Gates' home, one of whom was Gates.<sup>115</sup> Upon arriving home, the door became wedged, and Gates gained access to his house with the help of his cab driver.<sup>116</sup> Gates' lawyer contended that Gates identified himself as the owner of the house and provided his driver's license and Harvard identification card, but the police officer still did not believe Gates owned the house (which was located close to Harvard Square).<sup>117</sup> The lawyer asserted that Gates, then frustrated, requested the name and badge number of the police officer.<sup>118</sup> Even after seeing Gates' identification, which the police report claims he initially refused to provide, the police still arrested him.<sup>119</sup> This occurred over a decade ago in July of 2009, approximately eight months after the election of the first Black president in U.S. history.<sup>120</sup>

Another more recent and widely publicized racist events is simply known as "Charlottesville."<sup>121</sup> In August of 2017, a "Unite the Right" rally that included neo-Nazis and White nationalists occurred in Charlottesville, Virginia to protest the removal of Confederate statues.<sup>122</sup> When aggressive counter-protestors and the protestors clashed, a twenty-year-old White male ran his car into a group of protestors, killing a 32-year-old woman and injuring nineteen others.<sup>123</sup> The incident resulted in various responses by former President Trump who first said the following: "We condemn in the strongest possible terms this egregious display of hatred, bigotry, and violence on many sides — on many sides. It's been going on for a long time in

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<sup>115</sup> *Id.*; *but cf.* Weeden, *supra* note 14, at 134 (2009) (stating that the White woman who called the police in this incident "denied that she was a racial profiler" and in response to the question from the 911 dispatcher about the race of the two individuals engaged in suspicious activity, she responded "one of the two men 'looked kind of Hispanic' and she was not able to observe the other man," yet she was branded as a racist after the incident).

<sup>116</sup> See Goodnough, *supra* note 113.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See Weeden, *supra* note 14, at 136-37 (asserting that, after former President Obama's election, this country did not transcend race and, therefore, is not post-racial).

<sup>121</sup> Joel Gunter & Roland Hughes, *Charlottesville Remembered, 'A Battle for the Soul of America'*, BBC (Aug. 9, 2018), <https://www.bbc.com/news/world-us-canada-44619374> [<https://perma.cc/AH37-L8MF>].

<sup>122</sup> Meghan Keneally, *What to Know About the Violent Charlottesville Protests and Anniversary Rallies*, ABC NEWS (Aug. 8, 2018), <https://abcnews.go.com/US/happen-charlottesville-protest-anniversary-weekend/story?id=57107500> [<https://perma.cc/2J5X-8A2C>].

<sup>123</sup> *Id.*



our country. Not Donald Trump. Not Barack Obama. It's been going on for a long, long time."<sup>124</sup> Trump went on to say a couple days later, "Racism is evil. And those who cause violence in its name are criminals and thugs, including the KKK, neo-Nazis, white supremacists and other hate groups that are repugnant to everything we hold dear as Americans."<sup>125</sup> Trump later, however, said that both sides were to blame for the violence, and each side — the protestors including White supremacists and the counter-protestors — "had some very fine people," along with some bad people.<sup>126</sup>

Although he denounced racism at different points, Trump fueled the fire that his administration not only tolerated, but accepted racist statements and acts to a certain degree.<sup>127</sup> Even during Barack Obama's tenure as president, the "birther" movement marked an apparent racist attempt to undermine the legitimacy of his presidency.<sup>128</sup> This movement, pushed by Trump with support from an "overwhelmingly white, conservative wing," argued that former President Obama was not born in the United States, and, therefore, he was not a legitimate president.<sup>129</sup> Professor Erika Wilson argues, "The election of President Barack Obama at best revealed racial cleavages that have long existed, and at worst, increased rather than ameliorated racial discord" as demonstrated by Trump's slogan "Make America Great Again," along with the notion advanced by Trump's followers that they would "take back our country."<sup>130</sup> Professor Wilson attributes Donald Trump's election to "his naked appeal to white racial nativism."<sup>131</sup>

White supremacist groups formed after the Civil War, and they have been engaging in public activities, including lynchings and rallies, for many

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> See Wan & Kaplan, *supra* note 53 (citing a psychology researcher explaining that Trump's initial refusal to "signal out Nazis and white supremacists" provided a powerful message that racial fears are acceptable to express).

<sup>128</sup> Domenico Montanaro, *Without Apology, Trump Now Says: 'Obama Was Born In' The U.S.*, NPR (Sept. 16, 2016), <https://www.npr.org/2016/09/16/494231757/without-apology-trump-now-says-obama-was-born-in-the-u-s> [https://perma.cc/6NPL-YLR4] ("The birther movement — questioning the legitimacy of the first black president — has proven to be problematic for Trump in his attempts to appeal to black voters. It's something Republican former Secretary of State Colin Powell called, in hacked emails, 'racist.'")

<sup>129</sup> *Id.*

<sup>130</sup> Erika Wilson, *The Great American Dilemma: Law and the Intransigence of Racism*, 20 CUNY L. REV. 513, 514 (2017).

<sup>131</sup> *Id.*

years in the United States.<sup>132</sup> For example, the KKK started in 1866 in Tennessee, and after its revitalization based on the box office hit *Birth of a Nation*, its cross-burning rallies rose to prominence in 1915.<sup>133</sup> Indeed, this country suffers from a long history of racism.

Professor Bryan Stevenson, Founder and Executive Director of the Equal Justice Initiative,<sup>134</sup> views racism in the United States, which is “deeply embedded in our culture [and] has evolved over time,” in four iterations: Racism 1.0, 2.0, 3.0, and 4.0.<sup>135</sup> Racism 1.0 includes the time of slavery in the United States.<sup>136</sup> Racism 2.0 followed the emancipation of the slaves and involved lynching of Black people.<sup>137</sup> The violence and lynching led to a large migration of Black people from the South to the Northeast, Midwest, and West.<sup>138</sup> Racism 3.0 includes the segregationist Jim Crow laws that separated the races under the theory of separate but equal.<sup>139</sup> During this time, racially restrictive covenants and federal policy purposefully created and ensured residential segregation.<sup>140</sup> Finally, Racism 4.0 entails racial disparity in areas of “incarceration, education, health, economic resources, housing, and employment.”<sup>141</sup> For example, “Black people are 13%

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<sup>132</sup> See Carl Skutsch, *The History of White Supremacy in America*, ROLLING STONE (Aug. 19, 2017), <https://www.rollingstone.com/politics/politics-features/the-history-of-white-supremacy-in-america-205171/> [<https://perma.cc/74D3-48FR>].

<sup>133</sup> Michael Rosenwald, *The Ku Klux Klan Was Dead. The First Hollywood Blockbuster Revived It*, WASH. POST (Aug. 12, 2017), <https://www.washingtonpost.com/news/retropolis/wp/2017/07/08/the-ku-klux-klan-had-been-destroyed-then-the-first-hollywood-blockbuster-revived-it/> [<https://perma.cc/G9VY-6GY6>].

<sup>134</sup> *About Bryan Stevenson*, EQUAL JUSTICE INITIATIVE (<https://eji.org/bryan-stevenson/>) [<https://perma.cc/8RR3-YJLK>] (last visited Apr. 23, 2021).

<sup>135</sup> Strand, *supra* note 47 at 765.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*; see also Noel C. Richardson, *Is There a Current Incarceration Crisis in the Black Community? An Analysis of the Link Between Confinement, Capital, and Racism in the United States*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 183, 236 (1997) (commenting that “[f]or a dominant economic class, the [United States] has used the confinement of Black people, both civilly and criminally, as a means by which to accumulate and protect capital. Furthermore, the [United States] has utilized its legal system as the primary means by which to manage this exploitative social relationship.”); Jasmine B. Gonzales Rose, *Race Inequity Fifty Years Later: Language Rights Under the Civil Rights Act of 1964*, 6 ALA. C.R. & C.L.L. REV. 167, 167, 211 (2014) (noting that “[e]xpressions of racism have become more subtle and sophisticated,” including “racially discriminatory exclusion” in “employment, education, public accommodations, and civic participation”).

of the general U.S. population, yet they constitute 28% of all arrests, 40% of all inmates held in prisons and jails, and 42% of the population on death row.”<sup>142</sup>

Professor Jeremi Duru, in his powerful article “The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man,” chronicles the “deeply imbedded myth in American culture that black men are animalistic [subhuman], sexually unrestrained, inherently criminal, and ultimately bent on rape [of White women].”<sup>143</sup> The myth existed from the colonial times in the United States and continues today.<sup>144</sup> Professor Duru details the history of lynching in the United States, which took the place of legal slavery and control of Black men based on the notions that Black men were prone to criminal behavior and raping White women.<sup>145</sup> Lynching entails “killing done by several people acting in concert outside the legal process to punish a person perceived to have violated a law or custom.”<sup>146</sup> Oftentimes Black men were lynched even when not formally accused of rape.<sup>147</sup> Lynchings occurred throughout all of the United States, not just in the South.<sup>148</sup> Lynchings resembled sporting events as sometimes thousands of people, including families with children who packed food and drinks for the event, attended and watched lynchings to enjoy the spectacle and be a part of the experience.<sup>149</sup> The misconceptions about Black men that prompted lynchings are echoed today — 21-year-old Dylann Roof murdered nine Black church members because he believed Black men were “raping our women” and “taking over our country.”<sup>150</sup> Moreover, the countless instances of White people calling the police on Black people for doing everyday things reinforces those embedded fears and misperceptions of Black people’s supposed innate criminality.<sup>151</sup>

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<sup>142</sup> Strand, *supra* note 47.

<sup>143</sup> N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315 (2004).

<sup>144</sup> Ayres, *supra* note 82 (finding that perceptions today are still driven by the notion “that the black body in the white imagination is still equated with bestiality, criminality”).

<sup>145</sup> Duru, *supra* note 143.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Ghansah, *supra* note 72.

<sup>151</sup> Duru, *supra* note 143.

Racism also manifests itself in the United States in police brutality and the use of excessive force by the police.<sup>152</sup> The *Associated Press* named “the killing of unarmed Black males by law enforcement and private citizens[. . .] includ[ing] the killing of Michael Brown, John Crawford, III, Jordan Davis, Eric Garner, Trayvon Martin, and Tamir Rice,” as the “top news” of 2014.”<sup>153</sup> In May of 2020, a potential watershed event occurred when the Minneapolis police killed a Black man, George Floyd, after an officer pushed his knee into Floyd’s neck for eight minutes when Floyd was already handcuffed and in custody, demonstrating yet another instance of excessive force by the police, and police brutality against Black people.<sup>154</sup> Floyd repeatedly gasped, “I can’t breathe,” during those eight minutes.<sup>155</sup> He became unresponsive after four minutes, and, after being taken to a hospital, died shortly thereafter.<sup>156</sup> The four officers involved in the incident were fired, and the officer who kned Floyd’s neck for eight straight minutes, Derek Chauvin, was charged with second-degree murder, third-degree murder, and second-degree manslaughter.<sup>157</sup> Nearly one year later, a jury convicted Chauvin on all three of those charges.<sup>158</sup> The other three officers involved (two initially helped in restraining Floyd and all three later just

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<sup>152</sup> See, e.g., Alex Samuels, *Why a Guilty Verdict for Derek Chauvin Doesn’t Change the Reality of Police Violence*, FIFTYTHREE (Apr. 20, 2021), <https://fivethirtyeight.com/features/why-a-guilty-verdict-for-derek-chauvin-doesnt-change-the-reality-of-police-violence/>; see also *984 People Have Been Shot and Killed by Police in the Past Year*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [<https://perma.cc/7CTP-4VTK>] (last visited Apr. 20, 2021).

<sup>153</sup> Hutchinson, *supra* note 53, at 23–24.

<sup>154</sup> Ryan W. Miller, et al., *Minneapolis Mayor Wants Officer Charged; All 4 Cops in George Floyd’s Death ID’d; GoFundMe Page Raises \$123K: What We Know*, USA TODAY (May 27, 2020), <https://www.usatoday.com/story/news/nation/2020/05/27/george-floyd-protesters-clash-minneapolis-police-after-video/5264887002/> [<https://perma.cc/UGLE-EASM>].

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Christina Maxouris et al., *Cities Extend Curfews for Another Night in an Attempt to Avoid Violent Protests over George Floyd’s Death*, CNN (June 1, 2020), <https://www.cnn.com/2020/05/31/us/george-floyd-protests-sunday/index.html> [<https://perma.cc/T98D-V8U6>]; Josh Campbell, et al., *All Four Former Officers Involved in George Floyd’s Killing Now Face Charges*, CNN (June 4, 2020), <https://www.cnn.com/2020/06/03/us/george-floyd-officers-charges/index.html> [<https://perma.cc/7NMU-W8G2>] (discussing the charges brought against the officers involved).

<sup>158</sup> See Eric Levenson & Aaron Cooper, *Derek Chauvin Found Guilty of All Three Charges for Killing George Floyd*, CNN (Apr. 21, 2021), <https://www.cnn.com/2021/04/20/us/derek-chauvin-trial-george-floyd-deliberations/index.html> [<https://perma.cc/AZ6V-SCMN>].

watched the other officer kneel on Floyd's neck) were charged with aiding and abetting second-degree murder and aiding and abetting second-degree manslaughter.<sup>159</sup> Floyd's death sparked protests across the United States, and some of those protests became violent.<sup>160</sup> Although most protestors were peaceful, others looted and burned stores, and they also hit police with rocks and battles, which prompted cities to impose curfews to try to curb the violence.<sup>161</sup>

The protests regarding Floyd's murder spanned across the nation and lasted through the summer months of 2020 in the United States.<sup>162</sup> The protests often involved the organization Black Lives Matter, which experienced a dramatic increase in support in the United States.<sup>163</sup> Protests continued into the fall of 2020 after police were not charged with murder in the killing of Breonna Taylor — a Black woman shot in her own apartment after police entered and responded to fire from Taylor's boyfriend (who thought the police were intruders) during the execution of their no-knock warrant.<sup>164</sup> Instead, one officer was charged with wanton endangerment of

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<sup>159</sup> Josh Campbell, et al., *All Four Former Officers Involved in George Floyd's Killing Now Face Charges*, CNN (June 4, 2020), <https://www.cnn.com/2020/06/03/us/george-floyd-officers-charges/index.html> [https://perma.cc/7NMU-W8G2].

<sup>160</sup> Maxouris, et al *supra* note 157.

<sup>161</sup> Id.

<sup>162</sup> Howard Bryant, *Police, Protest, Pandemic and the End of the 9/11 Era*, ESPN (Sept. 29, 2020), [https://www.espn.com/espn/story/\\_/id/29979519/police-protest-pandemic-end-9-11-era](https://www.espn.com/espn/story/_/id/29979519/police-protest-pandemic-end-9-11-era) [https://perma.cc/Z3PV-Q52F].

<sup>163</sup> Sandra Lemaire, *How George Floyd's Death Has Impacted American Life*, VOA (June 26, 2020), <https://www.voanews.com/usa/race-america/how-george-floyds-death-has-impacted-american-life> [https://perma.cc/43WZ-Z6LP]; see Grace Hauck & Deborah Barfield Berry, *'Double Standard': Black Lawmakers and Activists Decry Police Response to Attack on US Capitol*, YAHOO! NEWS (Jan. 7, 2021), <https://news.yahoo.com/black-lives-matter-protesters-were-221653420.html> (discussing how many people, including Black lawmakers, activists, and prominent athletes, contend that the docile and lax police response to the mob that that stormed the Capitol building in January of 2021 versus the aggressive police response to Black Lives Matter protests in the summer of 2020 demonstrate the dichotomy between the police's inequitable approach to Black people and White people in the United States) [https://perma.cc/NUM7-UUYU]; see also Dave McMenamin, *Los Angeles Lakers' LeBron James: U.S. Capitol Siege Shows 'We Live in Two Americas'*, ESPN (Jan. 8, 2021), [https://www.espn.com/nba/story/\\_/id/30672218/us-capitol-siege-shows-live-two-americas](https://www.espn.com/nba/story/_/id/30672218/us-capitol-siege-shows-live-two-americas) [https://perma.cc/Z6MJ-LY6K].

<sup>164</sup> Cameron McWhirter & Arian Campo-Flores, *Breonna Taylor Decision Sparks More Protests as Leaders Urge Calm*, WALL ST. J. (Sept. 24, 2020), <https://www.wsj.com/articles/breonna-taylor-decision-sparks-protests-in-cities-across-u-s-11600949774> [https://perma.cc/PH3X-66TY]; see Jordan Culver & Grace Hauck, *'Absolutely Heartbreaking' Ruling in Breonna Taylor Shooting Sparks New Wave of Na-*

Taylor's uninjured neighbors based on the shots fired by police that traveled into the neighboring apartment.<sup>165</sup> Protestors also brought awareness to Ahmaud Arbery, a 25-year-old Black man, who was shot by two White men, a 64 and 34-year-old father and son, while Arbery was jogging unarmed in their neighborhood.<sup>166</sup> Amid the national protests based on the deaths of George Floyd, Ahmaud Arbery, and Breonna Taylor, a White Kenosha police officer in Wisconsin shot Jacob Blake, a 29-year-old Black man, seven times in front of his three children ages 3, 5, and 8 years old.<sup>167</sup> Months later, the Kenosha District Attorney decided against charging the officers involved with the shooting, as Blake possessed "a razor blade type-

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*tional Protests for Justice, Racial Equality*, USA TODAY (Sept. 23, 2020), <https://www.usatoday.com/story/news/nation/2020/09/23/breonna-taylor-protests-chicago-brooklyn-philadelphia-louisville/3510963001/> [<https://perma.cc/HB9J-2PRV>]; see also Griff Witte & Mark Berman, *With Breonna Taylor Decision, Summer's Anguished Protests Get Fresh Impetus for the Fall*, WASH. POST (Sept. 23, 2020), [https://www.washingtonpost.com/national/with-breonna-taylor-decision-summers-anguished-protests-get-fresh-impetus-for-the-fall/2020/09/23/1cd15f38-fddb-11ea-8d05-9beaa91c71f\\_story.html](https://www.washingtonpost.com/national/with-breonna-taylor-decision-summers-anguished-protests-get-fresh-impetus-for-the-fall/2020/09/23/1cd15f38-fddb-11ea-8d05-9beaa91c71f_story.html) [<https://perma.cc/49U8-CW8K>]; see also Christina Carrega & Sabina Ghebremedhin, *Timeline: Inside the Investigation of Breonna Taylor's Killing and its Aftermath*, ABC NEWS (Nov. 17, 2020), <https://abcnews.go.com/US/timeline-inside-investigation-breonna-taylor-killing-aftermath/story?id=71217247> [<https://perma.cc/77E6-XVTJ>] (discussing how police obtained the warrant for Taylor's address because Taylor's ex-boyfriend was allegedly a known drug trafficker according to police who purportedly was using Taylor's address to mail drugs); see also Jenna West, *WNBA Dedicates Season to Breonna Taylor, Holds Moment of Silence to Honor Her*, SPORTS ILLUSTRATED (July 25, 2020), <https://www.si.com/wnba/2020/07/25/wnba-dedicates-season-breonna-taylor-moment-of-silence> [<https://perma.cc/5XTY-5W35>] (discussing how WNBA dedicated the league's entire 2020 season to Breonna Taylor as part of efforts to bring awareness to racial and social injustice).

<sup>165</sup> Cameron McWhirter & Arian Campo-Flores, *Breonna Taylor Decision Sparks More Protests as Leaders Urge Calm*, WALL ST. J. (Sept. 24, 2020), <https://www.wsj.com/articles/breonna-taylor-decision-sparks-protests-in-cities-across-u-s-11600949774> [<https://perma.cc/PH3X-66TY>]; see Jordan Culver & Grace Hauck, *'Absolutely Heartbreaking' Ruling In Breonna Taylor Shooting Sparks New Wave of National Protests For Justice, Racial Equality*, USA TODAY (Sept. 23, 2020), <https://www.usatoday.com/story/news/nation/2020/09/23/breonna-taylor-protests-chicago-brooklyn-philadelphia-louisville/3510963001/> [<https://perma.cc/HB9J-2PRV>].

<sup>166</sup> See Janelle Griffith, *Ahmaud Arbery Shooting: a Timeline of the Case*, NBC NEWS (May 11, 2020), <https://www.nbcnews.com/news/us-news/ahmaud-arbery-shooting-timeline-case-n1204306> [<https://perma.cc/HZA9-K6HS>].

<sup>167</sup> See generally *id.*; Nicole Chavez et al., *Jacob Blake Needs 'A Miracle' to Walk Again After Kenosha Police Shot Him, Attorney Says*, CNN (Aug. 25, 2020), <https://www.cnn.com/2020/08/25/us/jacob-blake-kenosha-wisconsin-protests/index.html> [<https://perma.cc/3NN4-SHWE>].

knife” during the encounter that would allow the officers to employ a privilege of self-defense, which would make it difficult to obtain a conviction.<sup>168</sup>

Professor Wilson opines that this country fails to acknowledge the explanation for police brutality against Black people despite this country’s “history of state over-policing and brutalization of Black bodies dating back to slavery and Reconstruction.”<sup>169</sup> Instead, the United States avoids “convening a truth and reconciliation process acknowledging its past. . . . The United States does not ensure that its citizens understand or remember that past.”<sup>170</sup>

Yale Law Professor James Whitman provides another chilling and stark reality of the United States’ global prominence in the history of racism.<sup>171</sup> In his book, *Hitler’s American Model: The United States and the Making of Nazi Race Law*, Whitman shows how Hitler, Nazi leaders, and Nazi lawyers looked to American race law in creating the laws for their regime.<sup>172</sup> For example, “[I]n *Mein Kampf* Hitler praised America as nothing less than ‘the one state’ that had made progress toward the creation of a healthy racist order of the kind the Nuremburg Laws were intended to establish.”<sup>173</sup> The Nuremburg Laws, which included the Citizenship Law that “subjected Jews to a form of second-class citizenship” and the Blood Law that “criminalized marriage and sexual relations between Jews and ‘Aryans,’” found inspiration in American law at the time.<sup>174</sup> In particular, for their Citizenship Law, the Nazis looked to the United States’ immigration laws that barred many Asians from immigrating to the United States (the Asiatic Barred Zone Act of 1917) and the Immigration Act of 1924 that favored northern and western Europeans (Nordics) over eastern and southern Europeans.<sup>175</sup> Also, the Nazis revered the second-class citizenship created by the United States for Black people that deprived Black people of various political rights, such as the denial of the right to vote by requiring a literacy test in the south.<sup>176</sup>

<sup>168</sup> *Kenosha Police Officers Won’t Face Charges in Jacob Blake Shooting*, ESPN (Jan. 5, 2021), [https://www.espn.com/nba/story/\\_/id/30657898/kenosha-police-officers-face-charges-jacob-blake-shooting](https://www.espn.com/nba/story/_/id/30657898/kenosha-police-officers-face-charges-jacob-blake-shooting) [https://perma.cc/C6XH-XEXN].

<sup>169</sup> Erika Wilson, *The Great American Dilemma: Law and the Intransigence of Racism*, 20 CUNY L. REV. 513, 518 (2017).

<sup>170</sup> *Id.* at 519.

<sup>171</sup> See generally JAMES Q. WHITMAN, *HITLER’S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* (2018).

<sup>172</sup> *Id.* at 2, 12, 135.

<sup>173</sup> *Id.* at 2.

<sup>174</sup> *Id.* at 19, 29.

<sup>175</sup> *Id.* at 34-36.

<sup>176</sup> *Id.* at 38-39; see also Hutchinson, *supra* note 53, at 26 (“Historically, many states explicitly discriminated on the basis of race by enacting laws that criminal-

Moreover, Nazis admired the United States' citizenship laws that made Black people, Puerto Ricans, Filipinos, Chinese, and Native Americans second-class citizens.<sup>177</sup>

With regard to the Nazi Nuremberg Blood Law and anti-miscegenation laws, which prohibit marriage between different races, not only did the United States promulgate laws that prohibited marriages between Whites and minorities, but also some states independently made such marriages a criminal offense.<sup>178</sup> This type of law, used extensively by the states, finally ended in the United States in 1967 with the United States Supreme Court decision in *Loving v. Virginia*.<sup>179</sup> Professor Whitman asserts that America's laws and racist practices helped the Nazis create their own laws and heavily influenced one of the most evil regimes in the history of the world.<sup>180</sup> Whitman identified the United States as the global leader in racist immigration and anti-miscegenation laws that the Nazis referenced in meetings to create their own regime.<sup>181</sup>

Finally, it is worth noting that a major subject area of the law, critical race theory, revolves around the notion that racism infests society.<sup>182</sup> In particular, "[c]ritical race theory [. . .] is founded on the proposition that white supremacy pervades society, that it is intertwined with the very institutions of family, market, and state that shape social life."<sup>183</sup> Regardless of whether racism is increasing or decreasing in the United States, this country has blood on its hands from its own history of racism, and those hands remain soaked.

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ized conduct only if the individual who engaged in the activity was a person of color. Statutes also allowed for harsher punishment of persons of color than for whites who committed the same crimes. Even when criminal statutes did not contain racial classifications, legal authorities often enforced these laws more vigorously against defendants of color.”)

<sup>177</sup> See Whitman, *supra* note 171, at 38-43.

<sup>178</sup> *Id.* at 79.

<sup>179</sup> *Id.* at 33; see generally *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>180</sup> Whitman, *supra* note 171, at 4-5, 160-61; see generally Dias, *supra* note 8, at 502 (acknowledging that the “United States was originally and legally constructed as an apartheid country and all its systems and institutions were built to reinforce and perpetuate the ideology of whiteness as the measure of all that is good, right, moral, and superior in every way”).

<sup>181</sup> Whitman, *supra* note 171, at 34, 78.

<sup>182</sup> See Jerome M. Culp Jr. et al., *Subject Unrest*, 55 STAN. L. REV. 2435, 2436 (2003).

<sup>183</sup> See *id.*



### B. Racism in Sports

Racism certainly exists in sports in the United States today.<sup>184</sup> The University of Central Florida's Institute for Diversity and Ethics in Sport (TIDES) tracks reported instances of racism in sports and found that reported racist acts in sports went from 52 in 2018 down to 25 in 2019 after record increases in 2018 in the United States and the world.<sup>185</sup> Instances of recorded racist acts in sports in the United States in the last several years include, but are not limited to, the following:

- A Black NFL player's home was robbed and vandalized with racial epithets including a spray-painted swastika, the letters KKK, and a message that read "Go Back to Africa," and one spray-painted wall said, "Trump";<sup>186</sup>
- Another Black NFL player received hate mail that called him the N-word repeatedly and threatened his life after he joined Colin Kaepernick in his kneeling national anthem protest;<sup>187</sup>
- A man dressed in a gorilla suit stormed the field at an NFL game in Chicago and wore a T-shirt that read "All Lives Matter" and "Put The Guns Down";<sup>188</sup>
- A fan at a University of Wisconsin-Madison game wore a racist costume representing former President Barack Obama;<sup>189</sup>

<sup>184</sup> Richard Lapchick, *Racism Reported in Sports Decreasing but Still Prevalent*, ESPN (Feb. 19, 2020), [https://www.espn.com/espn/story/\\_/id/28738336/racism-reported-sports-decreasing-prevalent](https://www.espn.com/espn/story/_/id/28738336/racism-reported-sports-decreasing-prevalent) [https://perma.cc/L4F6-HA9M].

<sup>185</sup> *Id.*; see Richard Lapchick, *Once Again, Racist Acts in Sports Are on the Rise*, ESPN (Jan. 3, 2019), [https://www.espn.com/espn/story/\\_/id/25675586/racism-sports-continued-rear-ugly-head-2018](https://www.espn.com/espn/story/_/id/25675586/racism-sports-continued-rear-ugly-head-2018) (citing the number of racist acts in sports identified in the studies in previous years include the following: 41 in 2017 and 52 in 2018) [https://perma.cc/4JUG-MTFQ] [hereinafter Lapchick, *Racist Acts 2018*]; see generally Tom Edgington, *Sterling: Is Football Racism Rising?*, BBC NEWS, [www.bbc.com/news/amp/uk-46507364](http://www.bbc.com/news/amp/uk-46507364) [https://perma.cc/ay8c-3zjw]; see generally Richard Lapchick, *Racist Acts in Sports Were on the Rise in 2017*, ESPN (Jan. 11, 2018), [https://www.espn.com/espn/story/\\_/id/22041345/racism-continued-rear-ugly-head-sports-2017](https://www.espn.com/espn/story/_/id/22041345/racism-continued-rear-ugly-head-sports-2017) [https://perma.cc/SVV8-FGQR] [hereinafter Lapchick, *Racist Acts 2017*].

<sup>186</sup> Richard Lapchick, *Lapchick: The Year in Racism and Sports*, ESPN (Jan. 24, 2017), [https://www.espn.com/espn/story/\\_/id/18543159/racism-sadly-reared-ugly-head-sports-2016](https://www.espn.com/espn/story/_/id/18543159/racism-sadly-reared-ugly-head-sports-2016) [https://perma.cc/4L4Q-DD3A].

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

- A Major League Baseball (MLB) player said he endured racial slurs and a bag of peanuts thrown at him during a game at Fenway Park, the home field of the Boston Red Sox<sup>190</sup>;
- Someone spray-painted a racial slur on the front gate of LeBron James' Los Angeles home;<sup>191</sup>
- A Black head football coach at Texas A&M received hate mail that criticized his coaching, called him the N-word, and threatened him;<sup>192</sup>
- A Missouri bar owner taped Marshawn Lynch (a former NFL player) and Colin Kaepernick jerseys as a doormat to the entrance of his establishment (placed side by side, the jerseys read "Lynch Kaepernick");<sup>193</sup>
- Somebody hung a dummy of a Black Cincinnati Bengals NFL player from a noose near the Pittsburgh Steelers' stadium;<sup>194</sup>
- Five football players from a high school in Iowa were kicked off the team after a photo of them wearing KKK hoods, brandishing a firearm, burning a cross, and showcasing a Confederate flag went viral;<sup>195</sup>
- After a high school football player in Iowa knelt during the national anthem, a Snapchat posting showed a picture of him with a message reading, "kick this f---ing n----- off the football team like honestly who the f--- kneels for the national anthem";<sup>196</sup>
- When predominantly Black men's and women's basketball community college teams from Kansas visited North Arkansas College in Harrison, Arkansas, they heard "monkey noises and crow caws";<sup>197</sup>
- After Florida State's loss to in-state rival Florida in college football, a man posted on Facebook an image of Florida State's Black head football coach at the time (the first Black head coach in its history) being lynched;<sup>198</sup>

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<sup>190</sup> Lapchick, *Racist Acts 2017*, *supra* note 182.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Lapchick, *Racist Acts 2018*, *supra* note 182.

<sup>198</sup> *Id.*; see also Chaunte'l Powell, *FSU Fan Post Stating Willie Taggart Should Be Lynched Prompts Outrage, Review by State Attorney*, SUN SENTINEL (Nov. 25, 2018), <https://www.sun-sentinel.com/sports/florida-state-seminoles/os-sp-fsu-willie-taggart-outrage-1126-story.html> [https://perma.cc/9X7U-RBCR].

- Bananas were left in the locker room of an Ohio high school football team and were thrown at players during the game;<sup>199</sup>
- The Cincinnati Premier Youth Basketball League ejected a team from the league after finding sexist and racist names on the back of the children's jerseys, including "coon" and "knee grow";<sup>200</sup>
- A White referee ordered a Black high school wrestler from New Jersey to either cut off his dreadlocks or forfeit the match;<sup>201</sup>
- A fan allegedly directed "disrespectful" and "racial" comments toward a Black NBA player at a Utah Jazz game;<sup>202</sup> and
- A Black professional hockey player received a racist comment on Instagram saying he should "stick to basketball."<sup>203</sup>

One commentator blames the apparent increase in racist sports incidents on "those in high political office in the U.S. and throughout the world [who] are not reprimanded for making offensive statements regarding minority groups. A lack of accountability while holding our leaders to the highest standards has emboldened many people to lash out with hateful speech and actions."<sup>204</sup> The commentator argues that "[t]his pattern has been amplified and well documented since the 2016 presidential election."<sup>205</sup>

In any event, as noted above in the previous section regarding racism in the United States in general, racism in American sports has existed throughout the country's checkered history.<sup>206</sup> Although Black people participated in organized amateur and professional sports in the United States from the late 1800s to the early 1900s in sports such as baseball, boxing, horse racing, and cycling, they suffered racial abuse from opposing players and fans spewing racial epithets, while enduring the same treatment, as well as physical attacks, from their own teammates.<sup>207</sup> Moreover, after that period ended, a new era of exclusion began in which rules "excluded Black people from organized professional and collegiate sports."<sup>208</sup> According to the noted

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<sup>199</sup> Natalie Grim, *A High School Football Team Was in Tears after Bananas Were Left in Their Locker Room*, ABC (Oct. 8, 2018), <https://abc6onyourside.com/news/local/a-high-school-football-team-was-in-tears-after-bananas-were-left-in-their-locker-room> [<https://perma.cc/2QYN-BRNF>].

<sup>200</sup> Lapchick, *Racist Acts 2018*, *supra* note 182.

<sup>201</sup> *Id.*

<sup>202</sup> Lapchick, *supra* note 181.

<sup>203</sup> *Id.*

<sup>204</sup> Lapchick, *Racist Acts 2018*, *supra* note 182.

<sup>205</sup> *Id.*

<sup>206</sup> Lapchick, *supra* note 181.

<sup>207</sup> MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION* 699 (5th ed. 2019).

<sup>208</sup> *Id.*

sports and race scholar Kenneth Shropshire, “segregation of sports was the result of whites not wanting to associate with African-Americans, and whites’ belief in the inferiority of African-Americans.”<sup>209</sup>

Racial segregation in college sports included formal and informal rules of exclusion.<sup>210</sup> For instance, formal exclusion took place in the South where laws prohibited Black people from attending White universities, thus preventing Black people from playing sports for schools in the South.<sup>211</sup> Jim Crow (segregation) laws also prevented White people and Black people from interacting.<sup>212</sup> While a Texas statute prohibited White people and Black people from competing in a “boxing, sparring or wrestling contest” with each other, Atlanta maintained an ordinance that forbid amateur baseball teams “of different races from playing within *two blocks* of each other.”<sup>213</sup> Informal rules in the late nineteenth and early twentieth centuries, such as informal Jim Crow laws, involved, for example, Catholic universities denying admission to all Black people, thus prohibiting them from participating in sports for Catholic universities.<sup>214</sup> Some universities prohibited Black people from participating in athletics even if they were students.<sup>215</sup> The University of Kansas’ head of athletics in the 1930s stated, “[N]o colored man will ever have a chance as long as [I am here].”<sup>216</sup> Moreover, northern schools that did allow Black people to play college sports typically did not allow them to travel and play against southern schools, and the number of Black people that played on northern teams was often limited to one or two players.<sup>217</sup> If Black people did play in college, then they were excluded socially from the rest of campus and suffered from demeaning behavior from their own teammates and coaches, particularly as a dearth of Black teammates, faculty, and coaches existed.<sup>218</sup>

Racial segregation in professional sports mirrored the collegiate segregation.<sup>219</sup> For example, racial segregation began in the late nineteenth century in baseball when MLB prohibited Black people and dark-skinned

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<sup>209</sup> *Id.* (citing Kenneth L. Shropshire, IN BLACK AND WHITE: RACE AND SPORTS IN AMERICA 31 (1996)).

<sup>210</sup> *Id.* at 700-01.

<sup>211</sup> *Id.* at 700.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 701.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* (citing Loren Miller, *The Unrest Among College Students*, 34 CRISIS 187 (1927)).

<sup>217</sup> *Id.* at 701-02.

<sup>218</sup> *Id.* at 702.

<sup>219</sup> *Id.*

Latinos from playing, prompting Black people to create a separate entity, “the Negro Leagues,” in which they could compete.<sup>220</sup>

Reintegration of college and professional sports took place over time in the twentieth century.<sup>221</sup> The NFL, integrated from 1920 through 1934, banned Black people until 1946.<sup>222</sup> Professional basketball allowed Black people to compete up until World War I, and then a year after the NBA was formed in 1950, the Boston Celtics drafted a Black player.<sup>223</sup> In baseball, although Black people competed in MLB until the 1890s, once segregated, they did not play again in the major leagues until Jackie Robinson broke through with the Brooklyn Dodgers in 1947.<sup>224</sup> The Boston Red Sox eventually allowed a Black athlete to play in MLB, becoming the last team to integrate, in 1959.<sup>225</sup>

Racism is also evident in the limited number of Black people working in administrative and head coaching positions in sports.<sup>226</sup> Although almost 80% of NBA players are Black and nearly 70% of NFL players are minorities, there are very few Black NBA and NFL head coaches in proportion to the number of athletes.<sup>227</sup> Black people comprise only 23.3% of the head coaches in the NBA and just 9.38% of the head coaches in the NFL.<sup>228</sup> In

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<sup>220</sup> See *id.* at 702-03 (explaining how fair-skinned Latinos who were allowed to play faced derogatory, demeaning, and racist remarks and conduct); see generally WALTER T. CHAMPION, JR., *SPORTS LAW: CASES, DOCUMENTS, AND MATERIALS* 621 (2d ed. 2014) (stating how the separate Negro League was inferior to the White professional baseball league).

<sup>221</sup> Mitten, *supra* note 207, at 703.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 703-04.

<sup>224</sup> *Id.* at 703; Champion, *supra* note 220, at 578.

<sup>225</sup> Mitten, *supra* note 207, at 703.

<sup>226</sup> *Id.* at 705; see generally Timothy Davis, *Racism in Athletics: Subtle Yet Persistent*, 21 U. ARK. LITTLE ROCK L. REV. 881 (1999).

<sup>227</sup> RICHARD LAPCHICK, *THE 2020 RACIAL AND GENDER REPORT CARD NATIONAL FOOTBALL LEAGUE* 8 (David Zimmerman et al. eds., 2020) (stating almost 70% of NFL players are people of color); see Etan Thomas, *The NBA's Coaching Dilemma*, UNDEFEATED (Oct. 23, 2020), <https://theundefeated.com/features/nba-coaching-dilemma-black-coaches-in-lead-roles/> [https://perma.cc/DU25-MDX7] (noting nearly 80% of the players in the NBA are Black); see Kristian Winfield, *Stephen Silas Could Just Be the Rockets' Newest Scapegoat*, N.Y. DAILY NEWS (Nov. 2, 2020), <https://www.nydailynews.com/sports/basketball/ny-stephen-silas-hired-rockets-20201029-xg6na6wvnrtdl|jeno56w5t3ss4-story.html> [https://perma.cc/AST2-8VHR] (noting there were only seven Black NBA head coaches at the start of the 2020 season).

<sup>228</sup> See Winfield, *supra* note 227 (discussing the seven Black NBA head coaches at the start of the 2020 season); see Rooney II Says, *supra* note 26 (noting how there were only three Black head coaches in the NFL in the spring of 2021).

fact, of the 32 teams in the NFL, only three employ Black head coaches.<sup>229</sup> Moreover, executive positions follow the same pattern or worse: less than 11% of NBA teams employ Black CEOs/presidents, and just 12.5% of NFL teams employ Black general managers, which means only four of the 32 NFL teams employ a Black general manager.<sup>230</sup> Owners hire head coaches and CEOs/presidents/general managers in the NFL and NBA<sup>231</sup>. There are no Black majority owners in the NFL and only one in the NBA: former NBA superstar and global icon Michael Jordan.<sup>232</sup>

In college, the statistics remain similarly disappointing. In the revenue-generating sports, which have become an \$11 billion-per-year indus-

<sup>229</sup> See *Rooney II Says*, *supra* note 26.

<sup>230</sup> Matthew J. Mitten et al., *SPORTS LAW AND REGULATION* 708 (5th ed. 2019); see Richard Lapchick, *NBA's Racial and Gender Report Card*, ESPN (June 17, 2019), [https://www.espn.com/nba/story/\\_/id/26995581/nba-racial-gender-report-card](https://www.espn.com/nba/story/_/id/26995581/nba-racial-gender-report-card) [<https://perma.cc/Q925-QHCN>]; RICHARD LAPCHICK, *THE 2020 RACIAL AND GENDER REPORT CARD: NATIONAL BASKETBALL ASSOCIATION* 7 (David Zimmerman et al. eds., 2020) (providing that less than 11% of NBA team CEOs/presidents are people of color); see also *Rooney II Says*, *supra* note 26 (stating that Terry Fontenot of the Atlanta Falcons, Brad Holmes of the Detroit Lions, Andrew Berry of the Cleveland Browns, and Chris Grier of the Miami Dolphins were the only four Black general managers in the NFL in the spring of 2021). Jason Wright became the first Black president of an NFL team in August of 2020 when the Washington Football Team hired the business consultant and former NFL running back. See Ken Belson, *Washington Hires Former Player as N.F.L.'s First Black Team President*, N.Y. TIMES (Aug. 17, 2020), <https://www.nytimes.com/2020/08/17/sports/football/washington-jason-wright-team-president.html> [<https://perma.cc/2KCB-V5N9>]. The Washington Football Team, formerly known as the Washington Redskins, changed its name after years of protests once corporate sponsors finally complained about the name and applied financial pressure to the NFL team during a summer of national racial unrest. See Jeff Kerr, *Washington Redskins Change Name: Here's a Timeline Detailing the Origins, Controversies and More*, CBS SPORTS (July 13, 2020), <https://www.cbssports.com/nfl/news/washington-redskins-name-change-heres-a-timeline-detailing-the-origins-controversies-and-more/> [<https://perma.cc/DJ9K-JYBY>].

<sup>231</sup> See Nancy Armour, Mike Freeman, & Tom Schad, *Why do some NFL teams never hire people of color as GMs and coaches and others do?*, USA TODAY (Jan. 14, 2021, 9:54 AM), <https://www.usatoday.com/story/sports/nfl/2021/01/14/nfl-coaches-best-and-worst-nfl-teams-when-hiring-people-color/6653774002/> [<https://perma.cc/S423-Q78M>].

<sup>232</sup> See Ahiza Garcia, *These Are the Only Two Owners of Color in the NFL*, CNNMONEY SPORT (May 18, 2018), <https://money.cnn.com/2018/05/18/news/nfl-nba-mlb-owners-diversity/index.html> [<https://perma.cc/C2S5-NTBU>] (noting how Michael Jordan owns the Charlotte Hornets).

try,<sup>233</sup> Black people comprise 48.5% of FBS football players and 53.2% of Division I men's college basketball players.<sup>234</sup> However, Black men represent only 10% of head coaches (13 out of 130) in the FBS and only 22.7% of men's college basketball head coaches in Division I.<sup>235</sup> Moreover, 82% of campus leadership positions, which include presidents and chancellors, athletic directors, faculty athlete representatives, and conference commissioners, are occupied by Whites.<sup>236</sup> In particular, nearly 81% of chancellors and presidents are White, a little over 83% of athletic directors are White, 82% of faculty athletic representatives are White, and 80% of conference commissioners are White.<sup>237</sup> There are only twenty-two athletic directors of color (16.9%),<sup>238</sup> and only forty Black people (thirty-one male, nine female) hold campus leadership positions.<sup>239</sup> In fact, White men hold almost 67% of the president or chancellor positions.<sup>240</sup> Much like owners in professional sports hire their head coaches and executives (and nearly every single owner is White), campus leadership hire head coaches, and the overwhelming number of these campus leadership positions are held by White males.<sup>241</sup>

Critical race theory (CRT), briefly introduced earlier in the article, recognizes, among other things, that racism reinforces the White social and economic dominance over Black people and minorities, and CRT confronts "stereotypes employed by dominant groups to justify racial subordination."<sup>242</sup> In addition, "CRT challenges traditional dominant ideologies around objectivity, meritocracy, color-blindness, race-neutrality and equal

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<sup>233</sup> Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes' Rights Movement*, 38 CARDOZO L. REV. 1627, 1630-31 (2017).

<sup>234</sup> RICHARD LAPCHICK, THE 2020 RACIAL AND GENDER REPORT CARD: COLLEGE SPORT, INST. DIVERSITY & ETHICS IN SPORT 9 (Daniel Bowman et al. eds., 2021).

<sup>235</sup> *Id.* at 4.

<sup>236</sup> RICHARD LAPCHICK, THE 2020 DI FBS LEADERSHIP COLLEGE RACIAL AND GENDER REPORT CARD: THE LACK OF DIVERSITY WITHIN COLLEGIATE ATHLETIC LEADERSHIP CONTINUES, THE INSTITUTE FOR DIVERSITY AND ETHICS IN SPORT 8 (David Eichenberger et al. eds., 2021).

<sup>237</sup> *Id.* at 2.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 5, 8.

<sup>240</sup> *Id.* at 8.

<sup>241</sup> Richard Lapchick, *UCF Research Stirs Social Upset: White Men Dominate College Leadership Positions*, UCF TODAY (Feb. 3, 2014), <https://www.ucf.edu/news/ucf-research-stirs-social-upset-white-men-dominate-college-leadership-positions/> [<https://perma.cc/KM8D-YSV9>].

<sup>242</sup> Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 617 (1995).

opportunity.”<sup>243</sup> These concepts in CRT align with the different types of racism, including institutional racism and White supremacy, as well as prejudice and implicit bias, discussed in Part I.<sup>244</sup> CRT and its analysis of the different forms of racism just mentioned explain why there is a lack of Black head coaches in college and professional sports, as well as a lack of Black administrators, executives, and owners in sports; White dominance precludes participation of Black people in power positions, and Black people are thought to be inferior intellectually by Whites.<sup>245</sup> The same stereotype about intellectual inferiority prevented Black individuals from playing quarterback in football for many years because the quarterback position requires superior intellect,<sup>246</sup> but stereotyping still plays a role in how the media talks about Black athletes, including quarterbacks.<sup>247</sup> Professors Amy and Robert McCormick argue that the revenue generating sports in college athletics — football and men’s college basketball — amount to “apartheid-like systems” where White head coaches, athletic directors, school presidents, and NCAA executives profit off of the labor of young Black athletes.<sup>248</sup>

Whether one believes racism in sports has increased recently in America or not, racism continues to exist throughout sports and society in

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<sup>243</sup> KEVIN HYLTON, “RACE” AND SPORT: CRITICAL RACE THEORY 31 (2008).

<sup>244</sup> See discussion *supra* Part I.

<sup>245</sup> See Kwame Agyemang & Joshua DeLorme, *Examining the Dearth of Black Head Coaches at the NCAA Football Bowl Subdivision Level: A Critical Race Theory and Social Dominance Theory Analysis*, 3 J. ISSUES IN INTERCOLLEGIATE ATHLETICS, 35, 35–52 (2010) (discussing how critical race theory explains the lack of Black head coaches in college).

<sup>246</sup> See Davis, *supra* note 242, at 659–60 (explaining “[s]tacking involves the assignment of certain individuals to specific athletic positions based on race or ethnicity rather than ability,” such as Black people playing positions requiring athletes who can run fast and jump high while Whites play positions that require intellect including quarterback and pitcher); Walter Champion, *The O.J. Trial as a Metaphor for Racism in Sports*, 33 T. MARSHALL L. REV. 157, 160 (Fall 2007) (noting implied assertion that Black athletes are “intellectually or ethically inferior”).

<sup>247</sup> See Andrew C. Billings, *Talking Around Race: Stereotypes, Media, and the Twenty-First Century Collegiate Athlete*, 2 WAKE FOREST J.L. & POL’Y 199, 211–12 (2012) (discussing how intellect and work ethic are attributed to reasons for White athletes’ success, but Black athletes’ success hinges on their athletic prowess, such as NFL quarterback Cam Newton’s “fleet feet”).

<sup>248</sup> Amy Christian McCormick & Robert A. McCormick, *Race and Interest Convergence in NCAA Sports*, 2 WAKE FOREST J.L. & POL’Y 17, 17–19, 24–25 (2012).



the United States.<sup>249</sup> The next section discusses how racism develops and how to combat it.

#### IV. THE DISEASE OF RACISM: HOW IT STARTS AND HOW TO CURE

“No one is born hating another person because of the color of his skin or his background or his religion. People must learn to hate, and if they can learn to hate, they can be taught to love, for love comes more naturally to the human heart than its opposite.” — Nelson Mandela<sup>250</sup>

This section discusses how racism can begin at a young age, as early as four years old.<sup>251</sup> This section also provides some background on how to address racism.

##### A. How Racism Develops

Racist views and racial bias can start as early as four years old.<sup>252</sup> Some researchers have found that there is “an absence of correlation between children’s attitudes and those expressed by their parents,” meaning that children can develop racist views *without* direct inculcation by their parents.<sup>253</sup> In one study, a White three-year-old answered that it was the Black child who would get reprimanded by the teacher or who threw garbage on the floor simply because, according to the responding child, the hypothetical child was Black, while it was the White child who would win the prize or the game because the hypothetical child was White, again according to the respondent.<sup>254</sup> The young toddler’s mother, a White self-identifying liberal, watched in horror as her daughter provided these responses.<sup>255</sup> “Despite the

<sup>249</sup> See Nicole Chavez, *2020: The Year America Confronted Racism*, CNN, <https://www.cnn.com/interactive/2020/12/us/america-racism-2020/> [<https://perma.cc/W534-XN9B>] (last visited Apr. 23, 2021).

<sup>250</sup> *Nelson Mandela’s Most Inspirational Quotes*, ABC NEWS (Dec. 5, 2013), <https://abcnews.go.com/International/nelson-mandelas-inspirational-quotes/story?id=8879848> [<https://perma.cc/B6TK-2HY4>].

<sup>251</sup> Phyllis A. Katz, *Racists or Tolerant Multiculturalists? How Do They Begin?*, 58 AM. PSYCH. 897 (2003); see Meadows-Fernandez, *supra* note 38 (citing a University of Toronto study indicating children develop implicit bias regarding race as young as four years old).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

best efforts of parents/teachers/guardians, children still learn prejudice.”<sup>256</sup> Others argue that parents may or may not directly teach their children to be racist, but “[c]hildren[']s opinions are influenced by what the people around them think, do and say.”<sup>257</sup> Indeed, some argue that prejudice “does not come from children’s awareness of differences among people, but from their perception of negative attitudes about those differences.”<sup>258</sup>

Other reasons why people may become racist include the following: adopting racist views of people they know; failure to spend time with people of other races and culture while spending time only with people who share their background and culture; stereotyping and judging others quickly; and blaming others who are different for one’s own problems.<sup>259</sup> Phrases such as, “[T]hose people take our jobs” or “they get government handouts all the time” exemplify some of those racist underpinnings.<sup>260</sup> Moreover, some argue racism stems from biology as humans innately possess an “us vs. them” predisposition.<sup>261</sup>

Some also argue that racism is a social construct in which “racial construction depicted Whites as free, civilized, and citizens, while persons of color were portrayed as savages, violent, promiscuous, slaves, and foreigners.”<sup>262</sup> Similarly, some argue that racism is based on the “natural state of things” such that “socially constructed ideologies about identities based upon biology and phenotype are created to justify the establishment and maintenance of a racist status quo.”<sup>263</sup> And some argue racism amounts to a “desire of Whites to protect the white supremacist order in the United States” that allows Whites to maintain social, economic, and political dominance in society.<sup>264</sup>

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<sup>256</sup> *How Do Children Learn Prejudice?*, ANTI-DEFAMATION LEAGUE (2013), <https://www.adl.org/sites/default/files/documents/assets/pdf/education-outreach/How-Do-Children-Learn-Prejudice.pdf> [<https://perma.cc/7QMN-KGAD>].

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Racism*, AUSTL. HUMAN RIGHTS COMM’N, <https://humanrights.gov.au/quick-guide/12083> [<https://perma.cc/Y22N-QPNT>].

<sup>260</sup> *Id.*

<sup>261</sup> Wan & Kaplan, *supra* note 53.

<sup>262</sup> Hutchinson, *supra* note 53, at 29-30.

<sup>263</sup> Jackson, *supra* note 62, at 167.

<sup>264</sup> *Id.* at 168; see Strand, *supra* note 47, at 777 (“Through individual perceptions and interactions, implicit bias and White privilege affect institutional and social system culture.”); see also Faraz Shahlaei, *Soccer Stadiums, Where International Law, Culture and Racism Collide*, 7 ARIZ. ST. SPORTS & ENT. L.J. 291, 322 (2018) (“Racism is not about objective characteristics, but is about relationships of domination and subordination, about hatred of the ‘Other’ in defense of ‘self’, perpetrated and

### B. How Racism Can Be Countered

There are several ways to fight racism: education about the history of racism and its effects on society and individuals; sharing stories and experiences amongst different races; and teaching cultural competency.

The first step in education requires talking about racism.<sup>265</sup> As Justice Sotomayor stated, “The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.”<sup>266</sup> To build tolerance, speaking of racism must include discussing the roots and history of racism.<sup>267</sup> Moreover, telling stories to people of different races can help create bonds and bridges while educating others about their own race and culture.<sup>268</sup>

Another significant way to fight racism involves generating meaningful interactions between groups of different races.<sup>269</sup> Intergroup contact and cooperation, where different races work together towards some goal, can be effective to reduce prejudice.<sup>270</sup> People of different races must get to know each other to break down barriers and learn what they have in common.<sup>271</sup>

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apparently legitimized through images of the ‘Other’ as inferior, abhorrent, even sub-human.”).

<sup>265</sup> Erika Wilson, *The Great American Dilemma: Law and the Intransigence of Racism*, 20 CUNY L. REV. 513, 513–14 (2017); see Gerald A. Foster, *American Slavery: The Complete Story*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 401, 406 (2004) (stating that “[i]f we are to progress in the global and diverse political economy of the twenty-first century, we must expand our discussions on slavery to heal our wounds of race and the malignancy of racism”); see also Jamie L. Wacks, *A Proposal for Community-Based Racial Reconciliation in the United States Through Personal Stories*, 7 VA. J. SOC. POL’Y & L. 195, 212 (2000) (“Society’s and the individual perpetrator’s failure to acknowledge the reality of th[e] insidious] trauma [inflicted by both unconscious and conscious racism] makes it difficult for the victim to repair the damage to her dignity.”).

<sup>266</sup> Gene Demby, *Two Justices Debate the Doctrine of Colorblindness*, NPR (Apr. 23, 2014), <https://www.npr.org/sections/codeswitch/2014/04/23/306173835/two-justices-debate-the-doctrine-of-colorblindness> [<https://perma.cc/T2UU-UT86>].

<sup>267</sup> See Shahlaei, *supra* note 264, at 322.

<sup>268</sup> See Strand, *supra* note 47, at 780.

<sup>269</sup> See A.D. Benner, et. al, *Racial/Ethnic Discrimination and Well-Being During Adolescence: A Meta-Analytic Review*, 73 AM. PSYCH. 855 (2018); see Strand, *supra* note 47, at 765, 782 (advocating for civility, which includes “people working together to tackle complex civic challenges,” by Whites and Black people to “forg[e] relationships across racial lines”).

<sup>270</sup> See *Black peopleid*.

<sup>271</sup> *Quick Guide: Racism*, AUSTL. HUM. RIGHTS COMM’N, <https://humanrights.gov.au/quick-guide/12083> [<https://perma.cc/Y22N-QPNT>] (last vis-

Different races need contact with each other to unlearn implicit biases and overcome deep-rooted prejudices.<sup>272</sup> The costs of programs to provide opportunities for different races to interact may be high, but “the economic and social costs of continuing to ignore adolescents’ experiences of racial/ethnic discrimination are even higher.”<sup>273</sup>

Another way to battle racism includes giving opportunities to minorities in schools and the workplace. “Affirmative action is an important stratagem for enhancing genuine equality and respect for disadvantaged people in the United States, especially minorities and women.”<sup>274</sup> The concept of affirmative action, though, remains a contentious issue politically<sup>275</sup> and legally because some people perceive it as guaranteeing spots to minorities who are unqualified or less qualified than Whites.<sup>276</sup> The Rooney Rule requires NFL teams to interview at least two minority candidates before hiring a head coach, but the team need not hire a minority candidate.<sup>277</sup> This approach of simply guaranteeing interviews as opposed to ensuring hiring of minorities may be more palatable to those who resist affirmative action, but its effectiveness can be questioned as discussed below in Part IV of this article.<sup>278</sup>

Yet another way to address racism includes teaching cultural competence. “Cultural competence can be broadly defined as the ability to ‘relate

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ited May 25, 2020); see Sheryll Cashin, *Shall We Overcome? “Post-Racialism” and Inclusion in the 21st Century*, 1 ALA. C.R. & C.L.L. REV. 31 (2011) (“Research suggests that if you know someone from another ethnic or racial group personally you are less likely to see that group in a negative light.”); see also *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting) (“[U]nless our children begin to learn together, there is little hope that our people will ever learn to live together.”).

<sup>272</sup> Wan & Kaplan, *supra* note 53.

<sup>273</sup> See Benner et al., *supra* note 270, at 873.

<sup>274</sup> See Winston P. Nagan, *Reflections on Racism and World Order*, 14 U. FLA. J.L. & PUB. POL’Y 1, 7 (2002).

<sup>275</sup> Nikki Graf, *Most Americans Say Colleges Should Not Consider Race or Ethnicity in Admissions*, PEW RSCH. CTR. (Feb. 25, 2019), <https://www.pewresearch.org/fact-tank/2019/02/25/most-americans-say-colleges-should-not-consider-race-or-ethnicity-in-admissions/> [https://perma.cc/C8VV-N4LV].

<sup>276</sup> See Matt Apuzzo et al., *Trump Officials Reverse Obama’s Policy on Affirmative Action in Schools*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/us/politics/trump-affirmative-action-race-schools.html> [https://perma.cc/XS7Z-B6N3].

<sup>277</sup> See Dan Graziano, *NFL Approves Rooney Rule Changes, Tables Minority Hiring Incentives*, ESPN (May 19, 2020), [https://www.espn.com/nfl/story/\\_/id/29194925/nfl-approves-rooney-rule-changes-tables-minority-hiring-incentives](https://www.espn.com/nfl/story/_/id/29194925/nfl-approves-rooney-rule-changes-tables-minority-hiring-incentives) [https://perma.cc/LU3T-SLTN].

<sup>278</sup> See discussion *infra* Part IV.

to others comfortably, respectfully, and productively.’”<sup>279</sup> In the law, cultural competency serves as one of the traits required for a successful lawyer under the doctrine of professional identity formation.<sup>280</sup> Professional identity formation educates “law students and lawyers about what characteristics employers want, as well as how law students and lawyers must develop certain traits to be successful lawyers.”<sup>281</sup> At the lowest level of cultural competency, an individual believes their own culture is the best, they only recognize broad categories of culture, and they believe people of other cultures do not have a place or role in their community.<sup>282</sup> At the highest level, a culturally competent person does the following: “sees all people as culturally unique because we each create our own cultural and personal identities, based on the more general cultural contexts and patterns that we experience;” brings together their different cultures “into a positive whole;” “use[s] power in culturally appropriate ways;” seeks and “create[s] opportunities for multicultural interactions;” and “support[s] others in creating their own multicultural or intersectional identities.”<sup>283</sup> Professional identity formation seeks to teach and assess cultural competency in law students, who are typically young adults, but children can also be taught cultural competency.<sup>284</sup>

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<sup>279</sup> See Neil Hamilton & Jeff Maleska, *Helping Students Develop Affirmative Evidence of Cross-Cultural Competency*, 19 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 187, 197 (2017) (citing Ritu Bhasin, *Cultural Competence: An Essential Skill for Success in an Increasingly Diverse World*, LAWPRO MAG. (Sep. 2014), 9, 10, available at [http://practicepro.ca/LawPROmag/Cul-tural\\_Competence\\_Bhasin.pdf](http://practicepro.ca/LawPROmag/Cul-tural_Competence_Bhasin.pdf)) [<https://perma.cc/FZG8-8NZM>].

<sup>280</sup> Aastha Madaan, *Cultural Competency and the Practice of Law in the 21st Century*, AM. BAR ASS’N (Mar. 1, 2017), [https://www.americanbar.org/groups/real\\_property\\_trust\\_estate/publications/probate-property-magazine/2016/march\\_april\\_2016/2016\\_aba\\_rpte\\_pp\\_v30\\_2\\_article\\_madaan\\_cultural\\_competency\\_and\\_the\\_practice\\_of\\_law\\_in\\_the\\_21st\\_century/](https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2016/march_april_2016/2016_aba_rpte_pp_v30_2_article_madaan_cultural_competency_and_the_practice_of_law_in_the_21st_century/) [<https://perma.cc/6VR8-JSAN>].

<sup>281</sup> See Martin J. Katz, *Teaching Professional Identity in Law School*, 42 COLO. LAW. 45 (2013).

<sup>282</sup> See HOLLOGRAN CTR., UNIV. OF ST. THOMAS, PROFESSIONAL IDENTITY: CULTURAL COMPETENCE DEVELOPMENT CONTINUUM (2019), <https://www.stthomas.edu/media/hollorancenter/pdf/FINALCulturalCompetenceDevelopmentalRubricMarch2019.pdf> [<https://perma.cc/76W4-N67D>].

<sup>283</sup> See *id.*

<sup>284</sup> See, e.g., Christy Tirrell-Corbin, *How to Teach Children About Cultural Awareness and Diversity*, PBS (Aug. 4, 2015), <https://www.pbs.org/parents/thrive/how-to-teach-children-about-cultural-awareness-and-diversity> [<https://perma.cc/NL7W-BNU8>]; CAROLYN WEBSTER-STRATTON, HOW TO PROMOTE CHILDREN’S SOCIAL AND EMOTIONAL COMPETENCE xii (1999) (emphasizing behavioral health research supports early intervention in children to effectively promote cultural competency development).

Celebrating other races and cultures through reading serves as an effective method to teach cultural competency to children, but “actual experiences have the most profound influence on what children think and believe.”<sup>285</sup> For example, parents can “[e]ncourage cross-racial/ethnic/religious/ability friendships; [e]xpose [. . .] children to foods from different cultures; [a]ttend different events/festivals that celebrate a particular ethnic group, holiday or personal accomplishment, like the Special Olympics, the Chinese New Year or Holi, the Hindu festival of colors;” or patron “children’s or history museums[, which] house an abundance of artifacts from different cultures and countries;” and “[w]atch movies set in other cultures.”<sup>286</sup> Finally, parents provide the most powerful role models to help their children become culturally competent.<sup>287</sup> “Children become culturally sensitive and respectful when they see adults who are culturally sensitive and respectful, and who take a stand against bias, racism or insensitivity.”<sup>288</sup> Focusing on the strengths of children from other cultures helps provide a positive image of other cultures.<sup>289</sup>

The phrase “colorblind” comes up quite frequently when talking about racism.<sup>290</sup> When racism is defined too simplistically as “prejudice, bias, or discrimination based on perceptions of skin color,” then people believe that if they act colorblind and do not acknowledge someone’s skin color, then somehow they are not racist and racism will no longer exist.<sup>291</sup> “Colorblindness, as employed in contemporary society, ignores race without first eradicating racism.”<sup>292</sup> Ignoring race via the concept of colorblindness does not make racism obsolete, but “in fact renders racism indestructible.”<sup>293</sup> Someone who is colorblind may fail to recognize how racism remains embedded in this society and how it affects institutions and socioeconomic outcomes.<sup>294</sup> That colorblind person may also (1) ignore the differences that make others special and (2) lack appreciation for how those differences shape

<sup>285</sup> See Tirrell-Corbin, *supra* note 284.

<sup>286</sup> See *id.*

<sup>287</sup> See, e.g., *id.*; WEBSTER-STRATTON, *supra* note 284, at 6 (discussing the need to involve families in the development of children’s cultural backgrounds).

<sup>288</sup> See Tirrell-Corbin, *supra* note 284.

<sup>289</sup> See *id.*

<sup>290</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE TIME OF COLORBLINDNESS* 298-303 (2020).

<sup>291</sup> See Jackson, *supra* note 62, at 166.

<sup>292</sup> See *id.*

<sup>293</sup> See *id.*

<sup>294</sup> See Helen A. Neville et al., *The Myth of Racial Color Blindness*, AM. PSYCH. ASS’N, <https://www.apa.org/pubs/books/The-Myth-of-Racial-Color-Blindness-Intro-Sample.pdf> [https://perma.cc/9SWS-U4YD] (last visited Apr. 23, 2021).

the way others think, interact, and respond to people, including the negative effects racism imposes on the structure of society and people's own implicit biases.<sup>295</sup> When individuals start to see and appreciate differences in others, then they can better understand, communicate, and interact with others who may be different than them in some or many respects.<sup>296</sup>

One of the modern leading commentators on race, Ibram Kendi, argues that color blindness and the notion that someone is “not racist” are equivalent because “the colorblind individual, by ostensibly failing to see race, fails to see racism and falls into racist passivity,” like someone who is “not racist.”<sup>297</sup> According to Kendi, someone is either racist or antiracist—there is no in-between such as when some people claim to be “not racist.”<sup>298</sup> Someone is racist if they “endorse a racial hierarchy,” “believe[ ] problems are rooted in groups of people,” or “allow[ ] racial inequities to persevere.”<sup>299</sup> Under Kendi's framework, someone is antiracist if they endorse racial equity, “locate[ ] the roots of problems in power and policies,” or “confront[ ] racial inequities.”<sup>300</sup> Sports can also attempt to break down barriers and fight racism as discussed in the next section of the article.

## V. CURRENT EFFORTS AT TAKING A SHOT AT RACISM THROUGH SPORTS

This section describes the various efforts currently underway in sports to combat racism. Those efforts include the work of organizations such as RISE and professional sports leagues, a general effort to punish overt racism, and the well-known Rooney Rule. In the United States, one relatively new entity, the Ross Initiative in Sports for Equality (RISE), stands out for its efforts to use sports to combat racism through education, engagement, and empowerment.<sup>301</sup> Also, sports typically punish racist acts, but rules or reactive behavior that punish racist acts in sports get at the symptom, not the

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<sup>295</sup> *See id.*

<sup>296</sup> *See id.*

<sup>297</sup> *See* ANTIRACIST, *supra* note 57, at 10; *but cf.* Weeden, *supra* note 14, at 134 (espousing the advantages of a color-blind society and the dangers of race-preference decisions and reasoning by judges and the government as evinced by, among other things, the judicial opinion in the Dred Scott case).

<sup>298</sup> ANTIRACIST, *supra* note 57, at 9.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *See Who We Are*, ROSS INITIATIVE IN SPORTS FOR EQUALITY (RISE) (2020), <https://risetowin.org/who-we-are/index.html#> [<https://perma.cc/RQ3H-Z4FU>].

disease.<sup>302</sup> The Rooney Rule, discussed in detail below, provides another approach to fighting racism in sports, but many are still skeptical of the rule itself.<sup>303</sup> This section addresses these and several other current efforts to fight racism.

#### A. *The RISE Model*

NFL team owner of the Miami Dolphins and Wayne State School of Law alumnus Stephen Ross founded RISE, which seeks to “educate[ ] and empower[ ] the sports community to eliminate racial discrimination, champion social justice and improve race relations.”<sup>304</sup> RISE’s efforts fall into three categories: educate, empower, and engage.<sup>305</sup>

The education component includes a multifaceted approach with an interactive curriculum. For instance, it includes the RISE Leadership Program, which “increases an understanding of racial equity and builds cultural competence” by giving its constituents—professional, collegiate and school-aged athletes, coaches, and sports administrators—“the tools to be leaders in addressing matters of racism, prejudice, diversity and inclusion.”<sup>306</sup> RISE helps provide the skills and safe spaces to engage in difficult discussions about “identity, implicit bias, racial ideology and athlete activism” while “teach[ing] skills such as perspective taking, empathy, conflict resolution and leadership.”<sup>307</sup>

RISE also provides multi-week leadership programs for youth and coaches to play and learn together through experiential learning curriculum and sports. “These programs offer opportunities to have important and often

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<sup>302</sup> See Specht, *supra* note 38, at 306 (advocating that “the public and private condemnation that follows displays of racism” serves as a very “effective tool to change minds”).

<sup>303</sup> See, e.g., *Rooney II Says*, *supra* note 26; Rashad D. Grove, *Eight Reasons Why the NFL Should Kill the Rooney Rule & Update Its Policy on Hiring Black Coaches*, OKAYPLAYER (Jan. 8, 2020), <https://www.okayplayer.com/sports/rooney-rule-nfl-statistics-black-coaches.html> [<https://perma.cc/2ZDC-QHF5>]; see also Bryant Interview, *supra* note 27.

<sup>304</sup> See *Mission*, ROSS INITIATIVE IN SPORTS FOR EQUALITY, <https://risetowin.org/who-we-are/index.html#mission> [<https://perma.cc/KL58-ETXS>].

<sup>305</sup> See *What We Do*, ROSS INITIATIVE IN SPORTS FOR EQUALITY, <https://risetowin.org/who-we-are/index.html#> [<https://perma.cc/RQ3H-Z4FU>] (last visited May 30, 2020).

<sup>306</sup> See *How We Educate*, ROSS INITIATIVE IN SPORTS FOR EQUALITY, <https://risetowin.org/what-we-do/educate/index.html> [<https://perma.cc/U5QS-UG36>] (last visited May 30, 2020).

<sup>307</sup> See *id.*



difficult conversations about race, perceptions and stereotypes.”<sup>308</sup> RISE has worked with the NBA, NFL, and NHL teams, along with community organizations such as Boys & Girls Clubs and Police Athletic Leagues, to provide these multi-week programs in cities across the nation, including Baltimore, Chicago, Detroit, Los Angeles, Miami, New Orleans, New York and Tampa.<sup>309</sup> Many of these programs allow “local youth and law enforcement to break down barriers, build trust and strengthen relations” by playing sports together and learning about each other with “leadership activities focused on identity and diversity, empathy and conflict resolution.”<sup>310</sup> The interaction and bonds formed between participants during these events have the ability to change lives. For instance, a Black female teen, distrusting of police before the program, and a police officer created such a strong bond that it lasted well beyond the ten weeks. Their experience with RISE resulted in, among other things, the police officer supporting the teen in her personal life and becoming a part of the teen’s life—e.g., the police officer paid for the teen’s sweet sixteen party.<sup>311</sup>

Moreover, RISE created its Digital Learning Series, which teaches students, athletes, coaches, and fans cultural competency and how to be racial equity advocates in an interactive, web-based platform.<sup>312</sup> “The series features blogs, videos, podcasts, live chats and other interactive games.”<sup>313</sup> Topics covered thus far on the digital learning series include: (1) Racism; (2) Sports as a Vehicle for Change; (3) Privilege; (4) Leadership; and (5) Equity and Equality.<sup>314</sup> RISE also offers additional educational resources in the form of modules that teach concepts with activities. The modules available online cover the following topics: (1) understanding our identities; (2) diversity concepts; (3) equality vs. equity; (4) sports as a vehicle for social change; (5) social media; (6) building community; (7) inclusion, exclusion, and racism;

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<sup>308</sup> See *Multi-Week Leadership Programs*, ROSS INITIATIVE IN SPORTS FOR EQUALITY, <https://risetowin.org/what-we-do/educate/index.html#multi-week-leadership> [https://perma.cc/3WN9-W433] (last visited May 30, 2020).

<sup>309</sup> See *Leadership Workshops & Roundtables*, ROSS INITIATIVE IN SPORTS FOR EQUALITY, <https://risetowin.org/what-we-do/educate/index.html#leadership-workshops-roundtables> [https://perma.cc/34ML-G229] (last visited Mar. 9, 2021).

<sup>310</sup> See *id.*

<sup>311</sup> See Zoom Interview with Dr. Collin Williams, Senior Director of Curriculum for RISE (May 28, 2020) (on file with the author) [hereinafter Dr. Williams Interview].

<sup>312</sup> See *RISE Digital Learning Series*, ROSS INITIATIVE IN SPORTS FOR EQUALITY (RISE), <https://risetowin.org/digitallearning/index.html> [https://perma.cc/K28S-6HNW] (last visited Mar. 9, 2021).

<sup>313</sup> See *id.*

<sup>314</sup> See *id.*

(8) racial imagery; (9) understanding power; and (10) practicing empathy.<sup>315</sup> Finally, the education component also includes reports on athletes' quest for social justice and athlete activism.<sup>316</sup>

The second category of RISE's approach is empowering the sports community, which includes "athletes, coaches, and sports administrators at all levels," by giving them the necessary tools to battle racism and seek social justice.<sup>317</sup> RISE accomplishes this task by "creat[ing] unique opportunities for athletes, coaches and staff to learn and amplify their voice to make a difference as effective advocates."<sup>318</sup> For instance, RISE puts on leadership and sports advocacy workshops for former and current athletes to learn how to be social justice advocates by teaching them the history, knowledge, skills, and strategies to do so.<sup>319</sup> RISE also hosts "town hall and round table series [. . .] to convene [. . .] athletes, students, coaches, staff, community leaders and law enforcement, to discuss ways they can create positive social change in respect to race relations, inclusivity and social justice."<sup>320</sup> RISE also serves as a member of the Diversity and Inclusion Sports Consortium (DISC), which facilitates "meaningful, thought-provoking and open dialogue" amongst its members," and members create and share "best practices for diversity and inclusion efforts in the sports industry."<sup>321</sup>

The final approach of RISE involves engaging, which occurs through RISE's Champions of Change. "Champions of Change takes [college and professional sports] fans on a multi-sensory journey designed to educate, evoke empathy and inspire action," which includes "learning about the intersection of sport and society through [RISE's] interactive timeline [and] hearing personal stories of athlete experiences with racism."<sup>322</sup> Engagement

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<sup>315</sup> See *Resources*, ROSS INITIATIVE IN SPORTS FOR EQUALITY (RISE), <https://risetowin.org/what-we-do/educate/index.html#resources> [https://perma.cc/K8BM-KJSX] (last visited May 30, 2020).

<sup>316</sup> See *id.*

<sup>317</sup> *How We Empower*, ROSS INITIATIVE IN SPORTS FOR EQUALITY (RISE), <https://risetowin.org/what-we-do/empower/index.html> [https://perma.cc/WMC8-PVHE] (last visited Mar. 9, 2021).

<sup>318</sup> See *id.*

<sup>319</sup> See *Leadership & Sports Advocacy Workshops*, ROSS INITIATIVE IN SPORTS FOR EQUALITY (RISE), <https://risetowin.org/what-we-do/empower/leadership-and-sports-advocacy-workshops/index.html> [https://perma.cc/H5UZ-P528] (last visited Mar. 9, 2021).

<sup>320</sup> See *How We Empower*, *supra* note 317.

<sup>321</sup> See *Diversity & Inclusion Sports Consortium (DISC)*, ROSS INITIATIVE IN SPORTS FOR EQUALITY (RISE), <https://risetowin.org/what-we-do/empower/index.html#disc> [https://perma.cc/CCX5-BU65] (last visited Mar. 9, 2021).

<sup>322</sup> See *What We Do*, *supra* note 305.

also encompasses RISE's "Pledge to End Racism," which states, "I PLEDGE to treat everyone with respect and dignity. I will not tolerate racism or discrimination of any kind. I will speak out, RISE up and be a Champion of Change."<sup>323</sup>

RISE works with most of the largest sports organizations and sports media entities in the country, including the NBA (National Basketball Association), NFL (National Football League), MLB (Major League Baseball), NHL (National Hockey League), MLS (Major League Soccer), NASCAR, the NCAA (the governing body of college athletics), PGA (Professional Golfers' Association of America), USTA (United States Tennis Association), USATF (USA Track & Field), AVP (Association of Volleyball Professionals), ESPN, CBS Sports, Turner Sports, NBC Sports Group, and Fox Sports.<sup>324</sup>

RISE's programs focus on athletes in middle school, high school, college, and the professional leagues, as well as coaches in those ranks (some of whom are also teachers).<sup>325</sup> RISE works with a variety of sports in addition to those entities with which it partners and their respective sports, including swimming and lacrosse.<sup>326</sup>

Battling racism means addressing it head-on, which includes increasing dialogue about racism.<sup>327</sup> RISE's programs address racism directly by providing safe environments for tough discussions about race, privilege, power, empathy, diversity, and all the related concepts, to allow participants to learn and grow.<sup>328</sup>

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<sup>323</sup> See *Take Action*, ROSS INITIATIVE IN SPORTS FOR EQUALITY (RISE), <https://risetowin.org/take-action/index.html> [<https://perma.cc/7YMP-BLZV>] (last visited Mar. 9, 2021).

<sup>324</sup> See *Mission*, ROSS INITIATIVE IN SPORTS FOR EQUALITY (RISE), <https://risetowin.org/who-we-are/index.html#mission> [<https://perma.cc/KL58-ETXS>] (last visited Mar. 9, 2021).

<sup>325</sup> Zoom Interview with Scott Koenning, Director of Programs for RISE (May 28, 2020) (on file with the author) [hereinafter Koenning Interview].

<sup>326</sup> See *id.*

<sup>327</sup> See Nick J. Sciullo, *Richard Sherman, Rhetoric, and Racial Animus in the Rebirth of the Bogeyman Myth*, 37 HASTINGS COMM. & ENT. L.J. 201, 222, 228–229 (2015) (stating that society must admit racism exists, popular culture manifests racism, and those popular manifestations of racism have historical roots).

<sup>328</sup> See Dr. Williams Interview, *supra* note 311.

## B. Professional Leagues' Efforts

The major sports leagues in the United States each employ a diversity and inclusion or social justice arm.<sup>329</sup> For example, the Inspire Change campaign by the NFL promotes and supports programs that seek to bridge the education and economic gaps between underserved communities, improve the relationship between police and underserved communities, and to improve the criminal justice system.<sup>330</sup> Events supported by the effort include “social justice-related events during the Pro Bowl and Super Bowl including events with local law enforcement and RISE”;<sup>331</sup> nationwide programming that includes ads on television and social media;<sup>332</sup> community unity summits held at NFL team facilities or hosted by NFL players; local mentoring of at-risk youth by players, team staff, and executives; community gatherings with players and police; financial contributions to underserved schools; and funding for curriculum on African-American history.<sup>333</sup>

NBA Voices serves as the NBA’s social justice and diversity/inclusion arm.<sup>334</sup> NBA Voices involves “leading community conversations, supporting a network of community partners and amplifying the voices of people and organizations who are making a difference.”<sup>335</sup> NBA Voices accomplishes these goals through several programs, including the NBA Mentoring program, Building Bridges, and Community Conversations.<sup>336</sup> NBA’s Mentoring program “encourage[s] Americans to become mentors using PSAs, grassroots events, ticket donations and online organizing.”<sup>337</sup>

<sup>329</sup> See, e.g., *Our Philosophy*, MLB, <https://www.mlb.com/diversity-and-inclusion> [<https://perma.cc/RH7S-SEQZ>] (last visited Mar. 9, 2021).

<sup>330</sup> See *NFL Launches Inspire Change, Further Advancing National Conversation, Progress on Social Justice*, NFL (Mar. 9, 2021, 10:00 PM), <https://nflcommunications.com/Pages/NFL-LAUNCHES-INSPIRE-CHANGE,-FURTHER-ADVANCING-NATIONAL-CONVERSATION,-PROGRESS-ON-SOCIAL-JUSTICE-.aspx> [<https://perma.cc/5PQQ-QKJE>] [hereinafter *NFL Launches*].

<sup>331</sup> See *The NFL’s Inspire Change Initiative Showcases How the Players, Owners and The League Work Together to Create Positive Change in Communities Across America*, NFL (Mar. 9, 2021, 10:00 PM), <https://operations.nfl.com/football-ops/economic-social-impact/inspire-change/> [<https://perma.cc/WAA2-73SC>] [hereinafter *Inspire Change*].

<sup>332</sup> See *NFL Launches*, *supra* note 330.

<sup>333</sup> See, e.g., *id.*; *Inspire Change*, *supra* note 331.

<sup>334</sup> See *NBA Voices*, NBA, <https://voices.nba.com> [<https://perma.cc/K9U6-Z3HY>] (last visited June 1, 2020).

<sup>335</sup> See *id.*

<sup>336</sup> See *id.*

<sup>337</sup> See *Mentoring*, NBA, <https://voices.nba.com/mentoring/> [<https://perma.cc/QY4B-B6KM>] (last visited Mar. 9, 2021).

The NBA's Building Bridges program, discussed above as a part of RISE's multi-week programs, entails "community basketball tournaments, a 10-week basketball-based leadership curriculum, and other basketball programs. . .to break down barriers, bring people together and develop important bonds of trust between young people, mentors, community leaders & law enforcement."<sup>338</sup> Along with RISE, the NBA partners with Under Armour to create these programs.<sup>339</sup> Building Bridges Through Basketball "helps kids develop the skills they need to succeed on and off the court through mentorship and guidance from local police officers."<sup>340</sup> This program can foster connection between both the community and police and also the youth participants themselves.<sup>341</sup> Moreover, NBA's Community Conversations program provides "opportunities for young people, parents, local leaders and members of law enforcement to sit down and engage in candid dialogue about the challenges we face and our shared responsibility to create change."<sup>342</sup>

The NBA also maintains a commitment to diversity in hiring. To that end, the NBA trains those who hire for the NBA on best practices for inclusive recruiting and hiring.<sup>343</sup> The NBA works with various organizations including, but not limited to, the National Black MBA Association and the Thurgood Marshall College Fund, to reach more minority candidates.<sup>344</sup>

The WNBA has quietly become the standard of social justice and spearheaded the way for other professional sports leagues to push for social justice reform.<sup>345</sup> The WNBA's unified efforts to fight racial and social in-

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<sup>338</sup> *Building Bridges Through Basketball*, NBA, <https://voices.nba.com/building-bridges-through-basketball/> [<https://perma.cc/GX7B-D46R>] (last visited Mar. 9, 2021).

<sup>339</sup> *See id.*

<sup>340</sup> *See Under Armour, Building Bridges Through Basketball — Creating Community Through Sports*, YOUTUBE (July 10, 2019), <https://www.youtube.com/watch?v=PGXdX3Au94U> [<https://perma.cc/UB2S-B7AZ>].

<sup>341</sup> *See id.* (showing a Lebanese American high-school aged participant feeling accepted in the community).

<sup>342</sup> *See NBA Voices, Conversations*, NBA, <https://voices.nba.com/community-conversations/> [<https://perma.cc/84L7-FBCL>] (last visited Mar. 9, 2021).

<sup>343</sup> *See NBA Diversity and Inclusion, Recruiting and Development*, NBA, <https://inclusion.nba.com/recruiting-and-development/> [<https://perma.cc/9U4N-4FZG>] (last visited Mar. 9, 2021).

<sup>344</sup> *See, e.g., id.; Who We Are*, NAT'L BLACK MBA ASS'N, <https://nbmbaa.org/who-we-are/> [<https://perma.cc/9XLL-78WP>] (last visited Mar. 9, 2021) (describing how the National Black MBA Association guides, coaches, and mentors young Black professionals entering the corporate sector).

<sup>345</sup> *See, e.g., Erica L. Ayala, The NBA's Walkout is Historic. But the WNBA Paved the Way.*, WASH. POST (Aug. 29, 2020), <https://www.washingtonpost.com/outlook/>

justice date back to 2016 and continue today.<sup>346</sup> The WNBA decided not to play its games after the Jacob Blake shooting in 2020, like many other leagues, “[b]ut WNBA players are among the first athletes to wear warm-up shirts with social justice messaging affirming Black Lives Matter, hold media blackouts and even kneel during the national anthem.”<sup>347</sup> In fact, “WNBA players held a pregame news conference to address police brutality following the deaths of Philando Castile and Alton Sterling *a month before Colin Kaepernick took a knee* in a 2016 preseason game.”<sup>348</sup> One of the WNBA’s star players, Maya Moore, even took off two seasons from playing to fight for social justice issues.<sup>349</sup> She successfully worked to overturn the conviction of Jonathan Irons, who had served twenty-two years of his fifty-year sentence.<sup>350</sup> NBA stars such as LeBron James and Kyrie Irving have acknowledged the standard set by the WNBA and made contributions to their efforts.<sup>351</sup>

Even NASCAR, a sport composed of predominately White participants and fans, touts a robust diversity program<sup>352</sup> that includes the following: (1) Rev Racing, which is NASCAR’s supported racing team that “develop[s] female and minority drivers, and pit crew members in the NASCAR devel-

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2020/08/29/nba-wnba-racial-injustice/ [https://perma.cc/Y72V-V969]; LZ Granderson, *No League Was More Essential to the Social Justice Movement in 2020 Than the WNBA*, L.A. TIMES (Dec. 24, 2020), https://www.latimes.com/sports/story/2020-12-24/2020-in-review-social-justice-sports-wnba-breonna-taylor [https://perma.cc/P53G-XW26].

<sup>346</sup> See Ayala, *supra* note 345.

<sup>347</sup> See *id.*

<sup>348</sup> See Granderson, *supra* note 345.

<sup>349</sup> See Avery Yang, *Maya Moore Helps Get Inmate’s Conviction Overturned During WNBA Hiatus*, SPORTS ILLUSTRATED (Mar. 9, 2020), https://www.si.com/wnba/2020/03/09/maya-moore-jonathan-irons-conviction-overturned [https://perma.cc/7GAD-RP9S].

<sup>350</sup> See *id.*

<sup>351</sup> See, e.g., *Brooklyn Nets’ Kyrie Irving Commits \$1.5M to Help Pay WNBA Players Who Opted Out*, ESPN (July 27, 2020), https://www.espn.com/wnba/story/\_/id/29547214/brooklyn-nets-kyrie-irving-commits-15m-help-pay-wnba-players-opted-out [https://perma.cc/8TVF-2N6L]; Ben Morse, *After Leading Lakers to Victory, LeBron James Looks for WNBA Win over Kelly Loeffler*, CNN (Jan. 6, 2021), https://www.cnn.com/2021/01/06/sport/lebron-james-kelly-loeffler-la-lakers-atlanta-dream-wnba-spt-intl/index.html [https://perma.cc/P4Z2-NDUG].

<sup>352</sup> See, e.g., *NASCAR Drive for Diversity*, NASCAR (Mar. 9, 2021, 10:00 PM), https://hometracks.nascar.com/drive-for-diversity/ [https://perma.cc/7EJX-LCWF] (highlighting diversity program); Todd Palmer, *NASCAR Making a Push for Diversity*, KANSAS CITY STAR (May 12, 2018), https://www.kansascity.com/sports/nascar-auto-racing/article211040289.html [https://perma.cc/5EMC-FC9T] (noting that NASCAR is a predominately White sport).

opment series for future competition at NASCAR's highest levels";<sup>353</sup> (2) an internship program for college and graduate minority and female students;<sup>354</sup> (3) the NASCAR Opinion Leader Initiative (NOLI), which connects NASCAR with diverse businesses, civic organizations, and community leaders;<sup>355</sup> (4) the NASCAR Diversity Awards, held each year during Speed Weeks, which honors diversity leaders in the motorsport industry;<sup>356</sup> and (5) an initiative that helps provide scholarships to "Historically Black Colleges and Universities (HBCUs) and Hispanic Serving Institutions to nurture diverse talent and raise the sport's visibility."<sup>357</sup> In 2020, NASCAR removed all Confederate flags from its sanctioned events.<sup>358</sup>

George Floyd's murder also spawned a great deal of athlete activism and responses from professional athletes, college athletes, and sports leagues

<sup>353</sup> See REVRACING, <https://revracing.net/> [<https://perma.cc/97W4-WEAP>] (last visited Mar. 14, 2021).

<sup>354</sup> See NASCAR Diversity Internship Program, NASCAR HOME TRACKS, <https://hometracks.nascar.com/drive-for-diversity/nascar-diversity-internship-program/> [<https://perma.cc/RM9S-3WP9>] (last visited Mar. 14, 2021).

<sup>355</sup> See Opinion Leader Initiative, NASCAR HOME TRACKS, <https://hometracks.nascar.com/drive-for-diversity/nascar-opinion-leader-initiative/> [<https://perma.cc/2C98-KP2K>] (last visited Mar. 14, 2021).

<sup>356</sup> See Drive for Diversity Awards, NASCAR HOME TRACKS, <https://hometracks.nascar.com/drive-for-diversity/nascar-diversity-awards/> [<https://perma.cc/PXP5-54EE>] (last visited Mar. 14, 2021).

<sup>357</sup> See *id.*

<sup>358</sup> See, e.g., Ivan Pereira, *Trump Lashes out at Bubba Wallace, NASCAR over Noose Investigation, Confederate Flag Ban*, ABC NEWS (July 6, 2020), <https://abcnews.go.com/Politics/trump-lashes-bubba-wallace-nascar-noose-investigation-confederate/story?id=71628914> [<https://perma.cc/2GNF-6ZDS>] (discussing the noose found in the only Black NASCAR driver's garage for a race, which the FBI later concluded was not done as a part of a hate crime, prompting former President Trump to declare the noose incident a hoax and demand an apology from the Black NASCAR driver, while also criticizing NASCAR for removing the Confederate flag from NASCAR events); Lia Assimakopoulos, *Mississippi to Change State Flag After Pressure from NCAA, SEC*, NBC SPORTS WASH. (June 29, 2020), <https://www.nbcsports.com/washington/ncaa/mississippi-change-state-flag-after-pressure-ncaa-sec> [<https://perma.cc/G2NW-KRGE>] (discussing that in college sports, the Southeastern Conference (SEC), which includes the University of Mississippi (Ole Miss) and Mississippi State University, and the NCAA put pressure on the Mississippi legislature to remove the Confederate battle emblem from the state flag by threatening to withhold SEC and NCAA championships in the state of Mississippi until the flag changed occurred); Chandler Duster & Paul LeBlanc, *Mississippi Governor Signs Bill to Retire Flag with Confederate Emblem*, CNN (June 30, 2020), <https://www.cnn.com/2020/06/30/politics/mississippi-state-flag-confederate-emblem-removal/index.html>. [<https://perma.cc/L7A9-KPED>].

involving the fight against racism.<sup>359</sup> After the shooting of Jacob Blake, athletes across the country showed support for Blake, who was left paralyzed, and continued their protests against police brutality and racial injustice.<sup>360</sup> Players in the NBA refused to play in the days following the Blake shooting, and other professional athletes in the United States also similarly decided not to play some of their games.<sup>361</sup> The NBA resumed play in Orlando after the league made certain commitments requested by the players to address social and racial injustice, police brutality, and voter turnout.<sup>362</sup> In the fall of 2020, the NHL also pledged to fight against racism by mandating diversity and inclusivity training for players and employees and by

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<sup>359</sup> See, e.g., Dave Zirin, *A New Study Exposes Just How Racist College Sports Have Become*, NATION (Sept. 8, 2020), <https://www.thenation.com/article/society/ncaa-revenue-racism/> [<https://perma.cc/T9GH-JBMT>] (discussing University of Alabama's head football coach Nick Saban leading a march for racial justice and college athletes seeking racial justice via, among other things, voter registration and helmet decals advocating for change); Harry Lyles Jr., *Why 2020 Was College Football's Summer of Athlete Activism and What Comes Next*, ESPN (Aug. 29, 2020), [https://www.espn.com/college-football/story/\\_/id/29728043/why-2020-was-college-football-summer-athlete-activism-comes-next](https://www.espn.com/college-football/story/_/id/29728043/why-2020-was-college-football-summer-athlete-activism-comes-next) [<https://perma.cc/7F7U-ELUU>] (summarizing the college athlete movement in the summer that included marches and speeches on campuses and a coalition of athletes seeking racial justice on college campuses); Richard Lapchick, *NBA Plays Leading Role During Coronavirus Pandemic and Racial Reckoning*, ESPN (July 23, 2020), [https://www.espn.com/nba/story/\\_/id/29525197/nba-plays-leading-role-coronavirus-pandemic-racial-reckoning](https://www.espn.com/nba/story/_/id/29525197/nba-plays-leading-role-coronavirus-pandemic-racial-reckoning) [<https://perma.cc/2HX9-7DRE>] (mentioning the NBA emblazoning the phrase "Black Lives Matter" on the floor of the arenas in the NBA bubble in Orlando, Florida).

<sup>360</sup> See Sean Gregory, *Why Jacob Blake's Shooting Sparked an Unprecedented Sport Boycott*, TIME, <https://time.com/5883892/boycott-nba-mlb-wnba-jacob-blake/> [<https://perma.cc/QT7V-7A5K>].

<sup>361</sup> See *id.*

<sup>362</sup> See, e.g., Tim Bontemps, *NBA, NBPA Announce Playoffs to Resume Saturday, New Initiatives*, ESPN (Aug. 28, 2020), [https://www.espn.com/nba/story/\\_/id/29759939/nba-announces-playoffs-resume-saturday](https://www.espn.com/nba/story/_/id/29759939/nba-announces-playoffs-resume-saturday) [<https://perma.cc/TW7P-DYES>] (including promises by the NBA to create a social justice coalition and advocate for criminal justice reform, as well as dedicating arenas and resources to increase voter turnout for the November 2020 elections); Chris Mannix, *'Our Voices Were Heard': Inside the 48 Hours that Brought Back the 2020 NBA Playoffs*, SPORTS ILLUSTRATED, (Aug. 28, 2020), <https://www.si.com/nba/2020/08/29/players-owners-agreement-successful-protest> [<https://perma.cc/LZ9P-U2EX>]; Eric Woodyard, *NBA Distributing Money for Social Initiatives*, ESPN (Dec. 17, 2020), [https://www.espn.com/nba/story/\\_/id/30538191/nba-distributing-money-social-initiatives](https://www.espn.com/nba/story/_/id/30538191/nba-distributing-money-social-initiatives) [<https://perma.cc/L3BX-XNAD>] (discussing the NBA board of governors announcing a "\$300 million initial contribution to establish the NBA Foundation, dedicated to creating greater economic empowerment in the Black community").



forming fan and youth hockey inclusion committees to determine how to include more underrepresented groups in hockey.<sup>363</sup>

### C. Combatting “Overt” Racism

In addition to RISE and the efforts of sports leagues, sports in the United States also attempt to combat racism by punishing overt racist acts in the sports world.<sup>364</sup> For example, a Utah Jazz fan who allegedly made a racist comment to an NBA player during a game was banned for life from Jazz games based on the Utah Jazz’ code of conduct for its fans.<sup>365</sup> The NBA enacted a zero-tolerance policy for abusive or hateful behavior that results in ejections of fans from the game and potentially more severe punishments.<sup>366</sup> Similarly, the wrestling referee in New Jersey who forced a Black high school athlete to cut off his dreadlocks or forfeit a match received a two-season suspension.<sup>367</sup> Although New Jersey’s high school athletic association agreed to train high school athletics officials and staff on implicit bias, it came only after the alleged racist incident.<sup>368</sup>

NASCAR star driver Kyle Larson said the n-word during a televised racing event played online, which resulted in his actual racing team firing him.<sup>369</sup> Prior to losing his spot on the racing team, he had also lost many of

<sup>363</sup> See Emily Kaplan, *NHL Launches Initiatives with ‘Welcoming, Inclusive’ Mandate*, ESPN (Sep. 3, 2020), [https://www.espn.com/nhl/story/\\_/id/29803252/nhl-launches-initiatives-welcoming-inclusive-mandate](https://www.espn.com/nhl/story/_/id/29803252/nhl-launches-initiatives-welcoming-inclusive-mandate) [<https://perma.cc/6G2S-G4QE>].

<sup>364</sup> *Sports Will Play a Role in Fight for Racial Equality, and Be Held Accountable When Falling Short*, NBC SPORTS (June 6, 2020), <https://www.nbcsports.com/washington/other-sports/sports-will-play-role-fight-racial-equality-and-be-held-accountable-when-falling-short> [<https://perma.cc/V7FJ-DSY4>].

<sup>365</sup> See Cindy Boren, *Fan Banned for Life for Alleged Racial Comments Sues Russell Westbrook, Jazz for \$100 Million*, WASH. POST (Dec. 17, 2019), <https://www.washingtonpost.com/sports/2019/12/17/utah-jazz-fan-banned-alleged-racial-comments-sues-russell-westbrook-team/> [<https://perma.cc/R3MF-7876>] (stating that the fan is now suing the NBA player, Russell Westbrook, and the Utah Jazz for \$100,000,000 claiming defamation and intentional infliction of emotional distress).

<sup>366</sup> See Tim Reynolds, *NBA Enacting Zero-Tolerance Rules for Abusive, Hateful Fan Behavior*, NBA (Oct. 21, 2019), <https://www.nba.com/article/2019/10/21/nba-enacting-zero-tolerance-rules-fan-behavior> [<https://perma.cc/53M9-35HB>].

<sup>367</sup> See Steve Almasy & Madeline Holcombe, *Referee in Dreadlock Haircut Controversy Has Been Suspended for Two Years*, CNN (Sept. 19, 2019), <https://www.cnn.com/2019/09/19/us/new-jersey-dreadlocks-referee-suspended/index.html> [<https://perma.cc/V6BV-LH8L>].

<sup>368</sup> See *id.*

<sup>369</sup> See *NASCAR Star Kyle Larson Fired for Using Racial Slur in Virtual Race*, ESPN (Apr. 14, 2020), [https://www.espn.com/racing/nascar/story/\\_/id/29034370/nascar-star-kyle-larson-fired-using-racial-slur-virtual-race](https://www.espn.com/racing/nascar/story/_/id/29034370/nascar-star-kyle-larson-fired-using-racial-slur-virtual-race) [<https://perma.cc/56DN-SVX3>].

his sponsors for his racist remark.<sup>370</sup> Similarly, Donald Sterling, former owner of the Los Angeles Clippers, an NBA team, received a lifetime ban from the NBA for racist comments he made to his ex-girlfriend.<sup>371</sup> He told her that he did not want her associating with Black people, and, at the very least, he did not want her posting pictures of Black people or bringing them to basketball games.<sup>372</sup> Creighton University suspended its head basketball coach, Greg McDermott, from all basketball activities after he told his players after a loss to Xavier University, “Guys, we got to stick together. We need both feet in. I need everybody to stay on the plantation. I can’t have anybody leave the plantation.”<sup>373</sup>

Punishment of overtly racist behavior remains important, but punishing explicitly racist behavior fails to wholly stop the perpetuation of racism or racism at early ages; it just attempts to quell explicit racism with sanctions.<sup>374</sup> This approach, if combined with nothing else, treats the symptom, not the disease. For example, if someone suffers from chronic headaches, then simply prescribing medication for those headaches may treat the symptom, but the reason for those headaches, potentially a disease or whatever the underlying cause is for that symptom (e.g., vision worsening), goes untreated. Similarly, condemning racist acts when they occur helps to recognize those racist acts are inappropriate, but if nothing else is done besides punishing those racist acts, then the underlying cause of those racist acts (i.e., the reason for the racist motivations and feelings that precipitated the racist act) goes untreated, and the disease of racism continues. The Rooney Rule provides another means to combat racism.

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<sup>370</sup> See *id.*

<sup>371</sup> See Joseph Zucker, *Clippers Owner Donald Sterling Banned for Life from NBA for Racist Remarks*, BLEACHER REPORT (Apr. 29, 2014), <https://bleacherreport.com/articles/2042902-clippers-owner-donald-sterling-banned-for-life-from-nba-for-racist-remarks> [<https://perma.cc/UCG4-YJDZ>].

<sup>372</sup> See Braden Goyette, *LA Clippers Owner Donald Sterling’s Racist Rant Caught on Tape: Report*, HUFFPOST (Apr. 26, 2014), [https://www.huffpost.com/entry/donald-sterling-racist\\_n\\_5218572](https://www.huffpost.com/entry/donald-sterling-racist_n_5218572) [<https://perma.cc/8QHD-TED4>].

<sup>373</sup> See Jeff Borzello, *Greg McDermott Suspended by Creighton after Racially Insensitive Comments*, ESPN, [https://www.espn.com/mens-college-basketball/story/\\_/id/31007034/greg-mcdermott-suspended-creighton-racially-insensitive-comments](https://www.espn.com/mens-college-basketball/story/_/id/31007034/greg-mcdermott-suspended-creighton-racially-insensitive-comments) [<https://perma.cc/UT93-53FE>] (last visited Mar. 5, 2021).

<sup>374</sup> Lapchick, *supra* note 184.

#### D. Rooney Rule

The original Rooney Rule, enacted in 2003,<sup>375</sup> required an NFL team to interview a minority candidate before it hired a new head coach.<sup>376</sup> The rationale is that the interaction between the minority head coach and the White owner will help break down barriers, conscious and unconscious, by providing direct interaction between the two to help find commonalities and create a relationship.<sup>377</sup> The interaction may also help overcome unconscious bias against Black people for management positions because they are unfairly perceived as incapable of coaching or managing.<sup>378</sup> The Rooney Rule came about because of the lack of Black head coaches in the NFL.<sup>379</sup> Two attorneys—the late Johnny Cochran and Cyrus Mehri—commissioned a University of Pennsylvania economics professor, Dr. Janice Madden, to study the performance of head coaches in the NFL from 1986 to 2001.<sup>380</sup> She found that Black head coaches generally outperformed White head coaches, and Black head coaches were fired after performing better compared to White head coaches who were similarly fired.<sup>381</sup> Based on the study, Cochran and Mehri submitted a report that recommended, among other things, a requirement that NFL teams interview at least one minority candidate before hiring its new head coach.<sup>382</sup> In response to the report, the NFL's Workplace Diversity Committee, chaired by Dan Rooney (the late owner of the Pittsburgh Steelers), adopted the mandatory requirement, which became known as the Rooney Rule.<sup>383</sup>

In May of 2020, based on the efforts of the Fritz Pollard Alliance (FPA) and the NFL, the Rooney Rule underwent revisions.<sup>384</sup> The FPA served its

<sup>375</sup> See *NFL Expands Rooney Rule Requirements to Strengthen Diversity*, NFL COMM'NS, <https://nflcommunications.com/Pages/NFL-EXPANDS-ROONEY-RULE-REQUIREMENTS-TO-STRENGTHEN-DIVERSITY.aspx> [https://perma.cc/Z9R9-N3W7] (last visited Mar. 3, 2021).

<sup>376</sup> See CHAMPION, *supra* note 220, at 160 (stating Rooney Rule required at least one interview of a minority candidate for all head coaching vacancies).

<sup>377</sup> See N. Jeremi Duru, *The Fritz Pollard Alliance, the Rooney Rule, and the Quest to "Level the Playing Field" in the National Football League*, 7 VA. SPORTS & ENT. L.J. 179, 184 (2008).

<sup>378</sup> See CHAMPION, *supra* note 220, at 612.

<sup>379</sup> See generally *id.* at 611; Duru, *supra* note 377, at 184.

<sup>380</sup> See, e.g., Duru, *supra* note 377, at 184; CHAMPION, *supra* note 220, at 164.

<sup>381</sup> See Duru, *supra* note 377, at 184.

<sup>382</sup> See *id.*

<sup>383</sup> See *id.*

<sup>384</sup> See, e.g., Kevin Seifert, *Fritz Pollard Alliance Seeks Expansion of Rule Beyond Head Coaches, GMs*, ESPN (Jan. 16, 2020), [https://www.espn.com/nfl/story/\\_/id/28497697/fritz-pollard-alliance-seeks-expansion-rule-head-coaches-gms](https://www.espn.com/nfl/story/_/id/28497697/fritz-pollard-alliance-seeks-expansion-rule-head-coaches-gms) [https://

members—coaches, front office executives, and scouts of color—by advocating for a revised Rooney Rule.<sup>385</sup> The result includes the following amendments to the rule: (1) instead of requiring teams searching for a head coach to interview at least one minority candidate, teams must now interview at least two minority candidates from outside of their organization; (2) teams must now also interview at least one minority candidate from outside of their organization for any coordinator (offensive, defensive, special teams) position, which was not required before; and (3) teams and the league office must also interview minorities and/or female applicants for other positions such as “team president and senior executives in communications, finance, human resources, legal, football operations, sales, marketing, sponsorship, information technology and security positions.”<sup>386</sup> In addition, each NFL team must create a minority coaching fellowship program for NFL Legends, minority and female participants, which will hopefully create “a larger pool of qualified candidates in the pipeline from which head-coaching candidates are ultimately drawn.”<sup>387</sup>

The major complaint about the Rooney Rule revolves around its limitation: owners may be required to *interview* minority candidates, but they are not required to *hire* a minority candidate.<sup>388</sup> If minorities attain head coach-

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perma.cc/E5VT-FZDW]; Graziano, *supra* note 277; see also Jabari Young, *NFL Owners Approve Rooney Rule Expansion, Teams Required to Interview at Least 2 Minority Head Coach Candidates*, CNBC (May 19, 2020, 5:09 PM), <https://www.cnbc.com/2020/05/19/nfl-owners-approve-rooney-rule-expansion.html> [https://perma.cc/7MGY-X7HF].

<sup>385</sup> See Telephone Interview with N. Jeremi Duru, Counsel, Fritz Pollard Alliance, American University Washington College of Law Professor of Law, (Mar. 3, 2020) (on file with author).

<sup>386</sup> See Graziano, *supra* note 277.

<sup>387</sup> See *id.*

<sup>388</sup> See, e.g., *id.*; Charles McDonald, *The NFL Still Hasn't Done Much of Anything to Improve Diversity*, N.Y. DAILY NEWS (May 20, 2020, 12:46 PM), <https://www.nydailynews.com/sports/football/ny-nfl-diversity-rooney-rule-20200520-do2bckm47fgszdhdnrvbk2f6de-story.html> [https://perma.cc/TA9E-PCZ4] (asserting the Rooney Rule updates do not strike the heart of the issue within NFL hiring. The root issue lies with the NFL owners, mostly white men, who continue to hire “people that look like them”) (“The easiest solution would be to change the demographics of the people who make the hires, but that will never happen. NFL owners aren’t going to fire themselves or sell their teams unless they’re forced to.”); Jason Reid, *Rethinking the Rooney Rule*, UNDEFEATED (May 20, 2016), <https://www.nydailynews.com/sports/football/ny-nfl-diversity-rooney-rule-20200520-do2bckm47fgszdhdnrvbk2f6de-story.html> [https://perma.cc/7LGF-SNJA] (theorizing that “sham interviews” are a large problem in the NFL. This is where teams only interview African American candidates to comply with the rule, since they are still not forced to actually hire any individual candidate.).

ing jobs and executive leadership positions in the NFL, it can help erode institutional racism by redistributing power in the NFL.<sup>389</sup> The issue however still remains that the majority owners in the NFL are nearly all White, which epitomizes institutional racism in which Whites control all of the teams at the highest level due to their wealth and ultimate power.<sup>390</sup> Indeed, at an NFL owners' meeting in the fall of 2017, Houston Texans' owner Bob McNair infamously uttered these words when discussing players kneeling during the national anthem: "We can't have the inmates running the prison."<sup>391</sup>

In any event, the Rooney Rule appeared to work well at its outset, but it seems to be showing fewer signs of effectiveness.<sup>392</sup> The revamped Rooney Rule was meant to produce more consistent hiring of minorities than the original Rooney Rule.<sup>393</sup> According to Jeremi Duru, counsel for the FPA, "All the data shows us that if you have 'two in the pool' you're much more likely to get a diverse hire than you are if you have just one person of color in the pool."<sup>394</sup> However, in the 2021 spring hiring cycle, eleven minority and sixteen White candidates interviewed for seven NFL head coaching jobs,

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<sup>389</sup> See generally, Mike Florio, *NFL's "Broken System" of Minority Hiring Can Be Fixed in Only Two Ways*, NBC SPORTS (May 25, 2020, 10:47 AM), <https://profootballtalk.nbcsports.com/2020/05/25/nfls-broken-system-of-minority-hiring-can-be-fixed-in-only-two-ways/> [<https://perma.cc/KX35-NG9K>] (asserting NFL hiring disparities will only be fixed by a substantial change in minority team ownership, or by a racial discrimination lawsuit similar to how the Rooney Rule was first established); McDonald, *supra* note 388.

<sup>390</sup> See Kurt Badenhausen, *The NFL's Biggest Mismatch: Owners vs. Players in CBA Negotiations*, FORBES (Mar. 16, 2020), <https://www.forbes.com/sites/kurtbadenhausen/2020/03/16/the-nfls-biggest-mismatch-owners-vs-players-in-cba-negotiations/?sh=3869f0362b48> [<https://perma.cc/D568-N5UP>]; Kurt Badenhausen, *The World's Richest Sports Team Owners*, FORBES, <https://www.forbes.com/sites/kurtbadenhausen/2020/04/07/the-worlds-richest-sports-team-owners-2020/?sh=4c59f72227b5> [<https://perma.cc/ZA5K-7PAU>] (last visited Apr. 23, 2021).

<sup>391</sup> See, e.g., Tim Daniels, *Texas Owner Bob McNair on Protests 'We Can't Have Inmates Running the Prison'*, BLEACHER REPORT (Oct. 27, 2017), <https://bleacherreport.com/articles/2741008-texas-owner-bob-mcnair-on-protests-we-cant-have-inmates-running-the-prison> [<https://perma.cc/D29W-JCXH>] (illustrating the complete disregard McNair showed for the racial divisiveness in the league and country with his comment, "We can't have the inmates running the prison").

<sup>392</sup> See Neil Paine, *The Rooney Rule Isn't Working Anymore*, FIVETHIRTYEIGHT (Jan. 14, 2020, 3:17 PM), <https://fivethirtyeight.com/features/the-rooney-rule-isnt-working-anymore/> [<https://perma.cc/8ZVX-MJ9R>]; see also *Rooney II Says*, *supra* note 26.

<sup>393</sup> See Graziano, *supra* note 277 (discussing the potential of the new changes to the Rooney Rule and how the new measures will hopefully improve the "unacceptable record of minority hiring in positions of team leadership").

<sup>394</sup> See Duru, *supra* note 337.

and only two minority candidates received head coaching positions, and only one of those new minority head coaches is Black (the other is Lebanese American and the first Muslim to serve as an NFL head coach).<sup>395</sup>

In the fall of 2020, the NFL also approved a plan that gives a team two third-round compensatory draft picks if one of its minority assistant coaches or personnel is hired or promoted to the position of head coach or general manager of an NFL team.<sup>396</sup> This rule makes sense and incentivizes a team to promote minority coaches or personnel from within the organization. It makes less sense for division rivals and might actually create a disincentive for hiring a minority coach from a rival team.<sup>397</sup> For example, if the Dallas Cowboys employ a Black assistant coach who earns a head coaching job with the Washington Football Team, New York Giants, or any other NFL team, then Dallas would receive additional draft picks, but the Washington and New York teams would not receive additional draft picks for hiring that coach.<sup>398</sup> Others complain this incentive should not be needed as teams should already be hiring minorities, but obviously teams have not done so to this point.<sup>399</sup>

RISE's incredible work to fight racism through sports, along with the efforts of the professional leagues, must continue and expand to more areas and more people. These entities' messages, mission, and achievements regarding race, sports, and unity must also become more visible. The United States is making strides to combat racism through sports, but more can and should be done.

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<sup>395</sup> See *Rooney II Says*, *supra* note 26. Despite its detractors, Division I athletic directors in college adopted a best practice version of the original Rooney Rule that encourages universities to interview minority candidates for head football coaching positions. N. Jeremi Duru, *Call in the Feds: Title VI As a Diversifying Force in the Collegiate Head Football Coaching Ranks*, 2 WAKE FOREST J.L. & POL'Y 143, 151 (2012); Duru, *supra* note 385.

<sup>396</sup> See Adam Schefter, *Sources: NFL Diversity Hiring Plan Draws Mixed Feelings Around League*, ESPN (Nov. 15, 2020), [https://www.espn.com/nfl/story/\\_/id/30320664/sources-nfl-diversity-hiring-plan-draws-mixed-feelings-league](https://www.espn.com/nfl/story/_/id/30320664/sources-nfl-diversity-hiring-plan-draws-mixed-feelings-league) [https://perma.cc/Q5ZP-A6S7]; see also Kevin Seifert, *NFL Owners Approve Playoff, Diversity Measures*, ESPN (Nov. 10, 2020), [https://www.espn.com/nfl/story/\\_/id/30292901/nfl-owners-approve-playoff-diversity-measures](https://www.espn.com/nfl/story/_/id/30292901/nfl-owners-approve-playoff-diversity-measures) [https://perma.cc/SU5C-7LXK].

<sup>397</sup> See Schefter, *supra* note 396.

<sup>398</sup> See *id.*

<sup>399</sup> See *id.*

## VI. COMBATTING RACISM THROUGH SPORTS: THE THREE ES AND OPPORTUNITY

This section provides additional, tangible ways to use sports to fight racism. They include the three Es—*education* and *experiences* that occur *early*—along with opportunity.

### A. Education

Education lies at the heart of using sports to combat racism.<sup>400</sup> Education about valuing our differences, the importance of diversity, and the negative impact of racism must be embedded into sports education at an early age and continue throughout high school. The messaging must be constant and consistent.

Mandatory education or training for athletes, parents, and coaches are not uncommon. For example, on the topic of concussions, all fifty states require some type of training on concussions, but the states vary in who must take the training and how often they must do so.<sup>401</sup> In Texas, high school coaches and health care professionals involved in concussion protocols for teams must complete training on concussions every two years.<sup>402</sup> Virginia requires high school athletes, their parents, and coaches take a course on concussions.<sup>403</sup> Florida requires its high school athletes to take a course on concussions as well.<sup>404</sup> A similar approach should be taken with anti-racism education in sports.

The following are proposals to adopt for education on racism and diversity in sports for children:

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<sup>400</sup> See Shahlaei, *supra* note 264, at 324 (providing that the International Convention on the Elimination of All Forms of Racial Discrimination (ICEAFRD) and the Committee on the Elimination of Racial Discrimination promote education and tolerance as means to reduce racism).

<sup>401</sup> See *State Legislation and Policy*, SHAPE AM., <https://www.shapeamerica.org/standards/guidelines/Concussion/state-policy.aspx> [<https://perma.cc/C9ZV-RCQ8>].

<sup>402</sup> See Crystal Conde, *Law Changes Concussion Management*, TEX. MED. (Sept. 2011), <https://www.texmed.org/Template.aspx?id=22265> [<https://perma.cc/Q7CF-VAXU>].

<sup>403</sup> See Andre L. Taylor, *New Virginia Law: Mandatory Concussion Training for Parents, Student-Athletes*, PATCH (last updated Aug. 9, 2011, 5:50 PM), <https://patch.com/virginia/mclean/new-virginia-law-mandatory-concussion-training-for-pa7030be7808> [<https://perma.cc/GM3J-N75W>].

<sup>404</sup> See Laura Godlweski, *FHSAA Mandates Athletes Complete Concussion Course*, ATHLETIC BUS. (July 2015), <https://www.athleticbusiness.com/athlete-safety/florida-prep-athletes-required-to-complete-concussion-course.html> [<https://perma.cc/9HYR-59XN>].

- Required course, which can be virtual, in-person, synchronous or asynchronous, on anti-racism and diversity at every level of sports, both public and private, for every age group starting at four years old through high school;
  - These required courses can be all on-line, particularly for non-school sports leagues, but middle schools and high schools can invite speakers from colleges, the professional leagues, and retired athletes to speak to their schools, or the speakers can appear in pre-recorded videos;
  - Famous athletes and coaches from all of the professional sports leagues in the United States and recognizable college athletes and coaches will participate in the classes virtually or in-person, and famous professional and college athletes and coaches can also promote public service announcements that broadcast daily over television, radio, and social media, and denounce racism while promoting unity and diversity;<sup>405</sup>
  - The course will be applicable to every sport, whether it is a private league or public league, such as Little League Baseball and Softball (four to sixteen years old),<sup>406</sup> Pop Warner Football (five to sixteen years old),<sup>407</sup> YMCA sports (three to fifteen years old);<sup>408</sup> or elementary, middle, or high school leagues;

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<sup>405</sup> See generally FIFA, FIFA Good Practice Guide on Diversity and Anti-Discrimination 48-49, available at [https://resources.fifa.com/mm/document/afsocial/anti-racism/02/70/94/34/goodpracticeguideondiversityandanti-discrimination\\_sept2017\\_neutral.pdf](https://resources.fifa.com/mm/document/afsocial/anti-racism/02/70/94/34/goodpracticeguideondiversityandanti-discrimination_sept2017_neutral.pdf) [<https://perma.cc/XC7X-S2WM>] (advocating for star athletes to promote diversity and anti-racism messages because they are role models that people will listen to and follow); Faith Karimi, *NFL Players Release Video Calling on the League to Condemn Racism and Support Black Players*, CNN (June 5, 2020, 10:42 AM), <https://www.cnn.com/2020/06/05/us/nfl-players-stronger-together-video-trnd/index.html> [<https://perma.cc/8ZUS-UA2C>] (discussing how famous NFL players created a video where they explicitly and unequivocally “condemn[ed] racism and the systemic oppression of black people”).

<sup>406</sup> See *2020 Little League Age Chart for Baseball Division Only*, <https://www.littleleague.org/downloads/baseball-age-chart/> [<https://perma.cc/DE6V-AYTE>] (noting baseball ages); see also *2020 Little League Age Chart for Softball Division Only*, <https://www.littleleague.org/downloads/softball-age-chart/> [<https://perma.cc/SM95-A74Y>] (noting softball ages).

<sup>407</sup> See *About Pop Warner*, POP WARNER LITTLE SCHOLARS, <https://www.popwarner.com/Default.aspx?tabid=1437873> [<https://perma.cc/N57B-YJFT>].

<sup>408</sup> See, e.g., *Sports*, YMCA, <https://www.ymcatriangle.org/programs/sports> [<https://perma.cc/5LKN-SSGK>] (noting ages and various sports in the YMCA, in-



- The course will vary in length according to the age group and attention span, which is typically three (3) to five (5) minutes for every year of a child's life, meaning courses for four-year-olds would be twelve to twenty minutes long;<sup>409</sup>
- The course will include primarily, if not exclusively, famous athletes and coaches delivering the lessons and messages, including how they learned to appreciate the importance of working with people from different races and cultures, and why it is important to learn about others and how to work with others. Professional athletes who changed positively after interacting with teammates of different races or who gained more cultural awareness when they played with people of different races would be ideal speakers;<sup>410</sup>
- Middle school and high school children can also hear from reformed racists who can bring the shock value to these presentations;<sup>411</sup>

cluding "basketball, soccer, flag football, volleyball, baseball, tee-ball, softball, futsal and tennis").

<sup>409</sup> See generally *Attention Deficit/Hyperactivity Disorder (ADHD): How to Help Your Child*, SUMMIT MED. GRP., [https://www.summitmedicalgroup.com/library/pediatric\\_health/pa-hhgbeh\\_attention/](https://www.summitmedicalgroup.com/library/pediatric_health/pa-hhgbeh_attention/) [<https://perma.cc/QR8S-TMGK>] ("A normal attention span is 3 to 5 minutes per year of a child's age. Therefore, a 2-year-old should be able to concentrate on a particular task for at least 6 minutes, and a child entering kindergarten should be able to concentrate for at least 15 minutes.").

<sup>410</sup> See *Drew Brees Stands by Apology over Flag Comments in Response to President Trump*, ESPN (June 5, 2020), [https://www.espn.com/nfl/story/\\_id/29273182/drew-brees-stands-apology-flag-comments-response-president-trump](https://www.espn.com/nfl/story/_id/29273182/drew-brees-stands-apology-flag-comments-response-president-trump) [<https://perma.cc/9M23-4VPH>] (describing how star NFL quarterback Drew Brees apologized for his insensitive remarks that focused on the American flag instead of the issues facing the Black community, and Brees "pledge[d] to be an 'ally' for the black community in the fight for racial equality and social justice"); see also Daryl Bell, *'Brian's Song' is Forever*, UNDEFEATED (Nov. 30, 2016), <https://theundefeated.com/features/brians-song-is-forever/> [<https://perma.cc/69QH-QTLB>] (discussing the classic movie *Brian's Song* depicting the real-life friendship between a Black star football player for the Chicago Bears, Gale Sayers, and his White teammate, Brian Piccolo, as they support each other through Sayers' football injury and Piccolo's terminal cancer during the era of the civil rights movement). Frank Reich, Philadelphia Eagles offensive coordinator, said of *Brian's Song*, "[I learned about having] love for your teammates. Going through something together. Your struggles together. Your triumphs together." Daryl Bell, *'Brian's Song' is Forever*, UNDEFEATED (Nov. 30, 2016), <https://theundefeated.com/features/brians-song-is-forever/> [<https://perma.cc/69QH-QTLB>].

<sup>411</sup> See Nadine Ajaka, *What Does a Reformed Racist Look Like*, ATLANTIC (Feb. 15, 2017), <https://www.theatlantic.com/video/index/516663/what-does-a-reformed-racist-look-like/> [<https://perma.cc/K4T4-V3ZJ>].

- The course should include a brief history of racism in this country, the advantages of recognizing and appreciating the differences in races and cultures, the necessity of learning to form bonds and getting to know teammates of all races when competing with them to accomplish a goal, the value of unity and working together as a team, and the negative consequences when someone is racist;
- The course could also teach skills such as perspective-taking, empathy, recognizing biases, and cultural competence;
- The middle school and high school children should be required to take a short, multiple-choice quiz at the end of the course to demonstrate comprehension of diversity and unity, the negative consequences of racism, and the importance of cultural competency; and
- Courses and presentations for younger children could include animation with athlete voices.

The following is an example of the main points and potential narration of what the course would include for the youngest age group, four-year-olds:

In this great country of the United States of America, laws prevented some people from having basic rights, such as voting or owning land. People were very mean to each other just because someone looked different than them, had a different color of skin, or came from a different culture. The United States saw this was bad and changed the laws so that everyone may be treated the same, regardless of what they looked like or where they came from, but the laws did not change everyone's attitudes about each other.

Sports are where people of all different colors, cultures, and backgrounds come to play and have fun. To win as a team, you must work together with everyone on your team. Everyone on the team has different gifts, such as throwing, catching, running, or hitting, just like everyone looks different. We should appreciate those differences and celebrate them. Today, some people still treat each other differently because of how they look or because they have a different way of life. And when they do treat someone differently, they sometimes tease or make fun of that person who is different. When people are mean to others, they hurt people's feelings, which we don't want to do. We want to play hard, play fair, and treat people the way we want to be treated. And, remember, we always want to say "yes" to unity and "no" to racism.

If a child hears this type of message of anti-racism and diversity in every sport she or he plays every year from age four through nineteen, then that individual has a much better chance of understanding the value of diversity

and learning the evils of racism than someone who does not hear that message.<sup>412</sup> Moreover, people need a daily barrage of one or two simple, straightforward messages, such as “End Racism” or “Say No to Racism,” on television, radio, and social media that features a mix of high-profile and beloved athletes and coaches from the professional leagues and college ranks to ingrain the message in everyone’s head, and this message should be embedded in youth sports.<sup>413</sup>

Dr. Williams, the Senior Director of Curriculum for RISE, which creates, implements, and assesses the efficacy of its educational programs that use sports to combat racism, believes that educational programs at ages four and up would be beneficial to fighting racism.<sup>414</sup> RISE or another entity could modify its existing curriculum to work with pre-kindergarten and elementary school-age children.<sup>415</sup> The RISE curriculum includes its Digital Learning Series that covers (1) racism; (2) sports as a vehicle for change; (3) privilege; (4) leadership; and (5) equity and equality.<sup>416</sup> These interactive lessons could be modified and adopted for consumption by four-to-twelve-

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<sup>412</sup> See generally Vanessa LoBlue, *Why Children Like Repetition and How It Helps Them Learn*, PSYCH. TODAY (July 10, 2019), <https://www.psychologytoday.com/us/blog/the-baby-scientist/201907/why-children-repetition-and-how-it-helps-them-learn> [https://perma.cc/FUE9-SKF8].

<sup>413</sup> For instance, Minnesota University’s football team wore jerseys this past season in a game that replaced their names on the back with the phrase “End Racism.” See Paul Harvey, *Minnesota Unveils ‘End Racism’ Uniforms for Friday Night Contest with Purdue*, SATURDAY TRADITION, <https://saturdaytradition.com/minnesota-football/minnesota-unveils-end-racism-uniforms-for-friday-night-contest-with-purdue/> [https://perma.cc/8FZS-UG8Z]. Similarly, the NFL’s end zones included the messages “End Racism” and “It Takes All of Us.” See Bryant, *supra* note 162. In the NBA bubble, on the other hand, NBA players wore jerseys with a wide variety of messages, including “Black Lives Matter, Say Their Names, Vote, I Can’t Breathe, Justice, Peace, Equality, Freedom, Enough, Power to the People, Justice Now, Say Her Name, Sí Se Puede (Yes We Can), Liberation, See Us, Hear Us, Respect Us, Love Us, Listen, Listen to Us, Stand Up, Ally, Anti-Racist, I Am A Man, Speak Up, How Many More, Group Economics, [and] Education Reform and Mentor.” *Social Justice Messages Each NBA Player is Wearing on His Jersey*, UNDEFEATED (July 31, 2020), <https://theundefeated.com/features/social-justice-messages-each-nba-player-is-wearing-on-his-jersey/> [https://perma.cc/24D6-8JB6]. The root of racial injustice and social inequity issues remains racism. Numerous and varying messages, other than simple ones such as “End Racism” or “Say No to Racism,” can confuse or distract the recipient of the message.

<sup>414</sup> See Dr. Williams Interview, *supra* note 311.

<sup>415</sup> See *id.*

<sup>416</sup> See *RISE Digital Learning Series*, ROSS INITIATIVE IN SPORTS FOR EQUALITY (RISE), <https://risetowin.org/digitallearning/index.html> [https://perma.cc/K28S-6HNW] (last visited May 30, 2020).

year-olds. *Mister Rogers Neighborhood* and *Bill Nye the Science Guy* provide models for programming that can positively affect children's minds and behavior while also explaining complex issues in a digestible and palatable manner for children.<sup>417</sup> The same approach can be used for the proposals set forth in this article. Moreover, RISE's extensive educational resources also include modules on those same topics in its digital series, as well as related concepts of diversity, racial imagery, empathy, and power.<sup>418</sup>

Education could also take the form of multi-week programs that involve playing sports together, learning about topics relating to racism and diversity, and talking about these topics in a safe environment, just as RISE already does with older athletes, but these programs could be geared toward younger children.<sup>419</sup> It might take more facilitators for younger children when they are in groups or break-out sessions during a lesson, but it could be very effective, even for children as young as four.<sup>420</sup> Dr. Williams of RISE asserts that when children as young as four, five, or six are interacting together through playing then they can "see[ ] each other as other humans. And those differences, they're not being denied, but they're not really that important."<sup>421</sup> Young children building relationships through on-court activities can open up "things to happen off the court."<sup>422</sup> The programs could also build skills on how to talk, treat, and understand others, which RISE also already does with older athletes.<sup>423</sup> In general, the work of RISE to combat racism through sports must be applauded and should be expanded.

Also, sports figures should be utilized to drive home the message of anti-racism and diversity to children because children will listen to and fol-

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<sup>417</sup> See generally Shea Tuttle, *Seven Lessons from Mister Rogers That Can Help Americans Be Neighbors Again*, Greater Good Mag. (July 13, 2018), [https://greatergood.berkeley.edu/article/item/seven\\_lessons\\_from\\_mister\\_rogers\\_that\\_can\\_help\\_americans\\_be\\_neighbors\\_again](https://greatergood.berkeley.edu/article/item/seven_lessons_from_mister_rogers_that_can_help_americans_be_neighbors_again) [<https://perma.cc/2E7N-RAGW>]; Barbara Gutierrez, *The Profound Influence of Mr. Rogers*, Univ. of Miami (Nov. 20, 2019), <https://news.miami.edu/stories/2019/11/the-profound-influence-of-mr.-rogers.html> [<https://perma.cc/MV5X-KR8C>]; Victoria Chamberlin, *Kids Ask Bill Nye the Science Guy Their Science Questions*, WAMU (Apr. 28, 2020), <https://wamu.org/story/20/04/28/kids-ask-bill-nye-the-science-guy-their-science-questions/> [<https://perma.cc/QY7R-Q4LD>].

<sup>418</sup> See *Resources*, *supra* note 315.

<sup>419</sup> See Dr. Williams Interview, *supra* note 311.

<sup>420</sup> See *id.*

<sup>421</sup> See *id.*

<sup>422</sup> See *id.*

<sup>423</sup> See, e.g., *id.*; Koenning Interview, *supra* note 325.

low athletes.<sup>424</sup> Athletes are role models, whether they want to be or not, and children (and adults) look up to athletes.<sup>425</sup>

The following are proposals to adopt for education on racism and diversity in sports for parents, coaches, league administrators, and referees, which include the same proposals for children described above, with the following additions or differences:

- Required course, which can be virtual, in-person, synchronous or asynchronous, on anti-racism and diversity at every level of sports, both public and private;
  - These required courses can be all on-line for parents, referees, and administrators; for coaches, they can be on-line and include in-person presentations for middle schools and high schools who invite speakers from college, the professional leagues, and retired athletes to speak to their teams, or the speakers can appear in pre-recorded videos;
  - The course will either be 30 minutes (for parents) or an hour (for coaches, referees, and administrators);
  - The course could also include reformed racists who can bring the shock value to these presentations,<sup>426</sup> along with referees, parents, administrators, or coaches who failed to act in a culturally sensitive manner and suffered the consequences;
  - The adults should be required to take a short, multiple-choice quiz at the end of the course to demonstrate they understand the value of diversity and unity, the negative consequences of racism for the children and society, and the importance of cultural competency; and
  - The parents, coaches, referees, and administrators must also watch the video that the children watch, and parents must watch that same video with the younger children, ages four to twelve, to ensure the consistency of the message the children receive.

If leagues include training on sportsmanship for parents, which implores parents not to yell at players, coaches, and referees during games, then the

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<sup>424</sup> See *FIFA*, *supra* note 405, at 48-49 (advocating for star athletes to promote diversity and anti-racism messages because they are role models that people will listen to and follow).

<sup>425</sup> See *id.* (advocating for star athletes to promote diversity and anti-racism messages because they are role models that people will listen to and follow).

<sup>426</sup> See Ajaka, *supra* note 411.

unity and anti-racism messages can be blended in with the sportsmanship training.<sup>427</sup>

Educating the parents, coaches, league administrators, and referees remains crucial because racist views can be learned from what children see and hear.<sup>428</sup> Educating parents, particularly ones who may have strong biases against minorities (such as a White nationalist), is necessary.<sup>429</sup> If racism can be learned, then it defeats the purpose of teaching children not to be racist in a video or presentation when a parent five minutes later teaches or shows the child how to be racist. That parent must be educated, too.<sup>430</sup> One approach includes showing those parents that they should endorse anti-racism and tolerance because it will help lead to their children's success. For example, education that focuses on the changing workforce and leaders in the U.S. showing that more employees, managers, and officers of companies are Black or other minorities, and the White child must learn to work with her or his co-workers and supervisors who are minorities, may resonate with that White nationalist parent.<sup>431</sup> Sports, in particular, provide an even starker example. If a White child wants to play in the NBA, then he should know that almost 80% of the players in the NBA are Black,<sup>432</sup> which means that child will need to learn to work with Black people. If the White child wants to play in the NFL, that child should know that nearly 70% of the players in the NFL are people of color.<sup>433</sup> The pitch to all parents, including parents with a strong bias against minorities, can be that the White child must treat

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<sup>427</sup> See Jennifer Christopherson & Bradford Strand, *Mandatory Parent Education Programs Can Create Positive Youth Sport Experiences*, 29 SHAPE STRATEGIES: A J. FOR PHYSICAL & SPORTS EDUCATORS 8 (2016). <https://www.shapeamerica.org/publications/journals/strategies/upload/Mandatory-Parent-Education-Programs.pdf> [<https://perma.cc/66DG-Z8XR>].

<sup>428</sup> See Meadows-Fernandez, *supra* note 38 (noting the importance of educating the adults, including parents, about inclusivity).

<sup>429</sup> See Margaret A. Hagerman, *Why White Parents Need to Do More than Talk to Their Kids About Racism*, TIME (Sept. 4, 2018, 10:19 AM), <https://time.com/5362786/talking-racism-with-white-kids-not-enough/> [<https://perma.cc/C82W-4LQA>] (discussing how even well-intentioned parents can unintentionally promote or pass down racism to their children based on the conduct of the parents observed by their children and the parents' interaction with their children).

<sup>430</sup> See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–25 (1980).

<sup>431</sup> See *id.*

<sup>432</sup> See Thomas, *supra* note 227 (noting nearly 80% of the players in the NBA are Black).

<sup>433</sup> See LAPCHICK, *supra* note 26, at 27 (stating that almost 70% of NFL players are people of color).

his teammates with dignity and respect to get the most out of each other if the White child wants to be successful.<sup>434</sup>

Moreover, even if a parent espouses those positive theories in words, the message is lost if the child sees the parent acting in a racist manner.<sup>435</sup> As a result, just as racist acts should be dealt with in a zero-tolerance setting, the parent should avoid racist acts and speech in front of their children to help their child be successful not only in sports, but also in life. White NBA, NFL, MLB, or NHL players, along with reformed racists, could make this pitch to all parents, including parents who are White nationalists. When a White person speaks out about racism and the need for tolerance and understanding, it can have an enormous impact on others.<sup>436</sup>

### B. Experience

Experience plays a vital role in combatting racism by breaking down unseen barriers, implicit biases, and stereotypes.<sup>437</sup> The more meaningful and positive interactions between people of different races, the less likely those people will hold racist views about the other.<sup>438</sup> The following are proposals to adopt for experience regarding racism and diversity in sports for children:

- Hold season kick-off celebrations and season ending celebrations across either leagues or conferences that include teams from every area that competes, allowing children of different races to gather and enjoy each other's company in fun environments;

<sup>434</sup> See Bell, *supra* note 430, at 523-25.

<sup>435</sup> See Margaret Hagerman, *Why White Parents Need to Do More Than Talk to Their Kids About Racism*, TIME (Sept. 4, 2018), <https://time.com/5362786/talking-racism-with-white-kids-not-enough/> [<https://perma.cc/6PMZ-CY5T>].

<sup>436</sup> See Marc J. Spears, *Why Kyle Korver's Words on White Privilege and Racism Matter*, UNDEFEATED (Apr. 9, 2019), <https://theundefeated.com/features/why-jazz-kyle-korver-words-on-white-privilege-and-racism-matter/> [<https://perma.cc/W39S-RSNX>].

<sup>437</sup> See generally Specht, *supra* note 38, at 308, 314 (discussing how sports provide a great vehicle for addressing racism because it allows for interaction between groups of different races, and noting "research suggests that athletic competitions and youth sports programs can be a particularly effective means of creating understanding and trust in post-conflict environments . . . demonstrat[ing] how the foundational aspects of sports have the potential to bring diverse peoples together").

<sup>438</sup> See Benner, et. al, *supra* note 270; see Strand, *supra* note 47, at 765, 782 (advocating for civility, which includes "people working together to tackle complex civic challenges," by Whites and Black people to "forg[e] relationships across racial lines").

- Hold end-of-season all-star games at all levels composed of athletes of different races and a fun, celebratory meal afterwards;
- Allow coaches of varied races to coach players of different races in youth sports;<sup>439</sup>
- Take a pledge during games at all levels, from youth to professional sports, to “say no to racism” or to “end racism,”<sup>440</sup> such as RISE’s “Pledge to End Racism,” which states, “I PLEDGE to treat everyone with respect and dignity. I will not tolerate racism or discrimination of any kind. I will speak out, RISE up and be a Champion of Change”;<sup>441</sup>
- Encourage high school, college, and professional teams extend free tickets to minorities for a game;<sup>442</sup>
- Conduct “play, learn, and talk” programs around the biggest events of the year for each sport, such as the Super Bowl for football (which RISE already does), All-Star Weekend or The Finals for the NBA, and all-star games for all other professional sports, where young children of different races can play sports with each other, learn about concepts relating to racism and diversity, and talk about their experiences in a safe environment.<sup>443</sup>
  - Incorporate drills, such as throwing a football, shooting a free throw, taking a penalty shot, taught by a Black athlete and a White athlete;<sup>444</sup>
  - Host live panel discussions with athletes promoting unity, diversity, and anti-racism;

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<sup>439</sup> See generally Meadows-Fernandez, *supra* note 38; Duru, *supra* note 385 (acknowledging that youth sports tend to be extremely segregated).

<sup>440</sup> UEFA, which stands for the Union of European Football Associations and serves as the European continent’s soccer association, believes that players and coaches are obligated to denounce racism publicly, as shown by its “No to Racism” campaign. See *No to Racism*, UEFA: SOCIAL RESPONSIBILITY, <https://www.uefa.com/insideuefa/social-responsibility/respect/no-to-racism/> [https://perma.cc/T3ZC-KKR8] (last visited May 23, 2020).

<sup>441</sup> See *Take Action*, *supra* note 323.

<sup>442</sup> See Dana Roesiger, #FootballPeople Weeks, FARE NETWORK, <https://farenet.org/campaigns/footballpeople-action-weeks/> [https://perma.cc/L8LC-AQ7C].

<sup>443</sup> RISE already conducts these programs for children in middle school and older. See Dr. Williams Interview, *supra* note 311; see also Koenning Interview, *supra* note 325.

<sup>444</sup> See *Combating Racism and Racial Discrimination in the Field of Sport*, EUR. COMM’N AGAINST RACISM & INTOLERANCE (ECRI) <https://perma.cc/WZ4R-VNA5> (suggesting local “sport-related out-reach activities bringing together people from different backgrounds”).



- Host live educational panels teaching about the positive effects of diversity and inclusion, as well as the negative effects of racism, using interactive teaching and activities;<sup>445</sup>
- Display exhibitions celebrating the local high school, college, or professional team’s diversity and commitment to diversity based on its fans, players, and history;
- Display exhibitions similar to RISE’s Champions of Change, which “takes fans on a multi-sensory journey designed to educate, evoke empathy and inspire action” by teaching fans about how sport and society intersect using an “interactive timeline [and] hearing personal stories of athlete experiences with racism.”<sup>446</sup>
- Conduct multi-week programs that allow pre-kindergarten and elementary age children of different races to play, learn, and talk with each other.<sup>447</sup>

Socializing with other races through sports, competing with athletes of different races, as well as allowing Black coaches to coach predominately White youth teams (and vice versa) are beneficial in youth sports.<sup>448</sup> Professor Duru agrees and states, “[W]ithout question we need to find ways to implement initiatives that push toward racial tolerance and breaking down discriminatory barriers at the earliest levels. . . . [O]nce people come out of the crib, they’re hearing inputs from their parents, the same inputs from society, and starting to build up their world view.”<sup>449</sup> The messages should include tolerance, diversity, inclusion, and love.<sup>450</sup>

Dr. Williams opines that allowing children as young as four to play, learn, and talk with other races will help break down racial barriers and fight racism, which is precisely what RISE programs already do for older children.<sup>451</sup> Scott Koening, the Director of Programs for RISE, agrees, and

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<sup>445</sup> An interactive educational exercise could involve a “counter-stereotypical exemplar” in which, for example, a White person imagines being beaten up by another White person, and a Black person saves them. This type of exercise plays against the stereotype of Black criminality and aggression that will “temporarily form new neural pathways” and will help overcome those negative stereotypes about Black people. Paterson & Edwards, *supra* note 54, at 20-21.

<sup>446</sup> See *What We Do*, *supra* note 305.

<sup>447</sup> The RISE programs could be modified or adapted for younger children. Dr. Williams Interview, *supra* note 311.

<sup>448</sup> See Duru Interview, *supra* note 23.

<sup>449</sup> See *id.*

<sup>450</sup> See *id.*

<sup>451</sup> See Dr. Williams Interview, *supra* note 311.

states that play, along with conversation and activities, are the keys to providing experiences that can truly educate and transform the way people think and act.<sup>452</sup>

The main hurdle, as stated earlier, to increase interaction between races remains the cost of putting different races together in the same place at the same time.<sup>453</sup> Whether the cost involves staging a multi-week program or bringing together children from different area codes, the main issue will be funding.<sup>454</sup> As noted above, though, the cost of not doing so results in the assured perpetuation of racism in this country.<sup>455</sup> Government funding at the federal, state, or local levels, as well as funding from professional, college, and high school sports teams could assist greatly with these efforts.<sup>456</sup> An organization such as RISE, with ties to the wealthiest sports leagues and sports media entities in the United States, might be able to facilitate these events as it has already established itself as a coalition builder.<sup>457</sup>

Rules that prohibit racist behavior and include swift, harsh penalties should also be employed in all sports, including youth sports.<sup>458</sup> For professional sports, a racist incident by a fan should result in a lifetime ban from the stadium in which it occurs.<sup>459</sup> For all other levels of sports, starting from youth through college, a racist incident by a fan should result in a season-long ban.<sup>460</sup> Parents should not be denied access to all of their child's games for the rest of their lives based on one racist incident, but losing the opportunity to watch them for the rest of a season should function as a strong

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<sup>452</sup> See Koenning Interview, *supra* note 325.

<sup>453</sup> See discussion *supra* Part V.B.

<sup>454</sup> See *Racial/Ethnic Discrimination and Well-Being During Adolescence*, *supra* note 270, at 855-83.

<sup>455</sup> See discussion *supra* Part III.B.

<sup>456</sup> See *Title IX and the Rise of Female Athletes in America*, WOMEN'S SPORTS FOUND. (Sept. 2, 2016), <https://www.womenssportsfoundation.org/education/title-ix-and-the-rise-of-female-athletes-in-america/> [<https://perma.cc/L3SC-HBTA>].

<sup>457</sup> See Koenning Interview, *supra* note 325.

<sup>458</sup> For example, the Football Association (FA), England's premiere league for soccer, announced in the fall of 2020 that its players face bans of six to twelve games for discriminatory or racist conduct, while FIFA and UEFA already set a ten-game ban minimum for racist or discriminatory behavior by a player in their competitions. *New FA Guidelines Could See Footballers Face 12-Match Ban for Racism*, ESPN (Aug. 8, 2020), <https://www.espn.com/soccer/english-premier-league/story/4155525/new-fa-guidelines-could-see-footballers-face-12-match-ban-for-racism> [<https://perma.cc/BV79-SCNA>].

<sup>459</sup> See *Reports: Jazz Issue Lifetime Ban to Another Fan*, NBA (Mar. 25, 2019, 1:12 PM), <https://www.nba.com/news/reports-utah-jazz-lifetime-ban-second-fan> [<https://perma.cc/W78H-CSR3>].

<sup>460</sup>

deterrent to racist behavior with a clear message that society condemns such behavior. Moreover, players, coaches, owners, team executives, league administrators, and referees at the professional, college, and high school levels should receive an automatic ban amounting to half of their season if they engage in racist behavior, which can spill into the next season if the season has already progressed past the half-way point. A repeat offender should be banned for an entire season, even if it covers part of one season as well as the next. The third time offender should be banned for life. A consistent, zero-tolerance policy that punishes racist acts must be employed; thus, if an investigation determines an individual committed a racist act, then the punishment must be enforced.<sup>461</sup>

The Rooney Rule, discussed earlier, relies on the education and experience factors to combat racism.<sup>462</sup> In terms of education, initially the Fritz Pollard Alliance (FPA) focused on educating its members through teaching them about the interviewing process, conducting mock interviews, and mentoring.<sup>463</sup> Over the previous two hiring cycles, the FPA came to understand it must also educate the owners on equal opportunity initiatives and the advantages of diversity and inclusion for their teams.<sup>464</sup>

“Our goal is to ensure that these owners recognize not only, in casting a wide net and being broad in your searches and pursuing diversity, not only is that good for society and good for those individuals who are otherwise not being given opportunities, but it’s good for the owners. It’s good for the revenue stream. All the studies that we’ve seen indicate that when you have a broad coalition of individuals making a decision—when you’ve got diversity at the decision-making nodes, you’re going to get better decisions. If owners would embrace this well-established concept, then I think we would, throughout sports, find a great deal more diversity and ultimately more cohesion.”<sup>465</sup>

With regard to experience, the Rooney Rule mandates that a team looking for a head coach must interview minority candidates, and the whole premise is to create meaningful interaction between the White owner and minority coaches.<sup>466</sup> The FPA also wants to institute opportunities for White owners and prospective minority head coaches and general managers to socialize outside of an interview, which will help form those bonds neces-

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<sup>461</sup> See, e.g., *id.*

<sup>462</sup> See Duru Interview, *supra* note 23.

<sup>463</sup> See *id.*

<sup>464</sup> See *id.*

<sup>465</sup> See *id.*

<sup>466</sup> See *id.*

sary to make the hiring of minority candidates more likely.<sup>467</sup> The FPA held a meeting for the last decade, which it hopes to reinstitute, where its members gathered with other NFL coaches, general managers, scouts, and some owners.<sup>468</sup> The FPA and NFL league executives “are recognizing the import of just making sure people know each other.”<sup>469</sup> Placing minorities in leadership positions in the NFL also attacks institutional racism as it redistributes some of the power in the NFL to minorities.<sup>470</sup>

The Rooney Rule inspired the West Coast Conference, a collegiate sports conference, to adopt the Russell Rule, named after Bill Russell, a Black NBA Hall-of-Fame player who also served as a player/coach for the Boston Celtics.<sup>471</sup> The Russell Rule requires universities in that league and the league itself to interview an individual from a “traditionally under-represented community” for any of the following positions that come open: head coach; full-time assistant coach; athletic director; and senior administrator.<sup>472</sup>

The Rooney Rule also demonstrates how changes in sports can bring about changes in society. Entities and companies outside of the NFL have adopted some form of the Rooney Rule including Amazon,<sup>473</sup> tech companies such as Facebook, Xerox, Intel, and Pinterest; Goldman Sachs in the banking arena did as well.<sup>474</sup> The Rooney Rule even expanded to politics and the government.<sup>475</sup> “[B]oth the Democrats in the Senate and the Democrats in the House now have a rule that if you’re looking for a staff person, the Senator or the Congress person has to interview a person of color.”<sup>476</sup>

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<sup>467</sup> See *id.*

<sup>468</sup> See *id.*

<sup>469</sup> See *id.*

<sup>470</sup> See generally Sundiatu Dixon-Fyle et al., *Diversity Wins: How Inclusion Matters*, MCKINSEY (May 19, 2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters#> [<https://perma.cc/U5V8-KVWX>].

<sup>471</sup> See Myron Medcalf, *College Basketball Coaching Groups Endorse WCC’s ‘Russell Rule’ to Diversity Hiring*, ESPN (Aug. 12, 2020), [https://www.espn.com/college-sports/story/\\_/id/29646829/national-coaching-groups-endorse-wcc-russell-rule-diversify-hiring-pools](https://www.espn.com/college-sports/story/_/id/29646829/national-coaching-groups-endorse-wcc-russell-rule-diversify-hiring-pools) [<https://perma.cc/XB9M-4KCX>].

<sup>472</sup> See *id.*

<sup>473</sup> See Hallie Detrick, *Amazon Had Opposed a Requirement to Interview Diverse Board Candidates. Now It’s Embracing the ‘Rooney Rule.’*, FORTUNE (May 15, 2018, 4:47 AM), <https://fortune.com/2018/05/15/amazon-board-diversity-rooney-rule/> [<https://perma.cc/D8B3-SR5U>].

<sup>474</sup> See Duru Interview, *supra* note 23.

<sup>475</sup> See *id.*

<sup>476</sup> See *House Democratic Diversity Initiative*, COMM. ON H. ADMIN. (2017), <https://cha.house.gov/house-democratic-diversity-initiative> [<https://perma.cc/LB7M->

Similarly, the Oregon legislature requires interviewing a person of color in every search for a head coach or athletic director in the state of Oregon.<sup>477</sup> Furthermore, the city of Portland, Oregon requires an interview with a diverse (i.e., minority, female, disabled person) candidate if at all possible when an entity, such as the fire department or the police department, is hiring a bureau chief.<sup>478</sup>

### C. Early

Since children as young as four can start to exhibit racial bias, the education and experience relating to diversity and anti-racism should take place as early in one's life as possible.<sup>479</sup> Shaping children's minds at a young age while parents are a part of the process will help instill and reinforce the powerful and positive messages of unity and inclusion.<sup>480</sup> Internationally, education of the youth through sports has been recognized as a way to combat racism.<sup>481</sup> Thus, the more education and experiences a child can have through sports that encourage diversity and unity, celebrate other races, and reject racism, the better.

RISE provides a framework for fighting racism with sports through education, empowerment, and engagement.<sup>482</sup> RISE should continue its efforts and spread its work to more communities and areas of the country as RISE's capabilities increase. RISE's Board already includes professional sports and college commissioners, as well as sports media entity juggernauts.<sup>483</sup> It should add to its board representatives from Little League Baseball, Pop Warner, the YMCA, public and private school sports organizations

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ZXFU]; *Senate Democratic Diversity Initiative*, SENATE DEMOCRATS (2019), <https://www.democrats.senate.gov/about-senate-dems/diversity-initiative> [<https://perma.cc/9GNP-D9ET>]; Duru Interview, *supra* note 23.

<sup>477</sup> See H.B. 3118, 75th Oregon Legislative Assembly (2009).

<sup>478</sup> See *id.*; see also Duru Interview, *supra* note 23.

<sup>479</sup> See Meadows-Fernandez, *supra* note 38 (stating racial bias can start as early as four years old).

<sup>480</sup> See Hagerman, *supra* note 435.

<sup>481</sup> See Specht, *supra* note 38, at 307–08 (quoting the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance in 2001 stating that international, regional, and national sports organizations should work together “to intensify the fight against racism in sport by, among other things, educating the youth of the world through sport practiced without discrimination of any kind and in the Olympic spirit, which requires human understanding, tolerance, fair play and solidarity”).

<sup>482</sup> See discussion *supra* Part IV.A.

<sup>483</sup> See discussion *supra* Part IV.A.

starting as young as possible, including elementary grade schools, middle schools, and high schools, to expand its efforts to reach younger children.

#### D. Opportunity

Another way to battle racism is to provide opportunities to minorities.<sup>484</sup> Howard Bryant sets up the approach with this sentiment: he does not care who is racist and who is not; the concern is about who is getting hired.<sup>485</sup> “And so we run into this issue of, instead of talking about jobs and who gets hired and pipelines, instead we wring our hands and have these completely fruitless conversations about who’s a racist and who’s not.”<sup>486</sup> He concludes, “And at the end of the day, if I’m not being hired systematically, does it really make a difference who is racist and who is not? I don’t have a job.”<sup>487</sup> Once minorities have more opportunity, then their lives improve and in turn society improves.

Bryant’s arguments coincide with the notion that racism reflects the current White economic, political, and social dominance in society.<sup>488</sup> If Black people are placed into prominent jobs by giving them those opportunities, and then those Black people hire more minorities and some White people, then the power structure will begin to shift. Opportunity starts to change the way society operates and the way people view and treat each other. Instead of viewing Black people simply as bodies meant to “shut up and dribble”, their minds become appreciated, and they are valued for all of the abilities and talents they possess.<sup>489</sup> Thus, minorities get hired and start

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<sup>484</sup> See Bryant Interview, *supra* note 27.

<sup>485</sup> See *id.*

<sup>486</sup> See *id.*

<sup>487</sup> See *id.*

<sup>488</sup> See generally Wilson, *supra* note 63, at 3; Beishline, *supra* note 61, at 9 (citing Marissa Jackson, *Neo-Colonialism, Same Old Racism: A Critical Analysis of the United States’ Shift Toward Colorblindness as a Tool for the Protection of the American Colonial Empire and White Supremacy*, 11 BERKELEY J. AFR.-AM. L. & POL’Y 156, 166 (2009)).

<sup>489</sup> See generally Emily Sullivan, *Laura Ingraham Told LeBron James to Shut Up and Dribble; He Went to the Hoop*, TWO-WAY (Feb. 19, 2018, 5:04 PM), <https://www.npr.org/sections/thetwo-way/2018/02/19/587097707/laura-ingraham-told-lebron-james-to-shutup-and-dribble-he-went-to-the-hoop> [https://perma.cc/NFA9-5T7U] (discussing how a journalist told LeBron James, one of the leading athlete activists in the world who, among other things, started his own school for underprivileged children and worked with former First Lady Michelle Obama to increase voter turnout in the 2020 elections, to “shut up and dribble” and stay out of politics); *LeBron James Responds to Zlatan Ibrahimovic Telling Him to Stay Out of Politics*, NBC NEWS (Feb. 27, 2021, 8:51 AM), <https://www.nbcnews.com/news/sports/>

a different cycle of who is in power and society's view of different races changes.

The history and difficulty of Black people becoming head coaches or managers in the professional sports leagues is exemplified by Major League Baseball.<sup>490</sup> Only former MLB players, most of whom achieved amazing success in their playing careers, have ever been selected to work as managers of MLB teams.<sup>491</sup> And when one considers MLB's four major franchises—the New York Yankees, the Boston Red Sox, the St. Louis Cardinals, and the Los Angeles Dodgers—even though these franchises began as early as 1882 and as late as 1901, only one of those teams has ever hired a Black manager.<sup>492</sup> The Dodgers hired Dave Robertson, their first Black manager, in 2016.<sup>493</sup> “And what does it say to the rest of the league when your premier venerable franchises will not make these types of hires? Or what does it say to the Black people in the industry? You know, it really does tell you a lot of things about your station.”<sup>494</sup>

Bryant, therefore, is a critic of the Rooney Rule that has failed to produce hires of minority candidates consistently.<sup>495</sup> “What's really being said that hiring somebody who doesn't look like you requires this great mountain of morale fortitude. . . What it says this is a really angry racist country.

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lebron-james-responds-zlatan-ibrahimovic-telling-him-stay-out-politics-n1259068 [https://perma.cc/F27J-YEUL] (noting LeBron James' measured response that he will not be silent about social justice issues and instead will continue to “preach about equality, social injustice, racism, systematic voter suppression” when fellow international sports star Zlatan Ibrahimovic told James to stay out of politics).

<sup>490</sup> A former Los Angeles Dodgers executive, Al Campanis, once said when asked about the lack of Black baseball managers, “I truly believe that they may not have some of the necessities to be . . . a field manager, or perhaps a general manager.” Bryant Interview, *supra* note 27. Marge Schott, the former Cincinnati Reds owner, spoke favorably of Hitler and continuously made racial and ethnic slurs, before she was forced out of baseball. A famous sportscaster, “Jimmy the Greek” Snyder, infamously said “Black people were ‘bred to be better athletes because this goes all the way to the Civil War when . . . the slave owner would breed his big woman so that she would have a big black kid.’” Champion, Jr., *supra* note 220.

<sup>491</sup> See Bryant Interview, *supra* note 27.

<sup>492</sup> See *id.*; see generally Rhianon Walker, *The State of the Black Manager in Major League Baseball Would Disgust Jackie Robinson*, UNDEFEATED (Apr. 20, 2018), https://theundefeated.com/features/the-state-of-the-black-manager-in-major-league-baseball-would-disgust-jackie-robinson/ [https://perma.cc/UY27-V4CF].

<sup>493</sup> See Bryant Interview, *supra* note 27; see also *Dave Roberts Becomes 1st Minority Manager in Dodgers' History*, ESPN (Nov. 21, 2015), https://www.espn.com/mlb/story/\_/id/14188989/los-angeles-dodgers-hire-dave-roberts-manager [https://perma.cc/U8BS-UHP6].

<sup>494</sup> See Bryant Interview, *supra* note 27.

<sup>495</sup> See *id.*; see generally Paine, *supra* note 392; *Rooney II Says*, *supra* note 26.

And a really racist institution if you need to summon all the courage in the world to make a simple hire.”<sup>496</sup>

Bryant proposes an educational pipeline that tailors the education and the path to become a head coach or executive in professional sports to help create those opportunities for minority hires.<sup>497</sup> He states that the pipeline should start in high school and continue through college in sports management programs to teach and develop the skill sets necessary to obtain and thrive in those jobs.<sup>498</sup> He asserts that high schools and colleges, likely with the guidance of professional sports leagues, design those sports management programs “to funnel talent to those sports leagues.”<sup>499</sup>

Sports management and coaching pipelines should be developed for minorities as young as high school. Some professional sports leagues already promote their pipelines that exist for professionals, graduate students, and college students.<sup>500</sup> The major professional sports in the United States should work together to create a sports management pipeline that starts in high school.<sup>501</sup> For a pipeline or any efforts to combat racism in sports systematically to work, there must be coordination between the professional leagues, colleges, and high schools, and RISE could help facilitate those efforts.

## VII. COUNTER-ARGUMENTS

Some of the arguments against the proposals, such as the high cost of bringing different teams together across a city and the issue of parents who may exhibit or pass down racist ideas to their children, have been addressed previously in this article (e.g., the latter issue requires education for those parents). Other counter-arguments to the proposals are addressed below.

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<sup>496</sup> See Bryant Interview, *supra* note 23.

<sup>497</sup> See *id.*

<sup>498</sup> See *id.*

<sup>499</sup> See *id.*

<sup>500</sup> See *MLB Diversity Pipeline Program*, MLB, <https://www.mlb.com/diversity-and-inclusion/pipeline-program> [<https://perma.cc/MJ87-9H9C>] (last visited June 1, 2020); *NASCAR 2020 Diversity Internship Program*, NASCAR HOME TRACKS, <https://hometracks.nascar.com/drive-for-diversity/nascar-diversity-internship-program/> [<https://perma.cc/RM9S-3WP9>] (last visited June 1, 2020).

<sup>501</sup> See Mechelle Voepel, ‘It’s Very Important We Stay Together’: WNBA, NBA Figures Promote Strengthened Bond, ESPN (Aug. 28, 2020), [https://www.espn.com/wnba/story/\\_/id/29762456/wnba-nba-figures-promote-strengthened-bond](https://www.espn.com/wnba/story/_/id/29762456/wnba-nba-figures-promote-strengthened-bond) [<https://perma.cc/3GJ2-XS7Q>] (discussing how the NBA and WNBA seek unity and support from each other in the fight for social and racial justice).



A. *The Proposals Fail to Overcome or Address Each Type of Racism*

One may argue that the proposals in this article may address or attack one type or form of racism, but not all. Recall from Part I the different or major types of racism, which include prejudice and overt racial bias, implicit or unconscious racial bias, and institutional racism and White supremacy. Thus, the counter-argument is that providing opportunities for children of different races to interact together in a meaningful way through sports may help address prejudice and overt racial bias, along with implicit racial bias, but it fails to overcome institutional racism, which requires a redistribution of power and wealth. Likewise, educating someone about the history of racism, sharing stories about racism faced by minorities, and teaching cultural competence via sports may help prevent prejudice and implicit racial bias, but again does little against institutional racism. This argument possesses merit but is short-sighted.

Providing opportunities for minorities in positions of power and leadership in sports would most quickly lead to a redistribution of power and wealth where minorities possess more of both, but to obtain and sustain long-term changes adverse to institutional racism, Whites in power must understand the following: how racism is embedded in society; their own implicit biases; the experiences and perspective of minorities; how they can better understand and communicate with minorities (cultural competence); and the value of diversity and inclusivity. The proposals in this article each chip away at some type(s) or form(s) of racism, and even though a proposal may not fully eradicate every type or form of racism, it can attack one or more forms immediately and may have an effect on another type of racism in the long run.

B. *Some People Will Not Change*

One may argue that no matter how much education some are given they will still be racists. This argument falls in line with one of Critical Race Theory's tenets, which is that racism is permanent.<sup>502</sup> Some people, particularly if they are older, may refuse to change their behavior or views despite what they are taught about the negative consequences of racism.<sup>503</sup> I

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<sup>502</sup> See Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071, 1106 (2017).

<sup>503</sup> See Lindsay Dodgson, *People Can Seem More Racist as They Get Older, But It's Not Simply a Case of 'Being from a Different Time'*, BUS. INSIDER (July 4, 2018), <https://www.businessinsider.com/why-are-older-people-racist-2018-7> [https://perma.cc/JL8U-5SMU].

cannot fully disagree with this proposition, as one set of my own grandparents was racist. I am of mixed race (Black and Polish), and my White maternal grandparents refused to speak to my brother and me before they passed because they were racist. Nevertheless, the counter to this argument that some people will not change is that some people might.<sup>504</sup> Simply because there will be people who resist changing their views or adopting different behavior does not mean efforts to reach others who may be receptive to the messages of unity and anti-racism should cease.

*C. Forcing People to Interact with Each Other Will Create Resentment or Lack of Excellence*

If different races are forced to interact with each other, via community sports events or gatherings, then that forced integration may cause resentment.<sup>505</sup> For example, if a White community must spend additional monies to create opportunities for interaction between the White and Black athletes, and the Black teams have little or no money they can contribute, then the White teams may be upset. Also, if a league or organization decides that a Black coach will go to a White team to coach on the other side of town, the league will likely send one of its better coaches because it wants to give the participants the best experience and interaction possible, then the Black team that the coach would have been a part of loses an excellent coach, making the experience worse for the Black team. Moreover, if that Black coach takes her or his child to the White team, then the Black child may not play as well given the pressure of playing on a potentially non-welcoming team. These were the same issues that arose in school desegregation as the brightest Black students attended the White schools, and some Black students failed to perform as well as they could because of the pressure of being one of the few new Black students at the school.<sup>506</sup> Meanwhile, since the top

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<sup>504</sup> See, e.g., Ajaka, *supra* note 411; ESPN, *supra* note 410 (discussing how star NFL quarterback Drew Brees “pledge[d] to be an ‘ally’ for the black community in the fight for racial equality and social justice” after receiving criticism for his insensitive remarks that failed to acknowledge the plight of the Black community).

<sup>505</sup> See Reid, *supra* note 388 (discussing how the Rooney Rule is supposed to provide opportunities for minority coaches to earn head coaching jobs by requiring interviews of minorities, but these “minority interviews” are sometimes sham interviews that are done only to comply with the rule).

<sup>506</sup> See generally Christine H. Rossell, *An Analysis of the Court Decisions in Sheff v. O’Neill and Possible Remedies for Racial Isolation*, 29 CONN. L. REV. 1187, 1232 n.88 (1997) (noting studies where Black students were harmed based on desegregation, including detriment to their academic achievement); Mark A. Godsey, *Educational Inequalities, the Myth of Meritocracy, and the Silencing of Minority Voices: The Need for*

Black students left the Black schools, those Black schools became less talented.<sup>507</sup>

The response to these arguments is two-fold. First, a major issue of desegregation was sending Black students to schools without Black teachers and administrators.<sup>508</sup> Here, the Black athlete would play on a team where the child's own parent of the same race would coach, helping to make sure the minority athlete would be treated fairly and given equal opportunities. As a result, the Black athlete would have a much better chance of excelling than did Black students who attended White schools as a part of school desegregation. Second, the Black team would be gaining a presumptively excellent White coach and White player, which would not only allow the Black team to succeed, but it would also foster positive interaction amongst the races, which is a key to overcoming implicit bias and stereotypes.<sup>509</sup> The meaningful and shared experiences of the players and coaches of different races on each team would potentially dispel any initial resentment felt by the White teams (e.g. because of increased costs to facilitate the interaction) and the Black teams before they exchanged coaches and players. The good outweighs the costs, and the risk is worth it.

### VIII. CONCLUSION

Racism remains a deplorable stain on our country, and it is evident throughout society, including in sports.<sup>510</sup> Nevertheless, sports, which has been called a “great equalizer that can build bridges, transcend borders and cultures, and render even the fiercest conflicts temporarily irrelevant,” can

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*Diversity on America's Law Reviews*, 12 HARV. BLACKLETTER L.J. 59, 62, 83 n. 106 (1995) (recounting studies that show the negative effects of desegregation on the “token” Black children's self-esteem).

<sup>507</sup> See Thomas Sowell, *One of the Best Schools for Black Students Was Ruined by Good Intentions*, NAT'L REV. (Oct. 5, 2016), <https://www.nationalreview.com/2016/10/dunbar-high-schools-integration-ruined-exceptional-black-school/> [<https://perma.cc/7EXX-JM4N>] (discussing how an elite Black high school that produced the first Black judge and the first Black general and boasted graduates of Harvard, Yale, and Dartmouth, among others, lost its most talented students after desegregation and “became a typical ghetto school”).

<sup>508</sup> See Arval A. Morris, *Whither the Neighborhood School?—Comments on Washington v. Seattle School District and Crawford v. Board of Education*, 6 ED. LAW REP. 429, 433–34 (1983).

<sup>509</sup> See Duru Interview, *supra* note 23 (highlighting NFL coach Bruce Arians as an example of a White coach who embraces diversity and communicates well with Black players and, not coincidentally, whose best friend from his childhood is Black).

<sup>510</sup> See discussion *supra* Part II.

help fight racism in this country.<sup>511</sup> Before we attempt to change others, though, we must first examine ourselves.<sup>512</sup> As Nelson Mandela beautifully stated, “One of the things I learned when I was negotiating was that until I changed myself, I could not change others.”<sup>513</sup>

When examining the existing landscape regarding using sports to fight against racism, RISE and professional sports leagues are off to a great start, but more can and should be done. In particular, youth sports should be utilized to help educate young athletes, parents, coaches, administrators, and referees about the values of unity and diversity, as well as the negative consequences of racism. Any education must acknowledge and address racism directly and explicitly or else this country will continue to tip-toe around and avoid the topic of racism, which comes at a steep price. Any efforts to make lasting social change must unequivocally include constant discussion of racism and how it continues to impact the thoughts, views, and behavior of people in this country. Otherwise, sports will only address the symptoms, not the disease. Experiences through sports that involve meaningful interaction between races can break down barriers, including implicit bias and stereotypes.<sup>514</sup> Measures to combat racism via sports should take place as early in one’s life as possible because children as young as four years old can develop racial biases. Furthermore, opportunities for minorities in leadership positions in sports can also help subvert racism.

One of the messages in NFL endzones during the 2020 season regarding the efforts to end racism states, “It Takes All of Us,” and that includes lawyers.<sup>515</sup> As demonstrated throughout this article, lawyers and the frameworks they build play critical roles in the fight against racism, including via sports. From the passing and prosecution of the Civil Rights Act, Fair Housing Act, and Voting Rights Act of 1965 to the Rooney Rule, lawyers actively sought and achieved change.<sup>516</sup> For example, Johnnie

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<sup>511</sup> See Richard Attias, *Sport: Bridging the Gender Gap*, HUFFPOST (Aug. 28, 2012), [https://www.huffpost.com/entry/sport-bridging-the-gender\\_b\\_1836883](https://www.huffpost.com/entry/sport-bridging-the-gender_b_1836883) [<https://perma.cc/VK5V-HLAE>].

<sup>512</sup> Vaishnavi Vaidyanathan, *Nelson Mandela Death Anniversary: 10 Powerful Quotes by the Civil Rights Leader*, INT’L BUS. TIMES (Dec. 5, 2020, 6:50 AM), <https://www.ibtimes.com/nelson-mandela-death-anniversary-10-powerful-quotes-civil-rights-leader-3094683> [<https://perma.cc/99XC-M9D8>].

<sup>513</sup> Id.

<sup>514</sup> See *supra* note 271 and accompanying text.

<sup>515</sup> See Bryant, *supra* note 162.

<sup>516</sup> See generally *Creation of the Committee*, LAWS’ COMM. C.R. UNDER L., <https://lawyerscommittee.org/history/> [<https://perma.cc/YW5B-APLA>] (showcasing the work of the Lawyers’ Committee for Civil Rights, including collaborating with the Legal Defense Fund and the LCDC to bring suit in federal court challenging the

Cochran and Cyrus Mehri, the two individuals who commissioned a study to determine whether racism and discriminatory conduct existed in the hiring and firing of Black NFL head coaches, both worked as civil rights attorneys.<sup>517</sup> After spotting the issue of racism and discriminatory practices in the NFL and obtaining the findings from the study they commissioned—namely that Black NFL head coaches typically outperform White NFL head coaches, Black coaches face barriers to becoming head coaches in the NFL that White coaches do not, and Black head coaches suffered termination when lower performing White coaches did not in similar circumstances—Cochran and Mehri chose to cooperate with the NFL to seek changes rather than sue the NFL.<sup>518</sup> The persuasion and advocacy of those two lawyers led to the NFL adopting their policy recommendation that sought tangible change, which has influenced other sports leagues and influential entities outside of sports.<sup>519</sup>

Lawyers also serve as leaders of numerous industries, including the sports industry. Take for example Adam Silver, the commissioner of the NBA who embraced and helped lead the charge in fighting racial injustice alongside the players.<sup>520</sup> Three other lawyers also work (or worked) as current or former sports commissioners, Paul Tagliabue (former NFL commissioner),<sup>521</sup> Gary Bettman (NHL commissioner),<sup>522</sup> and Robert Manfred, Jr.

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constitutionality of parade ordinances following the massive arrests in Jackson of demonstrators protesting restrictive voting bills, and noting specifically how the committee urged the passage of the Civil Rights Act of 1964 and Voting Rights Act of 1965); *Fair Housing and Community Development Project*, LAWYERS' COMM. C.R. UNDER L., <https://lawyerscommittee.org/project/fair-housing-and-community-development-project/> [<https://perma.cc/S6T4-93B5>] (detailing the Committee's current work in fighting discrimination in housing through the Fair Housing Act); *see generally* Duru, *supra* note 329.

<sup>517</sup> *See* Duru, *supra* note 377, at 186.

<sup>518</sup> *See id.* at 186–88.

<sup>519</sup> *See id.* at 188–89; *see also* Part V of this Article. Moreover, the terminology and understanding of racism would not be possible without the work of lawyers and law professors, such as Charles Lawrence, whose groundbreaking work on discrimination and bias is cited in Part I of the article. This work must continue.

<sup>520</sup> *See* Lapchick, *supra* note 359.

<sup>521</sup> *See Profile of Paul John Tagliabue*, SPORTS ENCYCLOPEDIA, <https://sportsecyclopedia.com/nfl/comish/tagliabue.html> [<https://perma.cc/5SY7-T4AC>] (giving an overview Tagliabue's life and time in the NFL).

<sup>522</sup> *See Profile of Gary Bettman*, SPORTS ENCYCLOPEDIA, <https://sportsecyclopedia.com/nhl/comish/bettman.html> [<https://perma.cc/KKY9-QN9D>] (discussing Bettman's work as an attorney and as NHL Commissioner).

(MLB commissioner),<sup>523</sup> and each serves alongside Adam Silver as a member of the RISE Board of Directors.<sup>524</sup> With further regard to RISE, the entity created to combat racism through sports (discussed at length in Part IV of this article), its founder and major financial contributor is Miami Dolphins owner Stephen Ross, who is also a lawyer.

Lawyers are trained to spot issues, analyze the issues in light of the applicable rules and facts, deliver a variety of well-thought-out solutions to clients, and then execute the client's wishes through skillful advocacy. Lawyers in every industry, including sports, must continue to create rules and policies that enhance diversity and promote inclusivity. Lawyers can insert themselves into the situation as Cochran and Mehri did, or they can create the change from within if they are already a part of organizations that can institute the proposals set forth in this article. Lawyers possess unique skills that are critical to meaningful institutional change.<sup>525</sup> Lawyers, for example, used "vision, courage, intellectual heft and hard work" to "conceive[ ], develop[ ] and execute[ ] the plan to dismantle 'separate but equal' in American life" culminating in the landmark decision of *Brown v. Board of Education* that sought lasting institutional reform.<sup>526</sup> Lawyers must denounce racism in all of its forms. And they must serve as passionate and persuasive advocates for changes and reforms in sports that combat racism. Indeed, everyone involved with sports should consider the measures discussed in this article if they truly want to take a shot at fighting racism.

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<sup>523</sup> See *Profile of Robert D. Manfred Jr.*, SPORTS ENCYCLOPEDIA, <https://sportscyclopedia.com/mlb/comish/manfred.html> [<https://perma.cc/3G7C-ZEYC>] (detailing Manfred's path to becoming MLB Commissioner).

<sup>524</sup> See *Board of Directors*, RISE, <https://risetowin.org/who-we-are/index.html#board-of-directors> [<https://perma.cc/3HHM-953S>] (listing the members of the board of directors for RISE).

<sup>525</sup> See generally *Meet the Legal Minds Behind Brown v. Board of Education*, NAACP LDF, <https://www.naacpldf.org/ldf-celebrates-60th-anniversary-brown-v-board-education/meet-legal-minds-behind-brown-v-board-education/> [<https://perma.cc/ES6G-ATPQ>].

<sup>526</sup> See *id.*

## A Defense of Public Financing in a Time of Economic Hardship, Social Unrest, and Athlete Advocacy

Ryan Gribbin-Burket\*

### TABLE OF CONTENTS

INTRODUCTION .....	321
I. WHY IT MATTERS .....	322
II. SIZE AND SCOPE OF STADIUM DEVELOPMENT .....	324
III. ECONOMICS OF STADIUM DEVELOPMENT .....	328
A. <i>Public Financing Explained</i> .....	328
B. <i>Economic Effectiveness of Public Financing</i> .....	332
C. <i>Improving Economic Effectiveness of Public Assistance Going Forward</i> .....	336
IV. NON-ECONOMIC VALUE ADDED .....	339
A. <i>Evaluating and Incorporating Public Sentiment</i> .....	339
B. <i>Athletes and Athletics as a Local Force for Good</i> .....	343
C. <i>Greater Social Impact</i> .....	346
CONCLUSION .....	351

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## ABSTRACT

This article offers a critical look at the ever-expanding area of public financing for sports stadium development as a means of economic and cultural development in the United States. Public financing can take many forms, such as tax breaks, municipal bonds, or cash contributions; the term is used expansively to encompass these forms of assistance as well as others that result in some effect on tax revenues and expenditures. This article evaluates the merits of public financing provided to aid in stadium construction in an effort to recruit or retain a sports franchise. It discusses the issue's importance, scope, and merits based on both economic and non-economic factors. Overall, the article articulates a defense of the continued public financing of sports stadiums as a means of community development both economically and culturally, while acknowledging the need of local state governments to do so more responsibly.



## INTRODUCTION

This article proposes a two-prong framework which politicians, policy-makers, and academics should utilize in assessing both the viability and the benefits of public financing. First, one should consider whether there is a deal to be had with a private, for-profit enterprise that allows for a reasonable return on investment to justify this use of taxpayer dollars. Second, one should evaluate whether this financing produces a certain amount of cultural value to the community independent of whether an investment is a private, for-profit enterprise and independent of return on investment. Evaluating the cultural value added, regardless of other independent considerations, is consistent with the way in which other public works are conceptualized, such as museums.

Part I gives a brief overview of the ongoing importance of the public financing debate, provides examples of the potential financial and legal consequences an area may face when considering public financing, and connects those consequences to the effects they have on individuals in a community.

Part II looks to establish the economic might of the American sports industry and illustrate that the debate over public financing is likely to increase, especially given the short-term economic impact of the coronavirus. With the increasing value of sports franchises, television deals, and national and international fan bases, teams and leagues will likely only amplify the pressure on governments to make competitive public financing plans to keep or lure away a team. The pandemic may only exacerbate this trend as teams face large short-term cash crunches, while simultaneously expecting lucrative medium and long-term television and endorsement deals. They may look to public financing to bridge the gap.

Part III discusses the history of public financing for stadium development, concluding that as a purely economic matter it has, more often than not, been a bad investment. While sports stadiums do create some economic activity, the independent consensus is that sports stadiums have been an inefficient return on investment. This section presents both the prospective economic arguments used in favor of public financing as well as contemporary and retrospective economic analysis as to its actual economic impact. Furthermore, this section looks to recognize past shortcomings and formulate solutions. Given the reality of increased sports expansion and relocation, combined with increased financial uncertainty wrought by the pandemic, it is important to evaluate past forms of public financing for stadium development and the resulting economic consequences. Understanding what previous public financing deals have done well or poorly can illuminate a path

forward for better deals in the future. Lastly, this part will examine an emerging new approach to public financing and its early results.

Finally, Part IV looks at a myriad of non-economic justifications for public financing. Given the difficulty in quantifying such factors and their subjective nature, they are evaluated as policy considerations in conjunction with economic outcomes. This includes looking at the popularity of public financing of for-profit companies generally; potential community value added, similar to a museum or art exhibit; and potential community consequences of failures to recruit or retain a sports franchise. In particular, this part will highlight recent social and cultural contributions of sports teams, in areas such as voting and racial justice, that would have been impossible without stadium development and highly improbable without a public partnership. The result is that policymakers supporting such subsidies have done so either as advocates for economic gain, the public interest, or both and have generally helped their communities by using public financing as an investment.

## I. WHY IT MATTERS

Before addressing what public financing of stadiums is and whether it should continue, a brief discussion on how it affects people and why it matters is necessary. The first reason is legal and economical. Public financing of stadiums can tie a city or state to a team for decades<sup>1</sup> and tie them to debt for decades as well.<sup>2</sup> The second reason is personal. Many Americans simply just love sports, to a near irrational level.<sup>3</sup>

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<sup>1</sup> See John Breech, *Raiders Get Lease Done in Vegas, New Stadium Just Needs to Clear One More Hurdle*, CBS SPORTS (May 18, 2017, 6:39 PM), <https://www.cbsports.com/nfl/news/raiders-get-lease-done-in-vegas-new-stadium-just-needs-to-clear-one-more-hurdle/> [<https://perma.cc/ZKS2-QZMN>] (stating the Raiders received a 30-year lease term, which is longer than any previous amount of time the Raiders have spent in one city and highlighting options to renew which could extend to a maximum of 50 years).

<sup>2</sup> See Richard N. Velotta, *All Bonds for Las Vegas Raiders Stadium Sold in 90 Minutes*, LAS VEGAS REVIEW-JOURNAL (Apr. 11, 2018, 5:58 PM), <https://www.reviewjournal.com/business/stadium/all-bonds-for-las-vegas-raiders-stadium-sold-in-90-minutes/> [<https://perma.cc/UY7M-FUK5>] (noting the bonds used to help publicly finance had a 30-year maturation period).

<sup>3</sup> See generally Christine Emba, *Why Do We Care About Sports So Much?*, WASH. POST (Mar. 14, 2016, 7:27 AM), <https://www.washingtonpost.com/news/in-theory/wp/2016/03/14/why-do-we-care-about-sports-so-much/> [<https://perma.cc/A5XW-HZMC>] (scrutinizing the personal and cultural connection people feel to their sports' teams).

Ideally a team will never want to leave a city, and debts can and will always be paid by the responsible party. However, disputes can and do arise between localities and their sports teams.<sup>4</sup> These disputes are more than just technical matters, they are significant legal controversies with consequences worth hundreds of millions of dollars.<sup>5</sup> If not done properly, a public financing deal leaves governments not only losing money while a team remains local, but also facing massive obligations if a team leaves as well.<sup>6</sup> In most cases public financing may not be the cause of financial hardship, but the legal obligations appear quite onerous when, in a time of otherwise austerity, people realize just how inescapable they actually are.<sup>7</sup> In some instances, the public financing deal is the direct cause of unseemly financial consequences.<sup>8</sup>

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<sup>4</sup> See Dave Vest, *Coyotes Taking Legal Action Against Glendale for Ending Lease Agreement*, NHL.COM (June 11, 2015), <https://www.nhl.com/coyotes/news/coyotes-taking-legal-action-against-glendale-for-ending-lease-agreement/c-770561> [<https://perma.cc/T3RY-64R7>] (seeking \$200 million in damages when the city of Glendale voted to cancel its lease with the Arizona Coyotes); Dave Simpson, *Golden State Warriors Must Pay Coliseum Debt Despite Move*, LAW360 (Aug. 18, 2020, 10:19 PM), <https://www-law360-com.eresources.law.harvard.edu/articles/1302444/golden-state-warriors-must-pay-coliseum-debt-despite-move>.

<sup>5</sup> See Simpson, *supra* note 4 (asserting the remaining debt payments of \$140 million will be paid by the taxpayer if the Warriors are not compelled to pay); see also Helen Christophi, *Oakland Files Federal Lawsuit Against NFL, Raiders*, COURTHOUSE NEWS SERVICES, (Dec. 11, 2018), <https://www.courthousenews.com/oakland-files-federal-lawsuit-against-nfl-raiders/> [<https://perma.cc/4R98-9RFX>] (stating the city of Oakland was seeking treble damages over an “illegal” move to Las Vegas and noting the NFL received \$370 million in relocation fees for the move).

<sup>6</sup> See Robin Respaut, *With NFL Rams Gone, St. Louis Still Stuck with Stadium Debt*, REUTERS, (Feb. 5, 2016, 5:29 AM), <https://www.reuters.com/article/us-sports-nfl-stadiums-insight/with-nfl-rams-gone-st-louis-still-stuck-with-stadium-debt-idUSKCN0VC0EP> [<https://perma.cc/QY9Y-GCB8>] (detailing an uncommon maintenance clause that allowed the Rams to leave early and leave the county, city, and state facing millions in debt payments with no revenue to help offset costs).

<sup>7</sup> See generally Darrell Preston & Aaron Kuriloff, *Oakland Pays \$14 Million for NFL Raiders as Cops Fired*, BLOOMBERG (Jan. 28, 2013, 11:11 AM), <https://www.bloomberg.com/news/articles/2012-12-20/oakland-pays-17-million-for-nfl-raiders-as-cops-get-cut> [<https://perma.cc/U292-R96N>]; David Sirota, *Detroit, Other Cash-Strapped US Cities, States Slashing Pension Benefits While Subsidizing Professional Sports Stadiums*, IBTIMES (Jul. 22, 2014 1:09 PM), <https://www.ibtimes.com/detroit-other-cash-strapped-us-cities-states-slashing-pension-benefits-while-1635660> [<https://perma.cc/4B8H-ZUGF>].

<sup>8</sup> See Barry Petchesky, *Glendale May Sell City Hall to Pay for the Coyotes*, DEADSPIN (Jun. 25, 2013 3:21 PM), <https://deadspin.com/glendale-may-sell-city-hall-to-pay-for-the-coyotes-575360615> [<https://perma.cc/PE4T-KKRQ>].

These real-world consequences take the discussion of public financing from academic debate over economic theory to practical policy questions. The first question most concern themselves with is typically one of taxes. To maintain the tax-exempt status of their municipal bonds, governments often look to publicly acceptable tax increases.<sup>9</sup> Additionally, at least one local government has attempted to adopt an ordinance to ensure public support for public financing, which has resulted in legal battles.<sup>10</sup> These initiatives by local governments reflect an increasing awareness of both the impact on and importance to the public of public financing for sports stadiums.

## II. SIZE AND SCOPE OF STADIUM DEVELOPMENT

In normal times, the American sports industry is almost an economy unto itself. In recent years, the collective annual revenue of the NFL, MLB, NBA, NHL, and NCAA has totaled approximately thirty-nine billion dollars.<sup>11</sup> These five organizations are not the only major sports organizations,

<sup>9</sup> See Skip Sauer, *Cowboys Stadium Financing*, SPORTS ECONOMIST (Aug. 29, 2019) <https://thesportseconomist.com/cowboys-stadium-financing/> [https://perma.cc/CR7G-NU8F] (detailing that the public share of bond obligations is paid through a sales-tax increase, hotel-motel tax increase, and car rental tax increase); Richard N. Velotta, *Revenue from Las Vegas Room Taxes Surges in January*, LAS VEGAS REV.-J. (Mar. 19, 2018, 12:12 PM), <https://www.reviewjournal.com/business/tourism/revenue-from-las-vegas-room-taxes-surges-in-january/> [https://perma.cc/DR33-3D4C].

<sup>10</sup> See *Construction of St. Louis Stadium Will Not Need Vote to Use City Tax Dollars*, SPORTS ILLUSTRATED (Aug. 3, 2015), <https://www.si.com/nfl/2015/08/03/st-louis-rams-new-stadium-plan-construction-city-tax-dollars> [https://perma.cc/7QL5-9LMB] (invalidating city ordinance requiring voter approval of public subsidies for stadium financing).

<sup>11</sup> This represents cumulative annual revenue across 2018 and 2019 based on each organization's most recently available data at the time of first writing, to show, by way of example, the economic might of organized sports in America. See generally Maury Brown, *MLB Sees Record Revenue of \$10.3 Billion for 2018*, FORBES (Jan 7, 2019 3:31 PM), <https://www.forbes.com/sites/maurybrown/2019/01/07/mlb-sees-record-revenues-of-10-3-billion-for-2018/#7c6936f65bea> [https://perma.cc/B63P-U2FV]; Kurt Badenhausen & Mike Ozanian, *NBA Team Values 2019: Knicks on Top at \$4 billion*, FORBES (Feb. 6, 2019, 9:00 AM), <https://www.forbes.com/sites/kurtbadenhausen/2019/02/06/nba-team-values-2019-knicks-on-top-at-4-billion/#47e6f0f9e667> [https://perma.cc/8J3Z-HWBL] (annual revenue of NBA approximately \$8 billion); Scott Soshnick & Eben Novy-Williams, *The NFL Nears \$25 Billion Revenue Goal Ahead of Super Bowl*, CHICAGO TRIBUNE (Jan. 28, 2019, 8:40 AM), <https://www.chicagotribune.com/sports/ct-spt-nfl-revenue-super-bowl-20190128-story.html> [https://perma.cc/H627-F3WY]; Dan Rosen, *NHL Revenues, Salary Cap Projected to Rise*, NHL (Dec. 8, 2017), <https://www.nhl.com/news/nhl-revenues-salary-cap-projected-to-rise-in-2018-19/c-293815570> [https://perma.cc/

but they represent five of the largest and most recognizable sports organizations in the country. World Bank data indicates that this collective annual revenue represents economic output greater than that of over ninety countries.<sup>12</sup> Moreover, while these organizations are the biggest sports organizations, they are by no means the only ones. Other professional football leagues, baseball leagues, and hockey leagues exist,<sup>13</sup> as well as professional leagues of other sports such as golf, soccer, and tennis, which generate billions of dollars.<sup>14</sup> Simply put, the economic interests of professional sports are quite significant, and as a result so are the demands for stadiums and public financing.

A necessary consequence of the major economic might of sports in America is the constant demand for stadium and arena construction. This demand is demonstrated by the explosion of stadium and arena development in America in recent decades.<sup>15</sup> The NFL recently crystallized this trend

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BJ62-YA7D]; Scooby Axson, *NCAA Reports \$1.1 Billion in Revenues*, SPORTS ILLUSTRATED (Mar. 7, 2018), <https://www.si.com/college-basketball/2018/03/07/ncaa-1-billion-revenue> [https://perma.cc/J4UR-T6WC] (annual revenue of NCAA sports over \$1 billion).

<sup>12</sup> See WORLD BANK, [https://data.worldbank.org/indicator/NY.GDP.MKTP.KD?most\\_recent\\_value\\_desc=false&view=map](https://data.worldbank.org/indicator/NY.GDP.MKTP.KD?most_recent_value_desc=false&view=map) [https://perma.cc/BC5J-V6TT] (last visited Dec. 23, 2019).

<sup>13</sup> This includes the American Arena League (AAL) [https://en.wikipedia.org/wiki/American\\_Arena\\_League](https://en.wikipedia.org/wiki/American_Arena_League) [https://perma.cc/WLJ6-5MQS], Indoor Football League (IFL) [https://en.wikipedia.org/wiki/Indoor\\_Football\\_League](https://en.wikipedia.org/wiki/Indoor_Football_League) [https://perma.cc/4D3T-XDAV], six major independent baseball leagues (comprising 53 teams) <https://tft.fangraphs.com/independent-league-to-affiliated-baseball-who-makes-the-move/> [https://perma.cc/63T5-S37U], and the American Hockey League (AHL) [https://en.wikipedia.org/wiki/American\\_Hockey\\_League](https://en.wikipedia.org/wiki/American_Hockey_League) [https://perma.cc/7CEU-XWQM].

<sup>14</sup> The PGA TOUR alone generates \$1.28 billion. *PGA Tour*, NAT'L GOLF FOUND. <https://www.thengfq.com/company/pga-tour> [https://perma.cc/9CBZ-QY4B]. Major League Soccer (MLS) is becoming an increasingly valuable sports organization. Chris Smith, *Major League Soccer's Most Valuable Teams 2019: Atlanta Stays on Top as Expansion Fees, Sale Prices Surge*, FORBES (Nov. 4, 2019, 9:40 AM), <https://www.forbes.com/sites/chris-smith/2019/11/04/major-league-soccer-s-most-valuable-teams-2019-atlanta-stays-on-top-as-expansion-fees-sale-prices-surge/#1ad8625351b5> [https://perma.cc/Y5XS-HAXH]. And there is the additional presence of Major Arena Soccer League (MASL). See MAJOR ARENA SOCCER LEAGUE, <https://www.maslsoccer.com/> (last visited Mar. 25, 2021). Major tennis events can generate hundreds of millions of dollars. See Christopher Clarey, *In Tennis, Men and Women Are United in Looming Prize-Money Fight*, N.Y. TIMES (Oct. 11, 2019), <https://www.nytimes.com/2019/10/11/sports/tennis/grand-slam-prize-money.html> [https://perma.cc/UY3P-57XQ].

<sup>15</sup> Analysis of stadiums and arenas with major sports tenants reveals that since 1990, over 90 stadiums and over 110 indoor arenas have been constructed as of Fall

toward more development when it replaced ten stadiums in a twelve-year span, and the median lifespan of the replaced stadiums dropped from nearly fifty years to only thirty-one years.<sup>16</sup>

This inescapable reality of increased demand for stadium development, driven by industry growth and fast stadium turnover, presents a major and growing problem in the short and long term for local governments. The short-term problem for any local government is the threat of a team that wants a new stadium leaving and the economic and political fallout for government officials. The long-term problem is that local governments are in an ever-increasing competition with each other to recruit businesses and as a result need to offer increasingly generous economic and tax incentives to entice development.

This dilemma is compounded by not only the increasing frequency of stadium development but also the increasing costs of construction. In the 1950s, when public financing for stadium development first began, the average cost to construct a facility was under four million dollars.<sup>17</sup> From 1990 through 1998 the average cost of stadium construction was over two-hundred million dollars, representing a fifty-fold increase in the average cost.<sup>18</sup> This problem does not show any signs of abetting as stadium costs continue to skyrocket, the most prominent example being the Raiders' newly developed stadium in Las Vegas. The Raiders' new facility has a total cost nearing two billion dollars, including an expected seven-hundred-fifty million dollars in the form of public financing.<sup>19</sup> Despite this large price tag, the amount of public financing for the Raiders' stadium actually represents a lower percentage of the total cost than the average amount of public financing typically provided.<sup>20</sup> This illustrates that even when state and local governments can effectively negotiate a lower percentage of costs covered by

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2020. *List of U.S. Stadiums by Capacity*, WIKIPEDIA [https://en.wikipedia.org/wiki/List\\_of\\_U.S.\\_stadiums\\_by\\_capacity](https://en.wikipedia.org/wiki/List_of_U.S._stadiums_by_capacity) [<https://perma.cc/6GXH-FQHY>] (last visited Mar. 25, 2021); *List of Indoor Arenas in the United States*, WIKIPEDIA [https://en.wikipedia.org/wiki/List\\_of\\_indoor\\_arenas\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/List_of_indoor_arenas_in_the_United_States) [<https://perma.cc/SW69-NSU5>] (last visited Mar. 25, 2021).

<sup>16</sup> See Chris Isidore, *The Short Life of an NFL Stadium*, CNN (Sept. 8, 2014, 12:20 PM), <https://money.cnn.com/2014/09/08/news/companies/nfl-stadiums/index.html>

<sup>17</sup> John Siegfried & Andrew Zimbalist, *The Economics of Sports Facilities and Their Communities*, 14 J. ECON. PERSP. 95, 97 (2000).

<sup>18</sup> *Id.*

<sup>19</sup> Mick Akers, *AEG Sees No Problem Filling 46 Events at Las Vegas Stadium*, LAS VEGAS REV.-J. (July 18, 2018, 6:04 PM) (<https://www.reviewjournal.com/business/stadium/aeg-sees-no-problem-filling-46-events-at-las-vegas-stadium-1790538/>).

<sup>20</sup> Siegfried & Zimbalist, *supra* note 17, at 108 (stating public contributions have averaged seventy percent of construction costs through 1998).

public financing, rapidly rising costs still result in significant financial commitments, raising the importance of negotiating a beneficial deal.

This dilemma for state and local governments is not limited by geography, sport, team success, or any other factors aside from economic calculation. While iconic teams such as the Yankees, Cubs, and Cowboys are likely to never leave their cities, they are more the exception than the rule, and even then they cannot be taken for granted.<sup>21</sup> In the NFL, three teams simultaneously tried to relocate to Los Angeles in 2016,<sup>22</sup> and one of which, after failing to relocate to Los Angeles, successfully negotiated a relocation to Las Vegas.<sup>23</sup> In the NBA, after a run of success followed by on-court struggles, the Seattle Supersonics relocated to Oklahoma City.<sup>24</sup> There have been multiple attempts to relocate the Sacramento Kings to Seattle,<sup>25</sup> and even the wildly successful Golden State Warriors decided to move across the San Francisco Bay from the storied Oracle Arena in Oakland to the new Chase Center in San Francisco.<sup>26</sup> In the NHL, the league recently expanded to include the Vegas Golden Knights<sup>27</sup> and is expanding even further with the addition of the new Seattle Kraken.<sup>28</sup> The Islanders infamously moved to Brooklyn after years of negotiations with Nassau County regarding renova-

<sup>21</sup> See Richard Sandomir, *Yankees Say They Would Have Left Bronx if Pushed*, N.Y. TIMES (Oct. 24, 2008), <https://www.nytimes.com/2008/10/25/sports/baseball/25yankees.html> [<https://perma.cc/K99K-EH6Y>].

<sup>22</sup> Dan Hanzus, *Rams to Relocate to L.A.; Chargers First Option to Join*, NFL (Jan. 12, 2016, 8:13 PM), <http://www.nfl.com/news/story/0ap3000000621645/article/rams-to-relocate-to-la-chargers-first-option-to-join> [<https://perma.cc/LAL7-LN7L>].

<sup>23</sup> Gregg Rosenthal, *NFL Owners Approve Raiders' Move to Las Vegas*, NFL (Mar. 27, 2017, 7:07 AM), <https://www.nfl.com/news/nfl-owners-approve-raiders-move-to-las-vegas-0ap3000000795413> [<https://perma.cc/H784-R4XP>].

<sup>24</sup> *NBA Sonics Seek Arbitration to Escape Seattle Lease*, AFP (Sept. 21, 2007), <https://web.archive.org/web/20080622133358/http://afp.google.com/article/ALeqM5h9SX5Xx0dG5OJUP1gkLSlwzf-5ag> [<https://perma.cc/U3KU-4YTK>].

<sup>25</sup> See, e.g., Eric Freeman, *NBA relocation committee unanimously recommends the Kings stay in Sacramento*, Yahoo! Sports (Apr. 29, 2013), <https://sports.yahoo.com/nba-relocation-committee-unanimously-recommends-kings-stay-sacramento-225501313.html?a20=1> [<https://perma.cc/3LU9-D8DZ>].

<sup>26</sup> See Devin Gordon, *The Warriors Gamble Their Soul as They Swap Oakland for San Francisco*, THE GUARDIAN (Apr. 8, 2019, 9:30 AM), <https://www.theguardian.com/sport/2019/apr/08/goden-state-warriors-oracle-arena-move-oakland-san-francisco-nba> [<https://perma.cc/LC9S-YGWW>].

<sup>27</sup> Steve Carp, *Las Vegas Awarded NHL Expansion Team*, LAS VEGAS REV.-J. (June 22, 2016, 11:48 PM), <https://www.reviewjournal.com/sports/golden-knights-nhl/las-vegas-awarded-nhl-expansion-team/> [<https://perma.cc/9SVD-4A47>].

<sup>28</sup> KIRO7 News Staff, *Report: Seattle NHL Team Name Could Come Soon*, KIRO7 (Nov. 3, 2019, 8:51 AM), <https://www.kiro7.com/news/local/seattle-nhl-team-name-to-come-soon/1004496089> [<https://perma.cc/Y85T-3WCW>].

tions to their longtime home.<sup>29</sup> MLB, long considered the most reserved sport, has seen a spat of moves and new stadiums. The Yankees, potentially under threat of relocation, received a new stadium in 2009.<sup>30</sup> The Florida Marlins quickly won two World Series as an expansion team, and, almost as quickly, built a new stadium and rebranded as the Miami Marlins.<sup>31</sup> The Tampa Bay Rays have received permission to research a potential two-stadium franchise playing in both Montreal and Tampa Bay,<sup>32</sup> possibly as a way to leverage increased public financing and improvements to their current stadium.<sup>33</sup> All of this shows that regardless of city, sport, or success, sooner or later the question of public financing reaches far and wide with little to no signs of slowing down.

### III. ECONOMICS OF STADIUM DEVELOPMENT

#### A. Public Financing Explained

The examples of teams relocating, renovating, or constructing new stadiums described in Part II are just a small sampling of the overall trend and are meant to illustrate the fact that teams, good and bad, across the country and across all sports are a part of it. No matter the situation, the driving forces behind these decisions are economic. The Golden State Warriors are the perfect example. Despite positive fan and player attitudes towards Oracle Arena<sup>34</sup> and significant success in recent years,<sup>35</sup> the Warriors moved because it would maximize profits.<sup>36</sup> Regularly, the economics of a new stadium or arena are not reliably profitable without some form of public financing, often in the form of public subsidies or tax relief. While stadiums

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<sup>29</sup> Brian Croce & Andrew Hackmack, *Islanders Are Moving to Brooklyn*, LONG ISLAND HERALD (Oct. 24, 2012) [http://liherald.com/stories/Islanders-expected-to-move-to-Brooklyn,44047?page=2&content\\_source=&](http://liherald.com/stories/Islanders-expected-to-move-to-Brooklyn,44047?page=2&content_source=&) [<https://perma.cc/3GLD-LYTF>].

<sup>30</sup> Sandomir, *supra* note 21.

<sup>31</sup> Kevin Reichard, *It's Marlins Ballpark for 2012*, BALLPARK DIGEST (Jan. 27, 2012), <https://ballparkdigest.com/201201274441/major-league-baseball/news/its-marlins-ballpark-for-2012> [<https://perma.cc/VE62-5YEK>].

<sup>32</sup> James Wagner, *Rays to Explore Making Montreal a Part-Time Home*, N.Y. TIMES (June 20, 2019), <https://www.nytimes.com/2019/06/20/sports/tampa-bay-rays-montreal.html> [<https://perma.cc/77YA-JJWA>].

<sup>33</sup> *Id.*

<sup>34</sup> See Gordon, *supra* note 26.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*



are occasionally entirely privately financed,<sup>37</sup> those situations are the exception, not the norm. This section endeavors to look at the merits of the arguments in favor of and arguments against publicly financed sports stadium construction, how local governments have adapted in the face of such arguments, and whether continued public assistance is optimal, justifiable, or should be abandoned altogether. The section ultimately concludes that while in many instances public assistance has been sub-optimal, it remains economically justifiable, and state and local governments should work harder to negotiate more economically viable arrangements with sports teams.

As mentioned above, stadium construction often relies upon some form of public financing to be financially feasible. Given that stadiums are constructed all across the country, and the most significant forms of public financing come from state and local governments, there is no uniform package of public financing to measure or analyze. To the contrary, often times different cities and states are viewed as “bidding” against one another as to which one can offer the best public assistance package to entice a sports franchise.<sup>38</sup>

Public financing can come in many different forms, the first being indirectly through federal tax exemptions. Specifically, the federal government allows for interest earned on some municipal bonds offered by state and local governments to be tax exempt for federal income tax purposes.<sup>39</sup> Even though these bonds typically must predominantly fund a public entity or use, the federal government had specifically excepted bonds for stadium construction from this requirement up until 1986, thereby continuing the income tax exemption.<sup>40</sup> Even after the federal government attempted to remove this exception, a loophole in financing structure remains open that can continue to provide indirect federal subsidies to financing stadium construction.<sup>41</sup> This tax exemption on interest income from bonds makes the public debt financing a more enticing investment. Given the rising costs of stadiums and potentially billions of dollars in new public financing sought

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<sup>37</sup> See *MGM & AEG Building a 20,000-Seat Arena on the Las Vegas Strip*, BILLBOARD (June 19, 2013), <https://www.billboard.com/articles/business/1567353/mgm-aeg-building-a-20000-seat-arena-on-the-las-vegas-strip> [https://perma.cc/EF2V-L6AN].

<sup>38</sup> See Andrew Zimbalist and Roger G. Noll, *Sports, Jobs, & Taxes: Are New Stadiums Worth the Cost?*, BROOKINGS (June 1, 1997) <https://www.brookings.edu/articles/sports-jobs-taxes-are-new-stadiums-worth-the-cost/> [https://perma.cc/6J7H-R9AA].

<sup>39</sup> Austin J. Drukker et al., *Tax-Exempt Municipal Bonds and the Financing of Professional Sports Stadiums*, 73 NAT'L TAX J. 157, 160-61 (2020).

<sup>40</sup> *Id.* at 162.

<sup>41</sup> *Id.* at 163.

by sports organizations, this form of public financing can result in the federal government foregoing significant tax revenue to make a stadium's development financially feasible.<sup>42</sup>

While this form of public financing is at the federal level, the decision is distinctly a local economic decision. The loophole that allows the federal tax exemption of interest income requires state and local governments to assume responsibility for ninety percent or more of the debt issued.<sup>43</sup> This loophole also requires, that the state or local government service the debt through tax revenues unrelated to the stadium or a team's activities.<sup>44</sup> These de facto requirements mean that while the federal government will see a relative marginal decrease in revenues, it is the state or local government that has the discretion to issue bonds in a tax-exempt manner or not, and the local taxpayers will be solely responsible for the debt incurred.

State and local governments also provide more direct forms of public financing for sports stadium development. The primary mode of public financing provided by state and local governments is use of public subsidies to lower the actual costs incurred by the team and its owners.<sup>45</sup> These subsidies are typically financed through the issuance of the tax-exempt municipal bonds on the theory that new stadium developments—and often, the professional sports teams that come with them—provide a net benefit to the local economy.<sup>46</sup> This economic benefit would come from a variety of sources including: a significant short-term increase in construction jobs, increased consumer spending on leisure and entertainment, additional development due to increased interest in the area, and a resulting increase in tax revenues from the increased economic activity, offsetting the costs of the subsidy.<sup>47</sup> This view of using stadium development as a means of economic development has faced a sustained amount of criticism in recent years that has called into question the economic benefits of such public financing plans and the validity of the plans more generally.

While no uniform package of quantifiable public financing exists, what does exist is a general economic theory upon which this assistance is predicated. The theory is that stadium construction, and by extension recruitment of a major sports team, is an economic boon for the community which

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<sup>42</sup> *Id.* at 160-161.

<sup>43</sup> *Id.* at 162.

<sup>44</sup> *Id.* at 163.

<sup>45</sup> Scott A. Wolla, *The Economics of Subsidizing Sports Stadiums*, PAGE ONE ECON. (May 2017), <https://research.stlouisfed.org/publications/page1-econ/2017-05-01/the-economics-of-subsidizing-sports-stadiums/> [https://perma.cc/E9WJ-NUGN].

<sup>46</sup> *See id.*

<sup>47</sup> *Id.* at 1-2.

succeeds in recruiting or retaining a team. A strong enough grant of public assistance will, the thinking goes, generate hundreds, if not thousands, of construction jobs over multiple years, increase consumer spending, and create greater tourism of the area, along with a host of other economic benefits that will trickle down and encourage development. The hope is that this increased economic activity will lead to a stadium that is “self-financing”.

The theory that stadium construction and the related sports franchise increase economic activity in an area is not without some support.<sup>48</sup> However, it also comes with a fair amount of criticism, and closer scrutiny reveals notable failures and shortcomings of this theory of development.<sup>49</sup> Those shortcomings often come where actual economic benefits fail to meet projections and the stadium becomes an economic drain or at best has a neutral effect in the long-term. Additionally, critics highlight the equally important opportunity cost of construction of a sports stadium, including opportunities for other possible uses of tax dollars or alternative construction projects which could be more economically productive and efficient.<sup>50</sup>

The rise in public financing of private, for-profit sports stadiums is largely traced back to 1953, when the Boston Braves relocated and became the Milwaukee Braves.<sup>51</sup> Prior to this move, public financing of this sort was relatively unheard of, but as travel became easier and the sport expanded across the country, public financing as a means of luring and retaining sports teams began.<sup>52</sup> This marked a new era, prior to which sports stadiums were almost exclusively privately financed.<sup>53</sup> The subsequent rising costs of stadium construction combined with governments’ willingness to provide public financing has created the aforementioned bidding war where different local governments offer increasingly attractive, if not always financially wise, incentives to sports teams.<sup>54</sup> For communities, stadium construction and a related professional sports team is often an all-or-nothing proposition. If a community fails to successfully recruit a team with sufficient financial incentives for stadium construction, typically there is not a second team waiting to negotiate or accept such an offer, giving sports teams significant bargaining power.<sup>55</sup>

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<sup>48</sup> See generally Wolla, *supra* note 45

<sup>49</sup> See generally Siegfried & Zimbalist, *supra* note 17.

<sup>50</sup> See *id.* at 108-09.

<sup>51</sup> *Id.* at 96.

<sup>52</sup> *Id.* at 97.

<sup>53</sup> *Id.* at 96.

<sup>54</sup> *Id.* at 97-98.

<sup>55</sup> *Id.* at 98.

This inequality in bargaining power has often resulted in much maligned public financing deals for stadiums. Some of the more drastic recent public criticism includes tying stadium financing to negative outcomes such as police force reductions,<sup>56</sup> local governments cutting pension benefits,<sup>57</sup> and the need to sell city hall,<sup>58</sup> among many other issues linked to stadium construction.<sup>59</sup> While these criticisms are not always entirely accurate or representative due to more fundamental financial mismanagement by local governments, the sentiment underlying these critiques is the notion of millionaire and billionaire-supported for-profit sport enterprises receiving government assistance as both unfair and unnecessary.

The important question to ask in response to this criticism is whether public financing becomes a worthwhile long-term investment, or whether it serves as nothing more than an economic transfer to wealthy owners and sports franchises. The overwhelming economic consensus indicates that, from a purely economic standpoint, this is not a worthwhile investment for local governments.<sup>60</sup> Historically, as demonstrated above, these stadium development projects have proven to be unsound investments for taxpayers.

### B. Economic Effectiveness of Public Financing

The significant scrutiny surrounding public financing for private stadium development naturally stems from the significant increase in public financing provided for stadium development in recent decades. The thrust of the criticism surrounding public financing is that the economic projections used to justify public financing have been overly optimistic, leading to significant financial consequences. One economist concluded “the idea that sports is a catalyst for economic development just doesn’t hold water.”<sup>61</sup> Further, a variety of research indicates that the actual economic benefits of

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<sup>56</sup> See Preston & Kuriloff, *supra* note 7.

<sup>57</sup> See Sirota, *supra* note 7.

<sup>58</sup> See Petchesky, *supra* note 8.

<sup>59</sup> See Aaron Gordon, *America Has a Stadium Problem*, PAC. STANDARD, (June 14, 2017), <https://psmag.com/economics/america-has-a-stadium-problem-62665> [<https://perma.cc/6V3H-CXFQ>].

<sup>60</sup> *University of Chicago Sports Stadium Survey*, (Jan. 31, 2017), <http://www.igmchicago.org/surveys/sports-stadiums> [<https://perma.cc/KTF4-5A8R>] (indicating 57% of economists agree that cost to taxpayers is more than economic benefits generated, while only 2% disagreed)

<sup>61</sup> Wolla, *supra* note 45 (quoting Robert Baade).

stadium development plans have been only marginally positive, if not outright negative.<sup>62</sup>

As touched on above, there are some particularly egregious examples of negative economic consequences to local communities related to, or caused by, public financing. A poorly structured financing arrangement in Arizona led to an attempt to sell Glendale's City Hall and lease it back to secure enough cash to service the debt for the Phoenix Coyotes arena.<sup>63</sup> These types of debt commitments can come due at unideal times, such as when Oakland decreased the police force or when Detroit was on the verge of bankruptcy.<sup>64</sup> The economic criticism of such deals goes beyond these headline-grabbing and politically inconvenient examples. The criticism stems from the perceived failure to accurately capture or portray the economic effects of stadium development. Critics charge that economically interested groups such as developers, labor unions, and stadium owners utilize economic projections based on quite favorable assumptions that accentuate positive possibilities and ignore very real risks or even real negative consequences that take place after development.<sup>65</sup>

The first key criticism of the argument that stadium development promotes economic development is rooted in the economic concept of opportunity cost. Public financing involves a distribution of finite resources (cash, land, and debt capacity), and the dedication of those resources to one opportunity, in this case a sports stadium, necessarily results in foregoing an alternative opportunity. This is considered the "unseen" and unaccounted for cost of stadium development.<sup>66</sup> The heart of this criticism is that a sports stadium is likely a less productive or efficient use of resources than other uses, given the often large amount of public financing provided for stadiums.<sup>67</sup> A more economically productive use of funds could increase societal productivity in a greater way than the current investment, (the sports stadium), such as investments in airports, highways, bridges, or education.<sup>68</sup> Failure to use these funds for more economically productive investments is an opportunity cost of public financing. Second, there is an opportunity cost

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<sup>62</sup> See generally Wolla, *supra* note 45; Siegfried and Zimbalist, *supra* note 17; *University of Chicago Sports Stadium Survey*, (Jan. 31, 2017), <http://www.igmchicago.org/surveys/sports-stadiums> [<https://perma.cc/KTF4-5A8R>]

<sup>63</sup> Petchesky, *supra* note 8.

<sup>64</sup> See Preston & Kuriloff, *supra* note 7; see also Sirota, *supra* note 7.

<sup>65</sup> See Siegfried & Zimbalist, *supra* note 17, at 100, 103; see also Andrew Zimbalist *Circus Maximus*, BROOKINGS INST., 37-38, 43-44 (2015)

<sup>66</sup> Wolla, *supra* note 45.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.*

of providing the land, or facilitating the acquisition of land, for sports stadiums. This opportunity cost arises if the land dedicated to the sports stadium could result in greater economic outcomes such as job and wage growth.<sup>69</sup> Critics contend that when considering the costs of a stadium without considering these opportunity costs significantly understates the costs of stadium development.

In addition, a criticism of stadium development as a means of economic development is the failure by those in favor of the development to consider the substitution effect of development.<sup>70</sup> The core of this criticism is, essentially, that considering absolute spending at stadiums, rather than the relative spending at stadiums and its overall impact on entertainment spending in the economy, results in overstating the benefits provided to the local economy. Most studies have concluded that a majority of consumers have a relatively inflexible amount of discretionary income for leisure or entertainment activities.<sup>71</sup> This likely means that most money spent on or at a sporting event would have otherwise been spent on a different leisure activity, and if this is the case, then the net effect on consumer spending in the economy is near zero.<sup>72</sup> By simply analyzing the money spent on or at sporting events, rather than the money spent on or at sporting events above what expected spending would be on such activities absent a sports stadium, critics contend that the economic activity reasonably attributable to a sports stadium is being overstated.

This potential overstatement of effects on spending is to some degree mitigated by out-of-town spending.<sup>73</sup> When people from outside of the state or community that finances and houses a stadium travel for the purpose of attending the game, all of that new spending would otherwise not benefit the local economy. The extent of this outsider effect on the local economy is uncertain, difficult to quantify, and varies greatly depending on the stadium.<sup>74</sup> While it is difficult to ascertain the extent of this effect, a more accurate economic analysis necessitates evaluating the relative spending effects of sports rather than just the absolute spending effect. It is essential to account for all factors that may affect such analysis. Such a comprehensive

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<sup>69</sup> See Drukker et al., *supra* note 39, at 107.

<sup>70</sup> See generally Siegfried & Zimbalist, *supra* note 17, at 105; Dennis Coates & Brad R. Humphreys, *The Effect of Professional Sports on Earnings and Employment in the Services and Retail Sectors in US Cities*, REG'L SCI. & URB. ECON. 175, 176 (2003); Drukker et al., *supra* note 39, at 5; Wolla, *supra* note 45.

<sup>71</sup> See Siegfried & Zimbalist, *supra* note 17, at 105.

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *id.* at 105-06.

analysis is beyond the scope of this paper, but its absence serves to mitigate some of the economic criticism directed against public financing for sports stadiums.

Another frequent criticism of sports stadium development relates to its effects on the fiscal and budgetary health of local and state governments. This criticism is closely related to the above criticism that the economic stimulation from sports stadiums is often overstated. Sports stadiums are often described by their proponents as “paying for themselves” due to the increased economic activity they are projected to create. The criticism arises when this projected economic stimulation falls short, and the local and state governments ultimately suffer from the shortfall. This phenomenon helps explain the problems discussed above in Phoenix, Oakland, and Detroit. One study examined twenty stadiums constructed over a fourteen-year period and found an average cost of seven million dollars in operating subsidies, and no stadium provided a positive net operating income to their host communities.<sup>75</sup> While the study did qualify this finding with the fact that when determining the budgetary impact of stadium development it is necessary to know the particular terms of financing and public assistance, it concluded that if a financing burden falls primarily on the public, it will likely result in a significant budget shortfall for the responsible state or local government.<sup>76</sup>

The final major criticism of stadium development concerns its effects on employment and wages. The first part of this criticism covers an issue known as “leakage,” when certain economic benefits “leak” out of the originating local economy. Leakage deprives the local economy of any benefits from the wealth and activity that leak out to other areas. In the context of sports stadiums, there are a variety of causes of leakage. The first is that the vast majority of team revenue goes to either players or owners.<sup>77</sup> Both players and owners have relatively high income levels resulting in substantial federal taxes, which is the first form of leakage.<sup>78</sup> In addition to the high tax rates, the wealth of both players and owners, and the nature of professional sports, often lead to players and team owners owning homes and spending time and money outside of the local community, causing those economic benefits to leak out as well.<sup>79</sup> Additionally, players are considered to have a transient source of income resulting in a disproportionate amount of savings when compared to other types of workers in the leisure and en-

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<sup>75</sup> *Id.* at 108.

<sup>76</sup> *See id.*

<sup>77</sup> *See id.* at 106.

<sup>78</sup> *See id.*

<sup>79</sup> *See id.*

ertainment industry.<sup>80</sup> This increased propensity for saving directly decreases the propensity to consume, lowering the multiplier effect of the wages paid to players.<sup>81</sup>

Additionally, this criticism of stadium development's effects on wages and employment culminates in the argument that stadium development does not have the purported benefits on employment and wages that supporters of public financing purport. In fact, one key study concluded that development of sports stadiums may actually result in a net decrease in wages for hourly employees across multiple sectors and a net decrease overall.<sup>82</sup> This decrease is believed to stem from too much spending going toward sports stadiums, which often employ low-wage labor, which negatively affects those industries closely related to sports where the money would otherwise be spent.<sup>83</sup>

Overall, this scrutiny results in the unified criticism that stadium development as a means of economic development as currently executed often overpromises and underdelivers on economic benefits. In fact, many critics go further and argue that the way stadium development is currently financed not only fails to deliver the promised economic benefits, but also is often overly generous and actually detrimental to the local economy. These criticisms are buttressed by a significant amount of support indicating that consumer spending, employment, wage growth, and tax revenue do not typically grow as anticipated, and as a result the local government is unable to service the significant debt it took on to finance the stadium. These criticisms are valid and should be incorporated by any state and local governments considering public financing. By incorporating these criticisms, state and local governments can better evaluate public financing proposals, avoid historical pitfalls and financial missteps, and craft better deals for their constituents if they decide to move forward.

### C. *Improving Economic Effectiveness of Public Assistance Going Forward*

One important caveat to these economic criticisms is that the analysis is somewhat outdated. While *ex ante* analysis has often been criticized for the assumptions it makes and the "optimistic" economic projections for a development, *ex post* analysis suffers from the opposite flaw. When local governments begin to adjust their economic development strategies in response to such criticisms or economic shortcomings, it is unlikely that the

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<sup>80</sup> *See id.*

<sup>81</sup> *See id.*

<sup>82</sup> Coates & Humphreys, *supra* note 70, at 197.

<sup>83</sup> *See id.* at 190.



results of these adjustments can be accounted for in ex post analysis. Short-term trends of the most recent updates are unlikely to be analyzed in a historical analysis, and even if they are the sample may be too small or volatile to provide an accurate assessment of the changes. Long-term consequences are impossible to quantify, as they realistically do not exist yet. Most critical analyses of public financing for stadiums were conducted and published in the 1990s and early 2000s, and as a result, adjustments to such criticism can only be made after that time period. Given stadium financing can often come in the form of twenty- and thirty-year debt commitments, the long-term fiscal benefits or consequences of any changes in trends simply have not manifested yet.

This flaw in ex post analysis is critical to acknowledge as local governments potentially demonstrate an increased awareness of past economic development issues and at least anecdotal signs of more successful economic development plans. A 2018 *New York Times* article looked at this adjustment by local governments attempting to yield better and more direct economic gains by changing their stadium development strategies.<sup>84</sup> Specifically, the article noted the shift from stadiums being located in suburban settings with the expectation of self-generating economic growth to a more urban-centric model where the stadium is a synergistic part of a larger urban planning scheme.<sup>85</sup> This is a significant change, considering a primary critique of the economic development strategy is the inefficient development of land in the suburbs for stadiums resulting in both direct and indirect economic growth being less than expected.

The article highlights a variety of different developments with promising economic signs not only for general economic growth, but also for broader economic benefits across the community.<sup>86</sup> Beginning in Sacramento, the article details what currently appears to be a resounding economic success. Since the opening of a new arena for the Sacramento Kings, along with a surrounding commons area, the number of jobs in the community has purportedly increased thirty-eight percent.<sup>87</sup> Additionally, over a roughly one-year period, twenty-seven stores opened in the area and another twenty-three were projected to open within a year at the time of writing.<sup>88</sup>

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<sup>84</sup> Keith Schneider, *Welcome to the Neighborhood: America's Sports Stadiums Are Moving Downtown*, N.Y. TIMES (Jan. 19, 2018), <https://www.nytimes.com/2018/01/19/business/sports-arena-development.html> [https://perma.cc/D6NP-GMM9].

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

The area grew so rapidly that the city had to employ dozens of additional employees to handle the permitting process.<sup>89</sup>

Sacramento is not the only area to seemingly benefit economically from better urban planning. In San Francisco, at the time of writing, a new mixed-use development was being prepared which would have provided new housing for one-thousand six hundred residents as well as nearly one million square feet for retail and office space, similar to that of Sacramento.<sup>90</sup> In Columbus, Ohio, another mixed-use district was being developed around an NHL arena providing one thousand and thirty apartments as well two million square feet of commercial space.<sup>91</sup> These examples are just some of the many new mixed-use districts that are being developed, including in other areas such as Detroit, Michigan; Inglewood, California; and Cincinnati, Ohio.<sup>92</sup> These mixed-use districts based around stadiums and arenas are not only developing across the country; they are also developing across all of the major sports.<sup>93</sup>

The *New York Times* article specifically ties these new developments to criticisms of the “old model” of development, along with increased input from urban planners.<sup>94</sup> It is also important to note the broad applicability of the mixed-use model, as it started in Kansas City for a partially publicly financed Sprint Centre, which does not even have a professional sports team as a permanent tenant but does host college basketball games.<sup>95</sup> This model is credited both for revitalizing the Kansas City downtown area as well as changing the approach to public financing of sports stadiums.<sup>96</sup>

As discussed above, this evidence is still anecdotal as it is largely not accounted for in any ex post analysis. There is still a fair amount of uncertainty as to the definitive economic benefits derived from the mixed-use model as well as the strength of a potential causal relationship. This uncertainty as to the contours of the economic gains and how much is caused by the mixed-use model is touched on in the article, but so is the significant, but not yet empirically analyzed, economic growth of the downtown area in terms of jobs and tax revenue.<sup>97</sup> While this uncertainty cannot be ignored and the effects of this model need further in-depth empirical analysis to

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

ascertain the long-term economic benefits or consequences, the early returns seem to strongly indicate that with better urban planning by local governments, the negative economic consequences associated with public financing for stadium development can be mitigated and the public benefits amplified.

#### IV. NON-ECONOMIC VALUE ADDED

##### A. *Evaluating and Incorporating Public Sentiment*

The widespread proliferation of stadium subsidies and assistance has led to considerable study of, and opposition to, public financial support.<sup>98</sup> When Boston attempted to make a bid for the 2024 Olympic Games<sup>99</sup> a concerted effort emerged to oppose the city's bid, primarily in the form of a group known as "No Boston Olympics" (NBO).<sup>100</sup> While NBO's criticisms were rooted in the economic consequences of providing public financing to constructing Olympic stadiums, a myriad of other important factors emerged as well.<sup>101</sup> These additional externalities combined with the likely economic drawbacks ultimately caused support for the project to wither and Boston to lose the bid.<sup>102</sup>

This type of public feedback is valuable for policymakers to incorporate into their decision-making process for public financing. Before proceeding to the analysis, it is important to note some key distinctions between effects of sports stadiums and the externalities that were associated with Olympic arenas. First and foremost, Olympic arenas tend to be one-time use arenas, leaving a city struggling to put it to productive use after the Olympics conclude,<sup>103</sup> whereas public sports stadiums secure long-term leases from teams and often can be used for other entertainment events in the off-

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<sup>98</sup> See generally Andrew Zimbalist, *Boston Takes a Pass on the Olympic Torch*, 40 REG. 28 (2017).

<sup>99</sup> While the size, scale, and unique nature of the Olympics compared to less onerous and longer-term commitments of professional sports franchise limits their comparison value of substantive economic effect and other externalities, the public debate and all-inclusive analysis as to the effects of and support for public financing demonstrates what is recommended in this paper.

<sup>100</sup> See Zimbalist, *supra* note 98, at 30.

<sup>101</sup> See *id.* at 30-33 (discussing issues of space, public access, and infrastructure in addition to the likely negative economic consequences of significantly subsidizing the cost of a stadium).

<sup>102</sup> See *id.* at 33.

<sup>103</sup> See *id.* at 32.

season.<sup>104</sup> Second, due to the size and scale of the Olympics, they may require significant development projects which could make large swaths of public space inaccessible.<sup>105</sup> Contrast this with a traditional sports stadium which, due to its long-term use and smaller size, can be a central feature that augments other public spaces or can be planned around to have externalities minimized.<sup>106</sup> Finally, Olympic games are granted by the International Olympic Committee (IOC) and progress on a strict timeline which bidding governments have no control over, which can lead to rushed efforts and significant avoidable externalities such as massive displacement of lower income or impoverished people.<sup>107</sup> While this phenomenon may occur with a standard sports stadium, the government having a mutually beneficial and working relationship with the sports team at issue likely would provide more flexibility to avoid such issues.<sup>108</sup>

The other externalities posed by the Olympic arena are quite real, though to a much smaller scale, when contemplating stadium construction. Issues such as traffic congestion, infrastructure issues, and displacement, in addition to the economic considerations, should be considered by policymakers in making their decisions.<sup>109</sup> These factors combined with economic evaluations should help inform the debate about what is best for the community, and an open and transparent process should enable alignment between what a community wants and what is best for a community, as reflected by things such as local papers, public polling, vocal support or opposition from the community, etc.

A point of clarification at the outset: Despite sometimes forceful opposition as demonstrated in Boston's Olympic bid, as a general principle the public is not always against public financing for the sake of private development. A much-publicized recent example of general public financing for private development was Amazon's "HQ2" which, through the promise of

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<sup>104</sup> See *Stadium and Rent Details for All 32 NFL Teams*, LAS VEGAS REV.-J. (Mar. 6, 2017, 12:50 AM), <https://www.reviewjournal.com/sports/raiders-nfl/stadium-and-rent-details-for-all-32-nfl-teams/> [<https://perma.cc/495R-V2T6>]; see also *Partners in Patriotism*, GILLETTE STADIUM (March 4, 2018) [https://www.gillettestadium.com/wp-content/uploads/2018/12/Partners-in-Patriotism-Q3-2018-Newsletter\\_FINAL.pdf](https://www.gillettestadium.com/wp-content/uploads/2018/12/Partners-in-Patriotism-Q3-2018-Newsletter_FINAL.pdf) [<https://perma.cc/G25L-2FD7>].

<sup>105</sup> See Zimbalist, *supra* note 98, at 30.

<sup>106</sup> See generally Schneider, *supra* note 84.

<sup>107</sup> See Zimbalist, *supra* note 98, at 32 (discussing Chinese government evicting over one million people for 2008 Olympics and Brazilian government evicting over seventy-seven thousand "shanty town" residents for 2016 games).

<sup>108</sup> Thomas A. Musil, *The Sleeping Giant: Community Benefit Agreements and Urban Development*, 44 URB. LAW. 827 (2012).

<sup>109</sup> See e.g., Zimbalist, *supra* note 98, at 32.

public financing, was intended for New York City.<sup>110</sup> Amazon and New York State suffered withering criticism because of the deal,<sup>111</sup> and ultimately the agreement was withdrawn due to the public pushback.<sup>112</sup> Concerns about gentrification, housing costs, and transparency about the process quickly motivated a significant and successful opposition.<sup>113</sup> However, further scrutiny of the situation reveals that while the criticism of the public financing Amazon HQ2 would receive was intense, it was not as widespread as that intensity may indicate. In fact, given the national attention the Amazon HQ2 deal received, there was sufficient public polling to indicate that the deal was overall viewed quite favorably. A poll conducted just over a week before the Amazon HQ2 deal fell through found that, by a twenty-point margin, New Yorkers supported the deal granting approximately three billion dollars in state and city assistance to the company.<sup>114</sup> Furthermore, a poll of exclusively New York City voters conducted approximately two weeks before the deal was cancelled found more people approved of Amazon HQ2 coming to New York City than disapproved the move by a fifty point margin.<sup>115</sup> Approval was even higher among the communities more directly affected by the deal with Queens and State Senate District 12

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<sup>110</sup> See Laura Stevens et al., *Amazon Picks New York City, Northern Virginia for Its HQ2 Locations*, WALL STREET J. (Nov. 13, 2018, 12:16 AM), <https://www.wsj.com/articles/amazon-chooses-new-york-city-and-northern-virginia-for-additional-headquarters-1542075336> [<https://perma.cc/2LT7-7EQ6>].

<sup>111</sup> See Taylor Telford, *Amazon's HQ2 Split Between New York and Virginia Sparks Backlash from Locals, Politicians*, WASH. POST (Nov. 13, 2018, 11:28 AM), <https://www.washingtonpost.com/business/2018/11/13/amazons-hq-split-between-ny-carlington-sparks-backlash-locals-politicians/> [<https://perma.cc/WC2Q-SDJ3>].

<sup>112</sup> See J. David Goodman, *Amazon Pulls Out of Planned New York City Headquarters*, N.Y. TIMES (Feb. 14, 2019), <https://www.nytimes.com/2019/02/14/nyregion/amazon-hq2-queens.html> [<https://perma.cc/Y6CC-KPMB>].

<sup>113</sup> See generally Gaby Del Valle, *Amazon HQ2: The Many Layers of Backlash Against the Company's Expansion, Explained*, VOX (Nov. 13, 2018, 1:09 PM), <https://www.vox.com/the-goods/2018/11/6/18065666/amazon-hq2-backlash> [<https://perma.cc/6BE5-N49R>].

<sup>114</sup> *Majority Support NYS Deal with Amazon*, SIENA COLL. RSCH. INST. (Feb. 12, 2019), <https://scri.siena.edu/2019/02/12/majority-support-nys-deal-with-amazon/> [<https://perma.cc/EM4F-CVXX>] (finding 56% of New Yorkers in favor and 36% opposed).

<sup>115</sup> *New Poll Shows Overwhelming Support Among New Yorkers and Queens Residents for Amazon's New Headquarters*, HARRISX, <https://blog.harrisx.com/blog/2019/02/new-poll-shows-overwhelming-support-among-new-yorkers-and-queens-residents-for-amazons-new-headquarters> [<https://perma.cc/9BUS-Y5UB>] (finding 69% of New York City voters approve of Amazon HQ2 in New York City and 19% disapprove).

approving of the deal by sixty-four and fifty-eight point margins, respectively.<sup>116</sup>

Key to this discussion is the poll of New York City voters. This poll also asked about people's perceptions of having Amazon HQ2, which helped better understand the reasons for either supporting or opposing the move. Large majorities of voters believed Amazon HQ2 would bring good-paying jobs; improve the economy; increase property values; make New York City a "tech hub"; increase tax revenues for education, transportation, and other "vital services"; and provide new opportunities for local and small businesses.<sup>117</sup> However, it was not viewed as only having positive effects. A majority of those polled also believed having Amazon HQ2 in New York City would come with externalities such as increased housing costs and problems with public transit and transportation.<sup>118</sup> Given that a majority of those polled believed that Amazon HQ2 brought both positive and negative contributions, and an overwhelming majority still supported the move, this suggests that the communities most directly involved in and affected by the move considered both the benefits and burdens and came to the informed conclusion that having Amazon HQ2 built in New York City was a net gain for the community. Such sentiment should not be taken lightly by elected officials meant to represent the community.

While the events surrounding Amazon HQ2 and the Olympics garnered significant public attention and focus distinct from the recurring drawn out processes of sports stadium development, they provide guidance going forward. They both suggest that there are non-economic factors that the community cares about and that are important enough to be non-trivial in the decision-making process. They do not, however, illustrate precisely what those factors may be or instruct exactly how people may feel in a particular circumstance.

Sports stadiums meant for long-term use in a community potentially offer additional benefits to a community. These benefits can include community pride, increased prestige, and cultural enrichment, among others.<sup>119</sup> When deliberating on whether or not to offer public assistance to a sports stadium, public officials should account for these benefits and how the public may value them. Thinking beyond just the economic effects of a stadium can better capture how the community views and values a stadium. Providing sports stadiums, particularly ones that will be used by college sports

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<sup>116</sup> *Id.* (finding 80% of voters in Queen approve and 16% disapprove, and 77% of voters in State Senate District 12 approve and 19% disapprove).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> See Wolla, *supra* note 45.

teams, has drawn comparisons to funding other initiatives such as the arts.<sup>120</sup> Public officials also focus on the benefits that a sports team can contribute to youth development.<sup>121</sup> Other times public officials and members of the community may view having a premiere stadium, and the team that comes with it, as essential to increasing the prominence and prestige of a city.<sup>122</sup> These general benefits are just some of the values that can be contributed to a community through successful sports stadium development.

### B. *Athletes and Athletics as a Local Force for Good*

These general abstract benefits can be augmented by specific benefits and contributions a team or players may provide to a community. Starting with community and cultural identity, sports can be a key part of an individual's identity and sense of community. Local sports teams can help bring a sense of identity and common belonging across a community.<sup>123</sup> This sense of belonging can have positive effects on self-esteem, feeling of acceptance among peers, and communication.<sup>124</sup> This helps to demonstrate the intensely social and personal impact sports teams can have on a community, down to the individual level.

The degree to which an individual feels connected to and is affected by a sports team should not be underappreciated. Examining the psychological effects of a team on individuals has found that a team's performance and outlook can affect both a fan's mood and their self-esteem.<sup>125</sup> In fact, a fan's identity can be so intertwined with a team that their team's performance can affect their perception of their personal ability to accomplish certain tasks.<sup>126</sup> These types of effects are difficult, if not impossible, to project when con-

<sup>120</sup> See *City Council Approves Stadium Lease Extension for Aztecs*, FOX 5 (Aug. 6, 2018, 4:52 PM), <https://fox5sandiego.com/2018/08/06/city-council-to-consider-2-year-stadium-lease-for-aztecs-football/> [https://perma.cc/VF9R-8VY8].

<sup>121</sup> See Jack Flagler, *Austin City Council Postpones Vote on Major League Soccer Stadium Agreement*, CMTY. IMPACT (Aug. 10, 2018), <https://communityimpact.com/austin/northwest-austin/editors-pick/2018/08/09/austin-city-council-postpones-vote-on-major-league-soccer-stadium-agreement/> [https://perma.cc/U7WK-95P3].

<sup>122</sup> See Joe Nocera, *N.F.L. Stadium in Las Vegas May Be an Ego Boost, but Not an Economic One*, N.Y. TIMES (Oct. 21, 2016), <https://www.nytimes.com/2016/10/22/sports/football/las-vegas-raiders-nfl-stadium.html> [https://perma.cc/CGQ7-KNS5].

<sup>123</sup> Shirley Wang, *Sports Complex: The Science Behind Fanatic Behavior*, ASS'N FOR PSYCHOL. SCI. (May 2006).

<sup>124</sup> See *id.*

<sup>125</sup> See Edward R. Hirt et al., *Costs and Benefits of Allegiance: Changes in Fans' Self-Ascribed Competencies After Team Victory Versus Defeat*, 63 J. PERSONALITY & SOC. PSYCHOL. 723, 735 (1992).

<sup>126</sup> See *id.*

templating whether to provide public assistance to stadium development. However, they make it quite clear that having a local sports team can have an immense impact on not just economic conditions, but can have an immense impact on personal conditions as well.

Additional benefits, particularly to smaller communities, can flow from having the celebrity and star power brought by a major sports team and its athletes. Athlete philanthropy is becoming increasingly common and can benefit communities in need. Two notable examples are Kevin Durant and JJ Watt, two of the most successful athletes in the world, who do extensive work for their local communities.<sup>127</sup> Kevin Durant grew up in Maryland and went to school in Texas, but he does significant philanthropic work in Oklahoma City, where he played for a large part of his career.<sup>128</sup> Durant started his career in Seattle, and after one season the team was lured to Oklahoma City with a new arena.<sup>129</sup> Had that move not happened, it is likely all of the philanthropic and community work Durant does for Oklahoma City would not have happened either. Durant's efforts focus on impoverished communities: improving their schools, providing gifts during the holidays, and even running a summer camp,<sup>130</sup> all of which are actions that may be traditionally expected of the local government. Importantly, this work by Durant and his charitable foundation has continued in Oklahoma City even after Durant left for a different team.<sup>131</sup>

JJ Watt, a member of the Houston Texans and grew up in Wisconsin, is President of the Justin J. Watt Foundation Board of Directors, an organi-

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<sup>127</sup> See generally See Rhiannon Walker, *Warriors Forward Kevin Durant Still Doing Charitable Work in Oklahoma City*, THE UNDEFEATED (Dec. 14, 2016), <https://theundefeated.com/features/warriors-forward-kevin-durant-still-doing-charitable-work-in-oklahoma-city/> [perma.cc/X5MN-YFHM]; Kevin Patra, *J.J. Watt: \$41.6M in Hurricane Harvey Relief Shared*, NFL, (Aug. 27, 2018, 9:50 AM), <http://www.nfl.com/news/story/0ap3000000951756/article/jj-watt-416m-in-hurricane-harvey-relief-shared> [perma.cc/F3YR-NAD4]

<sup>128</sup> See Walker, *supra* note 127

<sup>129</sup> See Angela Galloway and Phuong Cat, *Sonics sold to ownership group from Oklahoma City*, SEATTLE PI <https://www.seattlepi.com/news/article/Sonics-sold-to-ownership-group-from-Oklahoma-City-1209167.php> (stating the team was sold after failing to receive public subsidies) [perma.cc/235V-T8FN] (July 17, 2006, updated Mar. 19 2011); see also *Sonics, Oklahoma City reach preliminary deal on arena*, USA TODAY [http://usatoday30.usatoday.com/sports/basketball/nba/sonics/2008-03-14-relocation-agreement\\_N.htm](http://usatoday30.usatoday.com/sports/basketball/nba/sonics/2008-03-14-relocation-agreement_N.htm) [perma.cc/KJ4W-R46X ] (last visited Apr. 30, 2021)

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*



zation committed to providing after school opportunities to children.<sup>132</sup> This foundation garnered particular attention in the aftermath of Hurricane Harvey's strike on the greater Houston area. Seeing disaster and tragedy unfold in his community, Watt decided to try and raise two-hundred-thousand dollars through his foundation to help with hurricane relief efforts.<sup>133</sup> Through his foundation's efforts Watt was able to raise over forty-one million dollars for hurricane relief efforts for the Houston area.<sup>134</sup>

These are just two notable instances in a long line of athletes helping their communities.<sup>135</sup> This is important to understand because when a state or local government is considering developing a sports stadium, it is more than just an infrastructure project and an economic impact; it is a team that can have a substantial impact on the community. A community not only begins to identify with its team, but also the players begin to identify as a part of the community and work to help it. In this way stadium construction can attract high income individuals such as athletes, who use their wealth in positive and redistributive ways through philanthropy, to help the community and even raise awareness for important issues.

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<sup>132</sup> See generally *The Foundation*, JUSTIN J. WATT FOUNDATION, <http://jjwfoundation.org/the-foundation/> [perma.cc/7FWD-3SJA] (last visited Mar. 5, 2021); see also *Board of Directors*, JUSTIN J. WATT FOUNDATION, <http://jjwfoundation.org/the-foundation/board-of-directors/> [perma.cc/4U87-WLSQ] (last visited Mar. 5, 2021).

<sup>133</sup> See Patra, *supra* note 127

<sup>134</sup> *Id.*

<sup>135</sup> See e.g., Jessica Golden, *Athletes Team Up to Raise Money for People Affected by Coronavirus*, CNBC (Mar. 16, 2020), <https://www.cnn.com/2020/03/16/athletes-team-up-to-raise-money-for-people-affected-by-coronavirus.html> [perma.cc/4QVM-G9RG]; Ira Winderman, *Dwyane Wade Receives NBA 'Community Assist Award' for Parkland Efforts*, SUN SENTINEL (Apr. 9, 2018), <https://www.sun-sentinel.com/sports/miami-heat/fl-sp-miami-heat-dwyane-wade-s20180409-story.html> [perma.cc/HXX3-3HH5]; Laura Scheffler, *New Laker Anthony Davis Is California Championship Dreamin'*, HAUTE LIVING (Nov. 6, 2019), <https://hauteliving.com/2019/11/anthony-davis-haute-living-los-angeles-cover-story/675194/> [perma.cc/S6NW-UFPB] (describing Anthony Davis' extensive charitable efforts for children in need while in New Orleans); Tania Ganguli, *Andre Johnson Plays Santa Claus, Buys \$16,266.26 Worth of Toys for Local Kids*, ESPN: NFL NATION (Dec. 2, 2014), [https://www.espn.com/blog/nflnation/post/\\_/id/152359/andre-johnson-plays-santa-claus-buys-16266-26-worth-of-toys-for-local-kids](https://www.espn.com/blog/nflnation/post/_/id/152359/andre-johnson-plays-santa-claus-buys-16266-26-worth-of-toys-for-local-kids) [perma.cc/49W5-TTYD]; Drew Brees, **AACSB**, <https://www.aacsb.edu/influential-leaders/honorees/2019/drew-brees> [perma.cc/DJS3-UTN7] (last visited Jan. 10, 2021) (detailing Drew Brees's efforts to help "rebuild" New Orleans post-Hurricane Katrina).

## C. Greater Social Impact

Additionally, at a time when sports no longer pretend to operate in an apolitical world separate and apart from the day-to-day struggles of society,<sup>136</sup> it is also time to recognize the impact local sports teams have on social and political issues. In fact, this greater social impact and connection has long existed is often implicit in the way we view and discuss sports in this country. In the midst of Joe DiMaggio's hitting streak during World War II and the Great Depression,<sup>137</sup> Jackie Robinson's breaking of the color barrier,<sup>138</sup> the return of sports following the tragic events of 9/11,<sup>139</sup> and now during a time of global panic from the coronavirus and unrest due to racial injustice, we are reminded of the greater cultural impact of sports. The conversation, at least at times, has been framed as a "return to normalcy"<sup>140</sup> and whether or not there is an "obligation" to return to play.<sup>141</sup> These historical moments and contemporary conversations go beyond the impact of any individual player and their efforts; they demonstrate how deeply intertwined our culture is with sports. This section proceeds to highlight the contemporary cultural impact of sports on pressing social issues as a means of demonstrating another non-economic justification for public financing of sports stadiums.

<sup>136</sup> Bill Shea, *'Stick to Sports' Rings Hollow as Athlete Labor Flexes Muscles Against Racism*, THE ATHLETIC (Sept. 4, 2020), [https://theathletic.com/2045292/2020/09/04/stick-to-sports-rings-hollow-as-athlete-labor-flexes-muscles-against-racism/?article\\_source=search&search\\_query=stick%20to%20sports](https://theathletic.com/2045292/2020/09/04/stick-to-sports-rings-hollow-as-athlete-labor-flexes-muscles-against-racism/?article_source=search&search_query=stick%20to%20sports) [perma.cc/8WNP-NJJ8] (discussing increase in athlete advocacy around racial injustice).

<sup>137</sup> Joe Posnanski, *The Baseball 100: No. 56, Joe DiMaggio*, THE ATHLETIC, (Jan. 31, 2020), <https://theathletic.com/1546447/2020/01/31/the-baseball-100-no-56-joe-dimaggio/> [perma.cc/SG7G-9TDM].

<sup>138</sup> Joon Lee, *Mookie Betts, Andrew McCutchen and More Mark Jackie Robinson Day*, ESPN, (Aug. 28, 2020), [https://www.espn.com/mlb/story/\\_/id/29762373/mookie-betts-andrew-mccutchen-more-mark-jackie-robinson-day](https://www.espn.com/mlb/story/_/id/29762373/mookie-betts-andrew-mccutchen-more-mark-jackie-robinson-day) [perma.cc/6HZH-J9T5].

<sup>139</sup> David Schoenfield, *Viewers Guide: Mike Piazza, Mets Help New York Heal Post-9/11*, ESPN (Mar. 31, 2020), [https://www.espn.com/mlb/story/\\_/id/28971919/viewers-guide-mike-piazza-mets-help-new-york-heal-post-9-11](https://www.espn.com/mlb/story/_/id/28971919/viewers-guide-mike-piazza-mets-help-new-york-heal-post-9-11) [perma.cc/3Q9G-KKGD].

<sup>140</sup> Allen Kim, *It May Be a Year Before Sports Return to Normalcy in the US, Fauci Warns*, CNN (Apr. 29, 2020), <https://www.cnn.com/2020/04/29/us/sports-coronavirus-return-spt-trnd/index.html> [perma.cc/BQU8-BHTQ] ("A return for sports would be a return to some semblance of normalcy.").

<sup>141</sup> See Jack Maloney, *NBA Commissioner Adam Silver Says Returning to Play is not About 'Dollars and Cents'*, CBS SPORTS (July 1, 2020), <https://www.cbssports.com/nba/news/nba-commissioner-adam-silver-says-returning-to-play-is-not-about-dollars-and-cents/> [perma.cc/3LDG-834N].

In light of a once-in-a-generation pandemic and ensuing economic hardship, one may logically conclude that now is the perfect time to re-evaluate state and local governments' willingness to provide vast public financing to wealthy private entities. While this article supports the continuous re-evaluation by state and local governments to ensure they are getting a good deal, it also argues that now is precisely the time when local sports teams have demonstrated their immense social value and should continue receiving support.

The most prominent example in recent history is the Milwaukee Bucks. The Milwaukee Bucks rocked the sports world this past fall, and most of the world more generally, with their unannounced boycott of an NBA playoff game to protest the police shooting of Jacob Blake, an unarmed Black man.<sup>142</sup> This Bucks team was great with rare championship potential, an eagerness to play after months off due to the global pandemic, and the potential to lose their best player if they did not win. However, the issue of racial injustice was of greater import to the team. As a local team the Bucks had a platform to give a voice to their community, and they used it. The Bucks' protest set off a wave of protests not just in the NBA,<sup>143</sup> but across the sports world,<sup>144</sup> and brought attention to protests across commu-

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<sup>142</sup> See Shams Charania & Joe Vardon, *Bucks Stage Walkout, All of Wednesday NBA Playoff Games Postponed*, THE ATHLETIC (Aug. 26, 2020), <https://theathletic.com/2025253/2020/08/26/sources-bucks-players-in-serious-talks-about-sitting-out-game-5-vs-orlando/> [perma.cc/AUW8-DLPV]; Tim Bontemps & Malika Andrews, *Three Game 5s Set for Wednesday Postponed After Bucks' Decision to Not Take Floor*, ESPN (Aug. 26, 2020), [https://www.espn.com/nba/story/\\_/id/29747523/three-game-5s-set-wednesday-postponed-bucks-decision-boycott](https://www.espn.com/nba/story/_/id/29747523/three-game-5s-set-wednesday-postponed-bucks-decision-boycott) [perma.cc/G5VV-FQTG].

<sup>143</sup> Jerry Brewer, *NBA Players Set a New Standard of Civil Disobedience. Now There's No Going Back.*, WASH. POST (Aug. 27, 2020), <https://www.washingtonpost.com/sports/2020/08/27/nba-protests-power/> [perma.cc/K2R5-KPZ6].

<sup>144</sup> See Mike Axisa & Dayn Perry, *Seven MLB Games Called off over Protests to Jacob Blake Shooting in Kenosha, Wisconsin*, CBS (Aug. 28, 2020), <https://www.cbssports.com/mlb/news/seven-mlb-games-called-off-over-protests-to-jacob-blake-shooting-in-kenosha-wisconsin/> [perma.cc/2XBZ-NXQX]; see also Jacob Knutson, *NHL Postpones 4 Playoff Games in Protest of Jacob Blake Shooting*, AXIOS (Aug. 27, 2020), <https://www.axios.com/nhl-postpone-playoff-games-jacob-blake-bd5edcb2-aa5e-41de-bcc0-5b71bc581651.html> [perma.cc/L279-KF8B].

nities.<sup>145</sup> This issue hit close to home for the Bucks players, and it reverberated throughout the world and brought greater attention to a major issue.<sup>146</sup>

One can only wonder if these events and the conversations that followed would have ensued if the Bucks did not reside in Milwaukee. Would they have protested, would they have even been in the position as championship contenders to protest a playoff game, and would it have resonated to the extent it did if they were not the hometown community struck by this awful act? These possibilities of no protests and no community support are not as remote as they might seem.<sup>147</sup> It was not long ago that the Bucks faced a serious possibility of relocation due to the financial stress of a new arena.<sup>148</sup> At the time, the Bucks received withering criticism for their request for public financing and the possibility of relocation.<sup>149</sup> Many publicly questioned the wisdom of providing funding to a private entity while other public entities faced disrepair.<sup>150</sup>

The public financing ultimately did come to fruition and has been a major success. As a result of the public financing contract agreed to by the team and the government, the Milwaukee Bucks had to meet certain hiring requirements that benefit underemployed and unemployed city residents, local small businesses, and minority-run businesses.<sup>151</sup> The Milwaukee

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<sup>145</sup> Ethan Sacks, *NBA-led Walkout over Jacob Blake's Shooting Marks Evolution of Protest in Pro Sports*, NBC NEWS (Aug. 28, 2020), <https://www.nbcnews.com/news/sports/nba-led-walkout-over-jacob-blake-s-shooting-marks-evolution-n1238544> [https://perma.cc/C2MT-A2L3].

<sup>146</sup> Jack Hamilton, *The NBA Strike Will Reverberate for Years to Come*, SLATE (Aug. 27, 2020), <https://slate.com/culture/2020/08/nba-strike-milwaukee-bucks-significance-jacob-blake.html> [https://perma.cc/GL8J-V7AF].

<sup>147</sup> Dan Devine, *Bucks Prez Repeats Relocation Threat, Invokes Seattle, Vegas if Arena Funding Not Approved*, YAHOO! SPORTS (July 7, 2015), <https://sports.yahoo.com/bucks-prez-repeats-relocation-threat—invokes-seattle—vegas-if-arena-funding-not-approved-154026419.html?y20=1> [perma.cc/SUV4-F3KQ].

<sup>148</sup> Dan Devine, *Deadlines, \$50M-\$100M Funding Gap, Relocation Threat Create Tension in Bucks Arena Deal*, YAHOO! SPORTS (Apr. 22, 2015), <https://sports.yahoo.com/deadlines—50m—100m-funding-gap—relocation-threat-create-tension-in-bucks-arena-deal-180843523.html?y20=1> [perma.cc/JGV7-GWMR].

<sup>149</sup> See Michael Powell, *An Arena Fairy Tale with Blurred Morals*, N.Y. TIMES (Oct. 16, 2014), <https://www.nytimes.com/2014/10/17/sports/basketball/milwaukee-bucks-look-for-financing-for-arena-as-other-city-centers-face-money-problems.html> [https://perma.cc/AMA8-PR8E]; see also Bruce Murphy, *Dispute over Bucks' Arena goes National*, URBAN MILWAUKEE (Oct. 23, 2014), <https://urbanmilwaukee.com/2014/10/23/murphys-law-dispute-over-bucks-arena-goes-national/> [https://perma.cc/9G2F-B8FM].

<sup>150</sup> See Powell, *supra* note 149.

<sup>151</sup> See Jeramey Jannene, *Fiserv Forum Workers to Get \$15/Hour*, URB. MILWAUKEE (Jan. 29, 2020), <https://urbanmilwaukee.com/2020/01/29/eyes-on-milwaukee->

Bucks exceeded all community benchmarks in this regard.<sup>152</sup> The city of Milwaukee now has a championship-contending basketball team<sup>153</sup> and a top-of-the-line stadium,<sup>154</sup> and they achieved that in a way that helps city residents who need it most.<sup>155</sup> In addition, the city of Milwaukee received an opportunity to speak out and make a difference on racial injustice through the Milwaukee Bucks; because the Bucks had a relationship with the city and were invested in the community, they took this opportunity.<sup>156</sup>

The Milwaukee Bucks are but one prominent and recent example of a greater social impact that local sports teams may have both on their community and throughout the nation. From speaking out on important social issues to taking an affirmative role in their communities, athletes and sports teams have become increasingly important advocates and catalysts for change. One particular issue of great importance is voting. In recent years, literal physical access to the ballot box has become a key voting rights is-

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fiserv-forum-workers-to-get-15-hour/ [https://perma.cc/436A-KPHW]; see also Jeramey Jannene, *Bucks Beat Hiring Targets on Fiserv Forum*, URB. MILWAUKEE (Nov. 20, 2019), <https://urbanmilwaukee.com/2019/11/20/eyes-on-milwaukee-bucks-beat-hiring-targets-on-fiserv-forum/> [https://perma.cc/GH78-JQWC] [hereinafter *Bucks Beat Hiring Targets*].

<sup>152</sup> *Bucks Beat Hiring Targets*, *supra* note 151; see also *Milwaukee Bucks Successfully Exceed Inclusionary Hiring Goals for the Construction of Fiserv Forum*, NBA (Nov. 19, 2019), <https://www.nba.com/bucks/news/milwaukee-bucks-successfully-exceed-inclusionary-hiring-goals-construction-fiserv-forum> [https://perma.cc/V8PK-MTCA].

<sup>153</sup> See *2019-20 NBA Predictions*, FIVETHIRTYEIGHT (last visited Jan. 12, 2021), <https://projects.fivethirtyeight.com/2020-nba-predictions/> (projecting the Milwaukee Bucks as the third most likely team to win the 2019-20 NBA Championship entering the regular season); see also *2019-20 NBA Predictions*, FIVETHIRTYEIGHT (last visited Jan. 12, 2021), [https://projects.fivethirtyeight.com/2021-nba-predictions/?ex\\_cid=RRpromo](https://projects.fivethirtyeight.com/2021-nba-predictions/?ex_cid=RRpromo) (projecting the Milwaukee Bucks as the second most likely team to win the 2020-21 NBA Championship as of January 12, 2021).

<sup>154</sup> Dan Devine, *Why the Milwaukee Bucks' New Arena is the NBA's Most Impressive*, YAHOO! SPORTS (Aug. 21, 2018), <https://sports.yahoo.com/milwaukee-bucks-new-arena-nbas-impressive-192841224.html> [https://perma.cc/ACJ4-WKMW].

<sup>155</sup> *Milwaukee Bucks Successfully Exceed Inclusionary Hiring Goals for the Construction of Fiserv Forum*, NBA (Nov. 19, 2019), <https://www.nba.com/bucks/news/milwaukee-bucks-successfully-exceed-inclusionary-hiring-goals-construction-fiserv-forum> [https://perma.cc/P268-P6BJ].

<sup>156</sup> See Ben Cohen, *Milwaukee Bucks' Protest of Jacob Blake Shooting Stops Sports World*, WALL STREET J. (Aug. 26, 2020), <https://www.wsj.com/articles/milwaukee-bucks-boycott-playoff-game-to-protest-kenosha-police-shooting-11598474937> [https://perma.cc/9NYR-3VDA]; see also @Bucks, TWITTER (Aug. 26, 2020, 7:26 PM), <https://twitter.com/Bucks/status/1298763794986995718> [https://perma.cc/RW8T-UXDB].

sue.<sup>157</sup> This issue has become even more acute the coronavirus pandemic and the potential danger of large in-person gatherings such as voting.<sup>158</sup> While of great national impact, the actual process of voting is an intensely local endeavor and again it has been local sports teams taking the lead to step up for their communities in a time of difficulty.

The most notable effort to help solve this major ballot access problem was a partnership by LeBron James and the Los Angeles Dodgers to use Dodger Stadium as a polling site for the 2020 election.<sup>159</sup> The Dodgers were not alone in their efforts to help improve access to the ballot box, and in fact were far from it.<sup>160</sup> While Dodger Stadium is famously privately financed,<sup>161</sup> the Dodgers (and Los Angeles teams generally) are an outlier in terms of market size, private wealth, and stadium financing. The vast majority of teams, at the time of this writing, who have reached deals to help with voting efforts received some form of public financing, typically to develop the stadium in the first place and in some cases to help with renovations to

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<sup>157</sup> See generally Andy Sullivan, *Southern U.S. States Have Closed 1,200 Polling Places in Recent Years: Rights Group*, REUTERS (Sept. 10, 2019), <https://www.reuters.com/article/us-usa-election-locations/southern-u-s-states-have-closed-1200-polling-places-in-recent-years-rights-group-idUSKCN1VV09J>.

<sup>158</sup> *Polling Locations and Voters*, CDC (last updated Jan. 4, 2021) <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> [<https://perma.cc/A2KB-922C>] (stating that “[e]lections with only in-person voting on a single day are higher risk for COVID-19 spread because there will be larger crowds and longer wait times” and describing the need for additional spacing and layout changes to safely accommodate voters amidst the pandemic).

<sup>159</sup> Christopher Brito, *LeBron James and Los Angeles Dodgers Team Up to Make Dodger Stadium a Polling Site, for 2020 Election*, CBS NEWS (Aug. 14, 2020), <https://www.cbsnews.com/news/2020-election-lebron-james-dodger-stadium-voting-polling-site/> [<https://perma.cc/SN77-XSQS>].

<sup>160</sup> See *id.*; see also Allan Smith, *Welcoming Voters, Not Fans: Sports Teams Push for Stadiums to Become Polling Sites*, NBC NEWS (Sept. 8, 2020), <https://www.nbcnews.com/politics/2020-election/welcoming-voters-not-fans-sports-teams-push-stadiums-become-polling-n1239459> [<https://perma.cc/VN5A-QCQK>] (highlighting NBA and NFL arenas also used for voting efforts); *Vote NBA Arenas & Facilities Being Used for 2020 Election*, NBA (Sept. 3, 2020), <https://www.nba.com/nba-arenas-polling-place-voting-center-2020-election> (Last visited Sept. 22 2020 11:13) [hereinafter *Vote NBA Arenas*] (listing 21 NBA team facilities used for some form of voting or election process).

<sup>161</sup> See generally Jerald Podair, *Op-Ed: Why Dodger Stadium Should be the Model for all Sports Venue Deals*, LA TIMES (Apr. 3, 2017), <https://www.latimes.com/opinion/op-ed/la-oe-podair-dodger-stadium-financing-20170403-story.html> [<https://perma.cc/DSK7-NZ8N>].

maintain team location and revitalize the local community.<sup>162</sup> In the leadup to the election, supporters of this effort hoped these stadiums could cumulatively process millions of votes while also making it easier and safer to vote during the pandemic and potentially increasing youth turnout.<sup>163</sup> It goes without saying, using stadiums for voting is quite literally impossible without the presence of a physical stadium. Furthermore, the geographic diversity of sports teams across big and small markets, facilitated by public financing, ensures these efforts reach voters across the country. Unlike other philanthropic and social efforts that can be boosted largely by national attention, the intensely local nature of voting makes this problem uniquely require a local presence, which sports stadiums provide.

## CONCLUSION

This paper has examined the growing demand for new sports stadiums and their increasing costs. As a direct consequence of that growing demand there has been unimpeded growth in demand for public assistance at ever increasing costs. This increase in demand for public financing, combined with the artificially limited number of sports teams in each league, gives significant bargaining power to sports leagues and has resulted in significant grants of public assistance to private stadium development.

After examining the reasons driving this growth in public assistance, this paper studied the direct and indirect forms of public assistance provided for private stadium development. It then looked at the ensuing criticism of the economic justifications for stadium and concluded that a significant number of previous stadium development projects were not materially beneficial to the economy. However, the paper concluded this portion of analysis by recognizing these problems may not be inherent to stadium development deals and that local governments have worked to adjust future deals in light

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<sup>162</sup> See *Vote NBA Arenas*, *supra* note 160; Karen Farkas, *Taxpayers Built the Q. See Who Pays for Other NBA Arenas, and Upgrades*, CLEVELAND.COM (May 19, 2019), [https://www.cleveland.com/metro/2016/12/the\\_q\\_is\\_one\\_of\\_the\\_oldest\\_and.html](https://www.cleveland.com/metro/2016/12/the_q_is_one_of_the_oldest_and.html) [<https://perma.cc/ETM7-XK7P>]; *Bank of America Stadium*, BALLPARKS.COM (Nov. 3, 2011), <http://football.ballparks.com/NFL/CarolinaPanthers/index.htm> [<https://perma.cc/6E4L-Q37S>] (noting that physical structure was privately financed but approximately \$50 million in public funds were provided for land acquisition and relocation).

<sup>163</sup> Smith, *supra* note 160 (stating the co-chair of the project believes each stadium can process up to 40,000 votes and the goal of signing up 50 to 100 stadiums and quoting Houston County Clerk on the potential health and logistical benefits of stadiums being used for voting).

of the criticism they have received which may be significantly more beneficial economically.

Lastly, this paper examined the potential for significant but non-economic benefits to a community by having a sports stadium and the related team. It found that sports can bring a myriad of positive effects on a community. These include effects on one's identity and psychology, the perception of one's city and community on a national stage, and the benefit of attracting higher-income, notable individuals such as athletes who will likely be willing to invest their time and wealth in as well as be a part of the community.

In conclusion, this paper finds that a lot of grants of public assistance in the past have been ill-advised and not economically beneficial to the community. It also concludes that this is not a necessary consequence of stadium development and alone may not be a dispositive reason to forego public assistance for stadium development. Through more stringent negotiating, more realistic economic analysis, and better urban planning, local governments can obtain better economic outcomes for the communities they represent. In addition, non-economic effects of sports on communities are both real and substantial and should be examined alongside economic considerations. As a result, when assessing stadium development through the paradigm of "is this a valuable use of taxpayer dollars?", local governments should use a two-prong analysis and weigh the results of both prongs: 1) as a private for-profit enterprise, is there a deal to be had that allows for a reasonable return on investment to justify this use of taxpayer dollars, and 2) does this produce a certain amount of cultural value to the community, such as a museum would, independent of the fact this is a private for-profit enterprise and independent of any consideration of return on investment, to justify the use of taxpayer dollars? Using this two-prong approach, most local governments will likely still grant such public assistance, but this approach will allow for a more deliberative and transparent process, honest debates on the merits of such a project both economic and non-economic, and more prudent decision making.



## #IAMAROBOT: Is It Time for the Federal Trade Commission to Rethink Its Approach to Virtual Influencers in Sports, Entertainment, and the Broader Market?

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### ABSTRACT

From Lil Miquela and Noonouri to Alex Hunter and latest Washington Wizards VIP fan Liam Nikuro, celebrity influencers continue to expand their audiences across the various social media platforms. In doing so, they and the brands they promote are subject to the Federal Trade Commission's *Guides Concerning the Use of Endorsements and Testimonials in Advertising* which require, among other provisions, that influencers disclose any material connections between them and the brands they endorse. While the FTC's continual issuance of updates to the *Guides* illustrates the challenges in keeping up with new technologies, the celebrity influencers cited above pose an additional challenge: they are all computer-generated images (CGIs) or, in other words, Robots. While the *Guides* are written to address humans, the FTC has yet to elaborate on how its disclosure rules and other provisions are to apply to the growing universe of Robots (other than to state that they do apply). Following a discussion of Robots as social media influencers, and an overview of the FTC's recent efforts to address the rapid growth of social media influencing, the authors provide critical assessments that may inform the FTC as it seeks to address how (and even if) the *Guides* can or should apply to Robots. One path proposes a set of standard operating procedures for Robots. Alternatively, the authors contend that the *Guides* should not apply to Robots, examining the challenges of a literal application of the *Guides* to Robots, as well as the FTC's "reasonable consumer" standard.

## TABLE OF CONTENTS

I. INTRODUCTION .....	355
II. THE RISE OF SOCIAL MEDIA INFLUENCER MARKETING .....	359
A. <i>Emergence of Computer-Generated Imaging &amp; Influencers</i> ..	362
B. <i>Brand Alignment with Virtual Influencers</i> .....	366
III. OVERVIEW OF FTC MISSION AND EVOLUTION OF THE GUIDES .....	368
IV. HOW SHOULD THE FTC HANDLE ROBOTS? .....	375
A. <i>Apply the FTC Endorsement Guides with Specific Rules for         Robots</i> .....	375
B. <i>Endorsement Guides Need Not Apply to Robots</i> .....	377
V. CONCLUSION .....	381

## I. INTRODUCTION

The National Basketball Association's ("NBA") response to the global COVID-19 pandemic was to play basketball games in a sheltered and enclosed environment in Florida, called the bubble, and no fans were allowed to attend in order to control the spread of the virus.<sup>1</sup> Yet in July 2020 as Rui Hachimura, a Wizards player who is half Japanese, drove to the basket in an exhibition game, a VIP fan named Liam Nikuro was seen in an Instagram post watching the action as he stood on the court near the three-point line.<sup>2</sup> Liam is also half Japanese and he has 14,800 followers on Instagram, but Liam is not a real person.<sup>3</sup> He is a virtual VIP guest, a computer generated image and a virtual influencer created by Tokyo-based company 1See Inc.<sup>4</sup> "We thought it (Liam) was a really unique and great way to connect with a younger generation and a new audience for us," said Jim Stone, President of Monumental Sports Entertainment the company the owns the Wizards.<sup>5</sup> When the fast-paced world of sports and entertainment collaborates with the even-faster-paced world of computer engineering and creates virtual "fans" and virtual influencers who are in essence Robots, how should our society and government respond, if at all?

In November 2019, the Federal Trade Commission ("FTC") issued a publication entitled *Disclosures 101: New FTC resources for social media influencers* (hereinafter "Disclosures 101").<sup>6</sup> An instructional video accompanied the publication, providing guidance to social media influencers on disclosures that are needed and how to effectively disclose that a material connection exists between a brand and the person posting about the brand on social media. The document was the latest in the FTC's efforts to tackle the Wild West of social media influencing and highlight the need for transparency

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<sup>1</sup> See Tadd Haislop, *NBA Bubble, Explained: A Complete Guide to the Rules, Teams, Schedules, & More for Orlando Games*, SPORTING NEWS (Aug. 26, 2020), <https://www.sportingnews.com/us/nba/news/nba-bubble-rules-teams-schedule-orlando/zhap66a9hcwq1kxmcex3ggabo> [https://perma.cc/VTW5-8Y7M].

<sup>2</sup> Scott Allen, *Liam Nikuro is a VIP Guest of the Wizards in the NBA Bubble. He's Also Not a Real Person*, WASH. POST: D.C. SPORTS BLOG (Aug. 5, 2020, 12:19 PM), <https://www.washingtonpost.com/sports/2020/08/05/liam-nikuro-is-vip-guest-wizards-nba-bubble-hes-also-not-real-person/> [https://perma.cc/9TJJ-8ZSV].

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Lesley Fair, *Disclosures 101: New FTC Resources for Social Media Influencers*, FED. TRADE COMM'N (Nov. 5, 2019, 12:23 PM), <https://www.ftc.gov/news-events/blogs/business-blog/2019/11/disclosures-101-new-ftc-resources-social-media-influencers> [https://perma.cc/8KKX-7P73].

and truthfulness in influencer marketing.<sup>7</sup> The creation and highly public launch of Disclosures 101 followed the enactment of the FTC's revised "Guides Concerning the Use of Endorsements and Testimonials in Advertising" in 2009 (hereinafter "Endorsement Guides").<sup>8</sup> The FTC announced in 2020 that it intended to revisit the Endorsement Guides;<sup>9</sup> however, there have been no recent amendments.

The FTC published helpful guides for online advertising including, among others, the issuance of *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* in 2013,<sup>10</sup> *The FTC Endorsement Guides: What People are Asking* in 2015 and 2017.<sup>11</sup> The FTC then issued a litany of notices and enforcement actions for endorsements that did not adhere to these publications and mailed ninety "educational" letters to brands and influencers, in April 2017, including letters to celebrities/influencers Jennifer Lopez, Allen Iverson and Kourtney Kardashian, as well as companies including Chanel and Adidas.<sup>12</sup> Five months later, on September 6, 2017, the FTC issued warning letters to twenty-one of those influencers.<sup>13</sup>

What distinguished Disclosures 101 from the FTC's previous communiques was that for the first time it directly targeted influencers, as op-

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<sup>7</sup> See Jim Dudukovich, *FTC Issues Guidance for Social Media Influencers; Will it Help?*, LEXOLOGY (Nov. 11, 2019), <https://www.lexology.com/library/detail.aspx?g=B6868448-f98b-4fe7-a1aa-90447dbf692a> [<https://perma.cc/EH9D-FYTA>]. A comprehensive timeline of FTC actions relating to influencers is provided in Appendix A, a document created by Dudukovich and published with his authorization.

<sup>8</sup> See 16 C.F.R. §§ 255.0-255.5, *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, FED. TRADE COMM'N (2019) [hereinafter *Endorsement Guides*].

<sup>9</sup> Dudukovich, *supra* note 7.

<sup>10</sup> *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*, FED. TRADE COMM'N (Mar. 2013), <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf> [<https://perma.cc/49QG-JC9L>].

<sup>11</sup> *The FTC's Revised Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N (Sept. 2017), <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> [<https://perma.cc/U6QX-AGE2>].

<sup>12</sup> Alexandra Steigrad, *FTC Issued Warnings to 45 Celebrities Over Unclear Instagram Posts*, WOMEN'S WEAR DAILY (May 8, 2017), <https://wwd.com/business-news/media/ftc-issued-warnings-to-45-celebrities-over-unclear-instagram-posts-10883342/> [<https://perma.cc/SK9D-U3QM>]. For a comprehensive timeline of the FTC's guidance and enforcement actions, see Appendix A. The authors wish to thank Jim Dudukovich, Counsel with Bryan Cave Leighton Paisner, LLP, for contributing this research.

<sup>13</sup> *Three FTC Actions of Interest to Influencers*, FED. TRADE COMM'N (Sept. 7, 2017) <https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers> [<https://perma.cc/9GEU-6YPE>].

posed to the brands and agencies. Disclosures 101 reinforced the fact that proper disclosure of a “material connection”<sup>14</sup> was the *influencer’s* responsibility and not just the responsibility of the brand or agency who engaged the influencer. It included the directive to “disclose when you have any financial, employment, personal, or family relationship with a brand.”<sup>15</sup> Last but not least, the document informed influencers that tags and likes are also considered endorsements.<sup>16</sup>

What Disclosures 101 did not address is what to do with non-human computer-generated images (“CGIs”), popularly known as virtual influencers, who in almost every way replicate humans, albeit without the actual human experiences of using a product or service.<sup>17</sup> Indicative of a growing trend, some of the most popular social media influencers today are CGIs and for purposes of this article we will refer to these fictional CGI-based virtual influencers as “Robots.” To date, Robots have been most popular and effective within the fashion industry, led by the likes of social media icons including Miquela Sousa, also known as Lil Miquela and lilmiquela, who in 2018 was named one of the most influential people on the internet along with Shudu, Bermuda, and Sophia the IT Girl.<sup>18</sup> Each of these Robots have their own unique fictional back-stories, personalities, and cadre of followers.<sup>19</sup> To date, the most impactful Robot influencers in sports include the previously mentioned Liam Nikuro with the Wizards and soccer player Alex Hunter who is a fictional football player who first appears in the FIFA video

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<sup>14</sup> Fair, *supra* note 6.

<sup>15</sup> *Id.* This mandate is more expansive than the FTC’s previous guidance in its directive to disclose “personal relationships,” creating potential confusion and vagueness as to the scope of this requirement.

<sup>16</sup> *Id.* As noted by one legal expert, this “is a very broad statement that may leave influencers perplexed about what their duties are if and when they ‘like’ a brand post, including how they can or should make a disclosure. This uncertainty may cause influencers to try and push responsibility on brands and agencies to provide clear instructions (including specific hashtags to use) in their influencer contracts.” Dudukovich, *supra* note 7.

<sup>17</sup> See Deborah Paracchini, *Milan Fashion Week and Fashion Law Trends – Lil Miquela, Shudu, Bermuda and Sophia The Robot: CGI and Robot IT Girls Who Will Become the Influencers of the Future*, DLA PIPER (Feb. 21, 2019), <https://blogs.dlapiper.com/iptitaly/2019/02/lil-miquela-shudu-bermuda-and-sophia-the-robot-cgi-and-robot-it-girls-who-will-become-the-influencers-of-the-future/#page=1> [https://perma.cc/S69M-KFKJ].

<sup>18</sup> *Id.*

<sup>19</sup> See *id.*; see generally Ava Farshidi, *Evaluating the FTC Endorsement Guidelines Through the Career of a Fashion Blogger*, 9 HARV. J. SPORTS & ENT. L. 185 (2018).

game in 2017.<sup>20</sup> With the emergence of Liam and Alex, it is likely that the use of Robots influencers in sport and other realms of entertainment will become more commonplace.<sup>21</sup>

The FTC has yet to provide specific guidance for Robot influencers or companies who “hire” or create them. This has resulted in a host of unanswered questions as to how the Guides are to be applied to Robots. For instance, Robots are incapable of having feelings and beliefs in a literal sense. Nor can they ever be deemed *bona fide* users of the products and services they tout. How can a computer-generated image have a “personal relationship” with a company or brand? This article will examine these and other questions raised by the use of Robots as virtual influencers.

Part I of this article examines the emergence of influencer marketing and, in particular, the growing popularity of computer-generated images as social media influencers. Part II provides an overview of the mission, purpose and enforcement role of the Federal Trade Commission followed by a history of the evolution of its guidelines for endorsements and testimonials and its concomitant efforts to deal with the rapid growth of social media influencing. Part III examines how the FTC should handle Robots. One path proposes the FTC develop and promulgate a set of standard operating procedures for Robots. A second path argues that the FTC should simply abandon the application of the Guides to Robots. This latter approach discusses not only the challenges of a literal application of the Guides to Robots, but more critically examines the FTC Guides’ “reasonable consumer” standard.<sup>22</sup> Ultimately, it is our aim to provide critical assessments that may

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<sup>20</sup> See *Alex Hunter*, FIFAFANDOM, [https://fifa.fandom.com/wiki/Alex\\_Hunter](https://fifa.fandom.com/wiki/Alex_Hunter) [<https://perma.cc/CZN8-9RJ6>] (last visited May 1, 2020).

<sup>21</sup> Although not CGIs per se, the recent launch of the Avatar Agency creates a new genre of “influencers” in sports. The company creates 3-D digital versions of professional athletes, commonly referred to as avatars, that are used on their social media platforms, greatly expanding the opportunity for athletes to serve as product and brand influencers without needing to provide their physical presence which is often a challenge for professional athletes with limited time for on-site commercial engagements. Avatar Agency is a division of Genies Inc., a California-based company whose investors include Kyrie Irving, Joe Montana and Russell Westbrook. The company has partnerships with the NFLPA and MLB Players, Inc., among others. See Eric Prisbell, *Avatars Start in Genies Inc. Strategy*, L.A. BIZ (Dec. 6, 2019), <https://www.bizjournals.com/losangeles/news/2019/12/06/avatars-star-in-marketing-agency-genies-inc-s.html> [<https://perma.cc/6FUX-YWTB>].

<sup>22</sup> For the remainder of this article, we use the phrase “FTC Guides” throughout to include not only the revised FTC Guides as promulgated in 2009 but also all of the FTC’s subsequent guidance documents on this issue.

inform the FTC as it seeks to address the increasingly prominent realm of virtual influencers.

## II. THE RISE OF SOCIAL MEDIA INFLUENCER MARKETING

Influencer marketing, by definition, is a form of marketing wherein an individual has a disproportionate ability to impact specific behaviors of others.<sup>23</sup> In recent years, influencer marketing has been focused on various social media platforms,<sup>24</sup> with the use of computer-generated images emerging as a new phenomenon.<sup>25</sup> According to one source, the influencer marketing industry, estimated as an \$8 billion industry in 2019, is on track to be a \$15 billion enterprise by 2022.<sup>26</sup>

An influencer possesses opinions trusted by their followers.<sup>27</sup> Influencer marketing hinges on the notion that it is effective because “no-one knows how to connect with [the customer] better than the influencer themselves.”<sup>28</sup> Influencers can meet their audience on a personal level better than large scale advertising.<sup>29</sup> Beyond the notion that followers will trust the influencer’s opinion, because the influencer is credible, there can be a more

<sup>23</sup> See Eytan Bakshy et al., *Everyone’s an Influencer: Quantifying Influence on Twitter* (2011), <http://snap.stanford.edu/class/cs224w-readings/bakshy11influencers.pdf> [<https://perma.cc/JSN6-KHGD>].

<sup>24</sup> See Morgan Glucksman, *The Rise of Social Media Influencer Marketing on Lifestyle Branding: A Case Study of Lucie Fink*, 8 ELON J. UNDERGRAD. RES. COMMS. 77, 77-78 (2017).

<sup>25</sup> See Tumelo Mojapelo, *The Rise of CGI Influencers*, FLUX TRENDS, <https://www.fluxtrends.com/the-rise-of-cgi-influencers/> [<https://perma.cc/M4RY-PTEG>] (last visited May 1, 2020).

<sup>26</sup> Reena Jain & Carly Kessler, *Pixel Perfect: The Legal Implications of Virtual Influencers and Supermodels*, ROBINS KAPLAN: REAL TALK: THE ROBINS KAPLAN BUS. L. UPDATE BY THE WOMEN OF BUS. LITIG. (Summer 2019), <https://www.robinskaplan.com/resources/legal-updates/real-talk-the-robins-kaplan-business-law-update/2019/real-talk-the-robins-kaplan-business-law-update-summer-2019/pixel-perfect-the-legal-implications-of-virtual-influencers-and-supermodels> [<https://perma.cc/R659-M78X>].

<sup>27</sup> Danielle Hayes, *A Rousing History of Influencer Marketing (We Promise)*, THE SHELF (Apr. 8, 2018), <https://www.theshelf.com/the-blog/influencer-marketing-timeline> [<https://perma.cc/D6SG-XYFB>].

<sup>28</sup> Aaron Brooks, *Effective Influencer Marketing in 2020 Will Hinge on ‘Creator’ Direction*, THE NEXT WEB (Dec. 24, 2019), <https://thenextweb.com/podium/2019/12/24/effective-influencer-marketing-in-2020-will-hinge-on-creator-direction/> [<https://perma.cc/VYK2-5SF2>].

<sup>29</sup> *Social Media Influencers Drive Trends – But How? And Why?*, MEDIKIX.COM (Apr. 18, 2019), <http://mediakix.com/2018/11/power-of-social-media-influencers-trendsetters/#gs.gj2rpo> [<https://perma.cc/43PD-DGGL>].

subtle effect if an influencer uses or appears to use a product or service, i.e. wears a particular brand or frequents a particular establishment, even without directly expressing an opinion about it. The influencer can “create trends and encourage their followers to buy products they promote.”<sup>30</sup> Brands often choose to use celebrity influencers because they are perceived as credible, and research has shown that when influencers are perceived as credible, brand equity increases.<sup>31</sup> The power of a celebrity on consumer evaluation can even be powerful when the celebrity is unfamiliar,<sup>32</sup> which is important for our discussion of computer-created Robot influencers.

The framework guiding influencer marketing is the idea of source credibility in which a communicator’s positive attributes lend its message to be perceived more positively.<sup>33</sup> This concept has become to be more generally known as source effect, initially theorized by Chaiken, who studied physical attractiveness and persuasion, and found that individuals who are seen as more attractive can persuade more easily.<sup>34</sup> Stated simply, the source of information matters, and source effect even applies to non-human, e.g. Robot, communication.

Influencer marketing is not a new phenomenon. The first influencers were likely members of the English monarchy<sup>35</sup> as well as various Popes in the Roman Catholic Church.<sup>36</sup> In the modern era, the first instance of influencer marketing likely occurred when the Davis Milling Company hired Ms. Nancy Green to appear on boxes of Aunt Jemima pancake mix.<sup>37</sup> She was chosen to appear on the product likely because of her warm personality,

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<sup>30</sup> *What is an Influencer? - Social Media Influencers Defined*, INFLUENCER MARKETING HUB (Jan. 28, 2021), <https://influencermarketinghub.com/what-is-an-influencer/> [<https://perma.cc/33TD-M5AY>].

<sup>31</sup> See Amanda Spry et al., *Celebrity Endorsement, Brand Credibility and Brand Equity*, 45 EUR. J. MKT, 882, 886 (2011).

<sup>32</sup> See Karla McCormick, *Celebrity Endorsements: Influence of a Product-Endorser Match on Millennials Attitudes and Purchase Intentions*, 32 J. RETAILING & CONSUMER SERV., 39, 39-45 (2016).

<sup>33</sup> Roobina Ohanian, *Construction and Validation of a Scale to Measure Celebrity Endorsers’ Perceived Expertise, Trustworthiness, and Attractiveness*, 19 J. OF ADVERT. 39, 41 (1990).

<sup>34</sup> Shelly Chaiken, *Communicator Physical Attractiveness and Persuasion*, 37 J. PERSONALITY & SOC. PSYCHOL. 1387, 1387-97 (1979).

<sup>35</sup> Hayes, *supra* note 27.

<sup>36</sup> *The History of Influencer Marketing*, GRIN (Sept. 10, 2019), <https://www.grin.co/blog/the-history-of-influencer-marketing-how-it-has-evolved-over-the-years> [<https://perma.cc/H24B-NF36>].

<sup>37</sup> Hayes, *supra* note 27.



Black skin tone, friendly demeanor and great cooking ability.<sup>38</sup> Throughout the 20th century, other brands joined the ranks in using influencer marketing, often using fictional characters that audiences knew were not real people, such as Coca-Cola using Santa Claus, or even brand-created influencers such as the Marlboro Man created by Philip Morris USA or Tony the Tiger created by Kellogg NA Company.<sup>39</sup>

Influencer marketing has become especially common in a sport context. Influencer marketing is a perfect fit in sports for numerous reasons, including the large and diversified market space in which sport operates, influencers' ability to create word-of-mouth excitement, and influencers' unique and differential characteristics such as passion and authoritative nature.<sup>40</sup> Examples of influencer marketing are as ubiquitous as the game itself. Cristiano Ronaldo is arguably the greatest soccer player of all time, but his off-the-field marketing prowess is equally impressive as he claims over 230 million followers on Instagram and has signed a \$1 billion lifetime contract with Nike to endorse its products.<sup>41</sup> Former NBA MVP Stephen Curry is one of the most popular influencers in the American sports landscape.<sup>42</sup> Curry's agent describes the Warrior point guard's relatable stature and nature, is a home run for influencer marketing: "He looks physically overmatched . . . People that look up to him, certainly the young players, they can't all be 6'9", but they could aspire to shoot or handle the ball like Stephen. His accomplishments are pretty unique, and on top of that he is humble and is just a good guy and it shines through."<sup>43</sup> In addition to professional sport, recreational sport influencers are common, especially related to fitness and

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<sup>38</sup> Erica Taylor, *Little Known Black History Fact: The History of Aunt Jemima*, BLACKAMERICANWEB, <https://blackamericaweb.com/2013/03/28/little-known-black-history-fact-the-history-of-aunt-jemima/> [https://perma.cc/5CDG-2VGJ] (last visited Aug. 20, 2020).

<sup>39</sup> Jose Angelo Gallegos, *The History and Evolution of Advertising*, TINTUP (June 29, 2016), <https://www.tintup.com/blog/history-evolution-advertising-marketing/> [https://perma.cc/UXK4-2LTH].

<sup>40</sup> Keepface, *Why Influencer Marketing is so Effective in the Sports Industry?* MEDIUM (Oct. 3, 2019), <https://medium.com/keepface-com/why-influencer-marketing-is-so-effective-in-the-sports-industry-d3a729b8115> [https://perma.cc/FH4V-VMHP].

<sup>41</sup> *Why Athlete Influencers Are so Effective*, MEDIKIX <https://mediakix.com/blog/athlete-influencers-social-media-marketing/> [https://perma.cc/F8B5-L54U] (last visited June 30, 2020).

<sup>42</sup> MVPIndex, *MVPIndex Presents the Year's Most Valuable Athletes on Social*, PR NEWSWIRE (Dec. 18, 2017), <https://www.prnewswire.com/news-releases/mvpindex-presents-the-years-most-valuable-athletes-on-social-300572798.html> [https://perma.cc/9Z4T-9D8X].

<sup>43</sup> Jarrel Harris, *Stephen Curry's Brand Growing at Same Exceptional Rate as His Game*, SPORTS ILLUSTRATED (Dec. 29, 2015), <https://www.si.com/nba/2015/12/29/>

well-being. Jen Selter is one of the most popular fitness influencers, posting daily workout videos, programs, and ads to her nearly 13 million Instagram followers.<sup>44</sup>

Although influencer marketing has been utilized in numerous forms, the rise of social media has contributed to its evolving nature.<sup>45</sup> Companies are increasing their spending on social media advertising,<sup>46</sup> often via influencers. Relative to traditional media, social media lends itself to consumer participation and content creation.<sup>47</sup> In the past, with media platforms such as television, radio and newspaper, the producer retained power and the role of the individual was reduced to passively consuming produced content.<sup>48</sup> A significant boundary existed between producer and consumer.<sup>49</sup> Due to these unique and differential characteristics possessed by social media, influencers can more easily connect with potential consumers. Furthermore, social media gives the consumer a platform to take on an active, as compared to passive, role, with an amplified voice.<sup>50</sup> Consumers, including influencers, can use this platform however they see fit, especially via encouraging other consumers both positively and negatively.

#### A. Emergence of Computer-Generated Imaging & Influencers

Using computers to create images and art likely began in the late 1960s and early 1970s at the University of Utah.<sup>51</sup> Graduate students, including John Warnock, who would go on to found Adobe; Jim Clark, who would go on to found Silicon Graphics; and Ed Catmull, who would go on to become President of Pixar, Inc., were essentially inventing the field from

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warriors-stephen-curry-under-armour-brand-marketing-superstar [https://perma.cc/D93J-G9RM].

<sup>44</sup> SOCIAL BLADE, <https://socialblade.com/instagram/user/jenselter> [https://perma.cc/Z35D-5676] (last visited Aug. 16, 2020).

<sup>45</sup> See Glucksman, *supra* note 24.

<sup>46</sup> Tereza Litsa, *Social Advertising Channels 2019: Growth, Trends, Spend*, CLICKZ (May 21, 2019), <https://www.clickz.com/social-advertising-channels-2019-growth-trends-spend/238772/> [https://perma.cc/96BE-G4FJ].

<sup>47</sup> See Janna Ehrhardt, *A Brief History of Influencer Marketing*, INFLUENCERDB (Oct. 19, 2017), <https://influencerdb.com/blog/brief-history-of-influencer-marketing/> [https://perma.cc/BG6Z-MWJB].

<sup>48</sup> See generally Henry Jenkins, *CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE* (New York University Press 2006).

<sup>49</sup> See *id.*

<sup>50</sup> Elizabeth B. Delia & Cole G. Armstrong, *#Sponsoring the #FrenchOpen: An Examination of Social Media Buzz and Sentiment*, 29 J. SPORT MGMT., 184, 185 (2015).

<sup>51</sup> ED CATMULL & AMY WALLACE, CREATIVITY, INC.: OVERCOMING THE UNSEEN FORCES THAT STAND IN THE WAY OF TRUE INSPIRATION 17 (2014).

scratch in a research lab.<sup>52</sup> Now, computer-generated images are commonplace across movies, television and video games. The CGI technology is of such high quality that these images are often mistaken for authentic photographs.<sup>53</sup> Due to the significant technological advancements, the line between physical and virtual has blurred significantly. According to a 2018 study by *FullScreen*, forty-two percent of respondents were unaware that they were following an influencer they thought was a real human.<sup>54</sup> Additionally, fifty-five percent of those surveyed who engage with a CGI influencer have made a purchase as a result of their following.<sup>55</sup>

Virtual celebrities have been prevalent since the late twentieth century, as the virtual band Gorillaz was founded in the late 1990s.<sup>56</sup> The band consisted of four virtual, animated two-dimensional members, who won a Grammy award in 2006.<sup>57</sup> Robots are now taking the limelight and are set to completely transform the current influencer industry. Today, entire influencer marketing profiles have been created using CGIs. Among the most prominent of these CGI influencers is Miquela Sousa, known as lilmiquela, who has garnered over 2.5 million followers on Instagram. Tables 1 and 2, below, show some popular Robots as measured by total followers on Instagram and Twitter, respectively. Generalizing from this data, it appears that consumers prefer to follow influencers on Instagram as compared to Twitter.

According to the 2019 study by social analytics platform HypeAuditor, “Virtual influencers have almost three times more engagement than real influencers. That means that followers are more engaged with virtual influencers content.”<sup>58</sup> Furthermore, eighteen to twenty-four-

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<sup>52</sup> *See id.*

<sup>53</sup> Dylan Love, *REAL OR FAKE: These Computer-Generated Images Look Just Like Actual Photographs*, BUS. INSIDER (July 18, 2013, 1:15 AM), <https://www.businessinsider.com/cool-3d-images-2013-7> [https://perma.cc/65MC-H245].

<sup>54</sup> Rebecca Paddon, *CGI Betrayal: New Study Reveals 42% of People Don't Know They're Following a Bot* (Jan. 24, 2019), ADOTAS, <http://www.adotas.com/2019/01/cgi-betrayal-new-study-reveals-42-people-dont-know-theyre-following-bot/> [https://perma.cc/3F5A-3EX9].

<sup>55</sup> *Id.*

<sup>56</sup> Christopher Morency, *Meeting Fashion's First Computer Generated Influencer*, BUS. OF FASHION (Feb. 5, 2018), <https://www.businessoffashion.com/articles/intelligence/meeting-fashion-s-first-computer-generated-influencer-lil-miquela-sousa> [https://perma.cc/AD7W-MZX4].

<sup>57</sup> *Id.*

<sup>58</sup> Andrew Hutchinson, *New Report Looks at the Rise of Virtual Influencers on Instagram*, SOC. MEDIA TODAY (Nov. 19, 2019), <https://www.socialmediatoday.com/news/new-report-looks-at-the-rise-of-virtual-influencers-on-instagram/567550/> [https://perma.cc/AQ6M-AFDV].

year-old female users are significantly more likely to engage with Robots.<sup>59</sup> Thus, using Robots on Instagram appears to be a viable strategy to engage with consumers. The exception to the notion that influencers are more popular on Instagram than Twitter is virtual soccer star and Coca-Cola endorser Alex Hunter, whose following is nearly six times larger on Twitter than Instagram, according to a review conducted by the authors of this article in July 2020.

TABLE 1: *POPULAR ROBOT INFLUENCERS ON INSTAGRAM*

Profile	Number of Followers <sup>1</sup>	Influencer Nature
lilmiquela	~2,500,000	Fashion/Social Change
noonouri	~361,000	Fashion/Social Change
bermudaisbae	~264,000	Music/Politics
imma.gram	~230,000	Culture/Fashion
shudu.gram	~205,000	Fashion
blawko22	~156,000	Gaming

<sup>1</sup>Measured by the authors in July 2020

TABLE 2: *POPULAR ROBOT INFLUENCERS ON TWITTER*

Profile	Number of Followers <sup>1</sup>	Influencer Nature
@MrAlexHunter	~60,800	Sports
@JedyVales	~42,700	Pornography
@lilmiquela	~26,200	Fashion/Social Change
@blawko22	~2,100	Gaming
@liam_nikuro	~1,800	Music/Fashion
@bermudaisbae	~1,800	Music/Politics

<sup>1</sup>Measured by the authors in July 2020

Every Robot has been created to meet a specific objective and to hit a target audience. For example, Bermuda (bermudaisbae) is a white, right-wing, President Donald Trump supporter created by the fictional company

<sup>59</sup> *Id.*

Cain Intelligence.<sup>60</sup> Her socio-political opposite, Miquela Sousa (lilmiquela), is a nineteen-year-old Brazilian American who champions more liberal beliefs such as Black Lives Matter and the # LGBTQ+ causes.<sup>61</sup> Sousa is even credited with writing to Congress to advocate for transgender rights.<sup>62</sup> As a singer, she has amassed 324,666 monthly listeners on Spotify as of March 2021.<sup>63</sup> In June 2018, *Time* named Sousa one of “The 25 Most Influential People on the Internet” along with President Trump, Rihanna, and actual human influencers Logan and Jake Paul.<sup>64</sup> The Los Angeles based startup Brud created both Miquela Sousa and video game influencer Blawko22 to effectively generate attention.<sup>65</sup> Joerg Zuber, the creator of noonoouri, is quoted as saying that he designed her to be “‘innovative, entertaining, and very personal and honest,’ with an altruistic side as well.”<sup>66</sup>

Robots have also achieved notoriety and followers within the realm of sports. In addition to the previously mentioned NBA VIP Liam Nikuro<sup>67</sup> a notable sport Robot is Alex Hunter, a game series character who first appeared in FIFA ‘17 and was created by EA Sports.<sup>68</sup> Players and fans were able to follow Alex on “The Journey” feature in FIFA ‘17, FIFA ‘18 and FIFA ‘19, before creators ended his story.<sup>69</sup> Hunter’s designers invented him

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<sup>60</sup> Emilia Petrarca, *Body Con Job Miquela Sousa has Over 1 Million Followers on Instagram and Was Recently Hacked by a Trump Troll. But She Isn’t Real.*, THE CUT (May 14, 2018), <https://www.thecut.com/2018/05/lil-miquela-digital-avatar-instagram-influencer.html> [<https://perma.cc/U9BA-TJMP>].

<sup>61</sup> *Id.*

<sup>62</sup> Taryn Hillin, *Can You Tell This Instagram Model is Actually a Computer Generated Robot*, ENTITY (Apr. 11, 2018), <https://www.entitymag.com/lil-miquela-instagram-model-actually-computer-generated-cyborg/> [<https://perma.cc/5SRL-HHLX>].

<sup>63</sup> *Miquela*, SPOTIFY, <https://open.spotify.com/artist/7licaqhcEBQUzz9FownRaJ> [<https://perma.cc/8RJL-EAXB>] (last visited Mar. 21, 2021).

<sup>64</sup> The 25 Most Influential People on the Internet, TIME (June 30, 2018, 7:00 PM), <http://time.com/5324130/most-influential-internet/> [<https://perma.cc/S6WM-G5DF>].

<sup>65</sup> Petrarca, *supra* note 60.

<sup>66</sup> Farouk Chekoufi, *Meet Noonoouri, the Virtual Instagram Influencer Loved by Kim Kardashian West and Dior*, VOGUE (June 19, 2018), <https://www.vogue.com.au/vogue-codes/news/meet-noonoouri-the-virtual-instagram-influencer-loved-by-kim-kardashian-west-and-dior/news-story/dfeb2658e3bbc7b2cfd11d0d26eb5bbc> [<https://perma.cc/92FJ-87UH>].

<sup>67</sup> Allen, *supra* note 2.

<sup>68</sup> Oli Platt, *FIFA 18 The Journey Mode: Alex Hunter’s Story So Far and What to Expect in Season Two*, GOAL (Sept. 29, 2017), <https://www.goal.com/en-us/news/fifa-18-the-journey-mode-alex-hunters-story-so-far-and-what/djw1spdjpwlrlrbe2yu9swpq0> [<https://perma.cc/R5TW-FEMD>].

<sup>69</sup> Talal Musa, *End of an Era FIFA 19: This is Why EA Sports Decided to End Alex Hunter’s Journey on FIFA*, DREAMTEAMFC.COM (Sept. 18, 2018, 10:21 AM), <https://www.dreamteamfc.com/news/end-of-an-era-fifa-19-this-is-why-ea-sports-decided-to-end-alex-hunters-journey-on-fifa>.

to be an authentic, young star with parents, relationships, and an exciting story: rising to prominence in the virtual soccer world.<sup>70</sup> As his story progressed throughout the trilogy, players were able to customize his appearance and uniform kit.<sup>71</sup> Hunter has since transcended the video game space, generating nearly 60,000 Twitter followers.<sup>72</sup> When he transferred to Real Madrid before the 2019 campaign, the team's official Twitter account, with over 10 million followers, welcomed him to Spain.<sup>73</sup> It remains to be seen if more sports organizations will continue this trend. However, it is clear that the public took an interest in Hunter's story based on the social media following, and thus virtual CGI Robot influencers can be understood as a viable marketing strategy for sports organizations.

### B. Brand Alignment with Virtual Influencers

Given that Miquela Sousa is one of the most popular virtual influencers, brands have lined up to align with her including, among others, Supreme, Vans, Chanel, and Prada (she even "attended" Prada's 2018 runway show).<sup>74</sup> In May 2019, she appeared in an advertisement with fashion company Calvin Klein that generated immense controversy.<sup>75</sup> Although the brand has a history of being provocative in its ads, the advertisement starring Sousa and human model and influencer Bella Hadid was especially divisive.<sup>76</sup> The video showed Sousa and Hadid sharing a loving gaze before a kiss.<sup>77</sup> Many commenters on social media were frustrated and thought the ad was "queerbaiting" as Hadid identifies as straight.<sup>78</sup> The advertisement was a part of Calvin Klein's #MyCalvins campaign, promoting freedom of ex-

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[www.dreamteamfc.com/c/gaming/418949/fifa-19-the-journey-ronaldo-alex-hunter-demo-release-date-review/](http://www.dreamteamfc.com/c/gaming/418949/fifa-19-the-journey-ronaldo-alex-hunter-demo-release-date-review/) [https://perma.cc/7RML-BF5B].

<sup>70</sup> See Mojapelo, *supra* note 25.

<sup>71</sup> *Id.*

<sup>72</sup> MrAlexHunter, TWITTER, <https://twitter.com/MrAlexHunter> [perma.cc/54Z3-38CK] (last visited Mar. 25, 2021).

<sup>73</sup> RealMadrid, TWITTER, <https://twitter.com/realmadrid/status/1026505683225780224> [https://perma.cc/3TDJ-9KBW] (last visited Mar. 25, 2021).

<sup>74</sup> *The Rise of The Fake Influencer*, CREATIVE INDUSTRY BRIEF (May 22, 2018), <https://www.creativeindustrybrief.com/the-rise-of-the-fake-influencer/> [https://perma.cc/9NBS-WKQC].

<sup>75</sup> Adrienne Pasquarelli, *Calvin Klein Apologizes for Bella Hadid Kiss with Lil Miquela*, ADAGE (May 20, 2019), <https://adage.com/article/cmo-strategy/calvin-klein-apologizes-bella-hadid-kiss-lil-miquela/2172796> [https://perma.cc/E7LE-XWJA].

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

pression.<sup>79</sup> The company released the spot on their YouTube channel, and Sousa also posted it to her own Instagram page.<sup>80</sup> Due to the immense backlash, Calvin Klein issued an apology but did not pull the video.<sup>81</sup> The controversy centered on the social complexity of the advertisement, e.g. queerbaiting, not the interaction between the human (Hadid) and the CGI Robot (Sousa).<sup>82</sup> Brands are also aligning with other noted Robots. Hunter was signed by Coca-Cola Zero Sugar as his soccer fame rose, and he appeared in a video advertisement.<sup>83</sup> Most posts on noonouri's Instagram feed are sponsored. Shudu.gram promoted Fenty Beauty Lipstick by Rihanna in a 2018 post.<sup>84</sup>

Whether or not consumers are aware profiles are actually CGI Robots, many want to know who is actually behind the various accounts and signing endorsement contracts on their behalf.<sup>85</sup> Unfortunately, some individuals choose to make their involvement with CGI Robot influencer profiles known, while others do not. For example, as previously mentioned, Zuber (creator of noonouri) is open about not only the fact that he created the profile, but also why he did so.<sup>86</sup> The same can be said for shudu.gram, but not for lilmiquela or bermudaisbae. All that is really known about lilmiquela's and bermudaisbae's creators is that the company Brud was her founder, and Brud wrote itself into lilmiquela's story by using bermudaisbae to "hack" her account.<sup>87</sup>

While human influencers often come with a host of potential challenges and pitfalls, the value and benefits of Robots are much more obvious. They do not age (at least, they don't have to), they can be dressed as desired and transported around the world with the click of a button, and their facial

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<sup>79</sup> Emily Kirkpatrick, *Calvin Klein Apologizes for Ad Featuring Bella Hadid and Lil Miquela Making Out*, N.Y. POST (May 20, 2019), <https://pagesix.com/2019/05/20/calvin-klein-apologizes-for-ad-featuring-bella-hadid-and-lil-miquela-making-out/> [<https://perma.cc/2JEF-953N>].

<sup>80</sup> Pasquarelli, *supra* note 75.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Mojapelo, *supra* note 25.

<sup>84</sup> Heather Nolan, *Brands Are Creating Virtual Influencers, Which Could Make the Kardashians a Thing of the Past*, ADWEEK (May 11, 2018), <https://www.adweek.com/brand-marketing/brands-are-creating-virtual-influencers-which-could-make-the-kardashians-a-thing-of-the-past/> [<https://perma.cc/Z549-TAQT>].

<sup>85</sup> Paddon, *supra* note 54.

<sup>86</sup> Charles Trepany, *The Robot Invasion Has Begun: Meet the Computer Generated Influencers Taking Over Instagram*, USA TODAY (Feb. 3, 2021), <https://www.usatoday.com/story/life/2019/10/16/cgi-influencers-blur-line-between-reality-and-fantasy-instagram-advertising/3790471002/> [<https://perma.cc/V7MM-ZQW4>].

<sup>87</sup> *Id.*

expressions can be engineered as desired. Furthermore, with CGI Robot influencers, versus other fictional characters, creators can more easily develop a storyline over time, evidenced by Hunter's soccer career. Finally, brands can be ensured that they will not have a controversial or embarrassing past.<sup>88</sup> It is likely due to their adaptability, control over brand safety, and apparent authenticity that companies decide to align with Robots to promote their products.<sup>89</sup> But as such, there remain unresolved issues as to just how the Endorsement Guides should be, or even can be, applied to Robots.

### III. OVERVIEW OF FTC MISSION AND EVOLUTION OF THE GUIDES

President Woodrow Wilson signed the Federal Trade Commission Act (the Act) on September 26, 1914, creating the Federal Trade Commission (FTC).<sup>90</sup> The Act declared unlawful “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce”<sup>91</sup> The Act, together with the Sherman Anti-Trust Act of 1890<sup>92</sup> and the Clayton Antitrust Act of 1914<sup>93</sup> articulates the economic policy goals of the United States to foster vigorous competition, free of monopolistic behavior, and with protections for the consumer from unfair and deceptive practices.

The mission of the FTC is to “[p]rotect consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity.”<sup>94</sup> The vision of the FTC is to help ensure that the United States has a “vibrant economy characterized by vigorous competition and consumer access to accurate information.”<sup>95</sup> The FTC has a “unique

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<sup>88</sup> *CGI Influencers: Why Brands and Consumers Should Pay Attention*, MEDIAXIX, <http://mediakix.com/2019/02/cgi-influencers-instagram-models/#gs.fibge> [<https://perma.cc/U54U-M9KQ>] (last visited Aug. 13, 2020).

<sup>89</sup> *Id.*

<sup>90</sup> *See generally Our History*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/our-history> [<https://perma.cc/3J3X-44LT>] (last visited June 7, 2019).

<sup>91</sup> 15 U.S.C. § 45 (a) (1) (2010).

<sup>92</sup> The Sherman Anti-Trust Act of 1890 is codified at 15 U.S.C. §§ 1-38 (1890).

<sup>93</sup> The Clayton Antitrust Act of 1914 is codified at 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53 (1914).

<sup>94</sup> *About the FTC*, <https://www.ftc.gov/about-ftc> [<https://perma.cc/64XQ-GGBK>], FED. TRADE COMM'N (last visited July 8, 2019).

<sup>95</sup> *Id.*



dual mission to protect consumers and promote competition.<sup>96</sup> The FTC has the authority to declare unlawful an act or practice if they deem it to be “unfair,” including if the act or practice causes or is likely to cause “substantial injury to consumers which is not reasonably avoidable by consumers themselves” and “not outweighed by countervailing benefits to consumers or to competition.”<sup>97</sup>

The FTC Guides are administrative interpretations of the laws, in order to inform the public and businesses what is expected of them.<sup>98</sup> While none of the Guides constitute law, they each represent the FTC’s articulation of what the applicable law requires or prohibits, and failure to comply with the FTC’s Guides may result in “corrective action” by the FTC.<sup>99</sup>

The FTC may issue a cease and desist order and seek civil monetary penalties against a person, partnership, or corporation committing an unfair or deceptive practice and violating the Act.<sup>100</sup> The FTC must first issue a complaint if it believes that a person, partnership, or corporation is employing an unfair and deceptive method of competition and it is in the public interest to issue the complaint.<sup>101</sup> A hearing is then held at the FTC at least thirty days after service of the complaint to show why the FTC should not issue a cease and desist order.<sup>102</sup> At the conclusion of the hearing the FTC may issue an order to the person, partnership, or corporation compelling it to stop using the unfair or deceptive practice.<sup>103</sup> The person, partnership, or corporation can appeal to the Commission to reopen the matter.<sup>104</sup> The case could proceed to a federal appeals court and ultimately to the U.S. Supreme Court.<sup>105</sup>

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<sup>96</sup> *What We Do*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/what-we-do> [<https://perma.cc/9LXM-QD6R>] (last visited July 8, 2019).

<sup>97</sup> 15 U.S.C. § 45(n) (2010).

<sup>98</sup> The Supreme Court has held that the FTC’s guides are “not fixed rules as such, and were designed to inform businessmen of the factors which would guide Commission decision. *F.T.C. v. Mary Carter Paint Co.*, 382 U.S. 46, 48 (1965). The Guides are also used as guidance in false advertising cases based on state law or based on the Lanham Act, 15 U.S.C. §§ 1051-1141. See Jessica Godell, Comment, *Consumer-Generated Media and Advertising-Are They One and the Same? An Analysis of the Amended FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 10 J. MARSHALL REV. INTELL. PROP. L. 206, 209-11 (2010).

<sup>99</sup> FTC Practice Rules, 16 C.F.R. § 1.5 (2012).

<sup>100</sup> 15 U.S.C. § 45(b) (2010).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> 15 U.S.C. § 45(b) and (c) (2010).

If an FTC cease and desist order is violated, a civil penalty of “not more than \$10,000 for each violation” may be “forfeit[ed] and pay[ed] to the United States” in a civil action brought by the Attorney General of the United States<sup>106</sup> or by the FTC.<sup>107</sup> A U.S. district court may also grant injunctions and other equitable relief to enforce final orders of the FTC.<sup>108</sup> In addition, if the FTC proves to a federal court that a reasonable person would have known that the act or practice, which is the subject of the final cease and desist order, was “dishonest or fraudulent”<sup>109</sup> the court may grant whatever relief it deems necessary including, but not limited to, rescission or reformation of contracts, the refund of money, return of property, the payment of damages, and public notification, but not punitive damages.<sup>110</sup>

On December 1, 2009, the FTC’s latest version of the Endorsement Guides took effect<sup>111</sup> reflecting the first updates to them in twenty-nine years.<sup>112</sup> The public comments to the revised Guides “correctly point out that the recent developments of a variety of consumer-generated media poses new questions about how to distinguish between communications that are considered ‘endorsements’ within the meaning of the Endorsement Guides and those that are not.”<sup>113</sup>

The FTC defines an endorsement as:

any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring ad-

<sup>106</sup> 15 U.S.C. § 45(l) (2010). Clarification in brackets added.

<sup>107</sup> 15 U.S.C. § 45(m)(1)(A) (2010).

<sup>108</sup> 15 U.S.C. § 45(l) (2010).

<sup>109</sup> 15 U.S.C. § 57b(a)(2) (2010).

<sup>110</sup> 15 U.S.C. § 57b(b) (2010). See discussion *infra* Section IV. A. Apply FTC Endorsement Guides with Specific Rules for Robots and note 153 on the question of whether it is fraud if the controllers of the Robot engaged in behavior that demonstrated that they attempted to trick people into believing that the Robot was a real person and secured some benefit based on that trickery.

<sup>111</sup> Notice of Adoption Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53124, 53125 (Oct. 15, 2009) [hereinafter Notice of Adoption]. The Guides for Endorsements and Testimonials can be found at 16 C.F.R. §§ 255.0-255.5 (July 3, 2019).

<sup>112</sup> See Press Release, *FTC Publishes Final Guides Governing Endorsements, Testimonials. Changes Affect Testimonial Advertisements, Bloggers, Celebrity Endorsements*, FED. TRADE COMM’N, available at <http://www.ftc.gov/opa/2009/10/endortest.shtm> [https://perma.cc/BHX8-WN5Z] (last visited July 8, 2019); see also Godell, *supra* note 98.

<sup>113</sup> Notice of Adoption, *supra* note 111.

vertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.<sup>114</sup>

According to the FTC, in order to determine if a statement is an endorsement, the fundamental question is whether, viewed objectively, “the relationship between the advertiser and the speaker is such that the speaker’s statement can be considered ‘sponsored’ by the advertiser and therefore an ‘advertising message.’”<sup>115</sup>

In other words, in disseminating positive statements about a product or service, is the speaker: (1) acting solely independently, in which case there is no endorsement, or (2) acting on behalf of the advertiser or its agent, such that the speaker’s statement is an ‘endorsement’ that is part of an overall marketing campaign? The facts and circumstances that will determine the answer to this question are extremely varied and cannot be fully enumerated here, . . .<sup>116</sup>

The Endorsement Guides instruct that endorsements must “reflect the honest opinions, findings, beliefs, or experience of the endorser” and “an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser.”<sup>117</sup> Furthermore, if an advertisement represents that the endorser uses the endorsed product, the endorser must be a bona fide user of a product.<sup>118</sup>

The Endorsement Guides, in 16 C.F.R. § 255.1(d), make it clear that “[a]dvertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers.”<sup>119</sup> The Endorsement Guides further state that: “Endorsers also may be liable for statements made in the course of their endorsements.”<sup>120</sup> For example, if an endorser claims that a

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<sup>114</sup> 16 C.F.R. § 255.0(c) (2010) (“The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act”).

<sup>115</sup> See Notice of Adoption, *supra* note 111, at 53126.

<sup>116</sup> *Id.* Since they could not “fully enumerate” all facts and circumstances, the Guides included some examples: whether the speaker is compensated; whether the product or service was provided for free by the advertiser; the terms of any agreement; the length of the relationship; the previous receipt of products or services from the same or similar advertisers; or the likelihood of future receipt of such products or services; and the value of the items or services received.

<sup>117</sup> 16 C.F.R. § 255.1(a) (2010).

<sup>118</sup> *Id.* at § 255.1(b).

<sup>119</sup> *Id.* at § 255.1(d).

<sup>120</sup> *Id.*

product works well and is effective, and it in fact does not, then the endorser can be held liable.<sup>121</sup> Whether reading from a script or using their own words, endorsers must be especially careful with statements that amount to testimonials that describe a product's efficacy or benefits.<sup>122</sup> "The Commission is not persuaded that a celebrity endorser's contractual obligation to read the script he or she is given should confer immunity from liability for misrepresentations made in the course of that endorsement."<sup>123</sup> In other words, an endorser's testimonial must be accurate and not just part of a script, so that the consumer is not deceived.<sup>124</sup>

The language in 16 C.F.R. § 255.1(d) attempts to provide clarity regarding possible liability for endorsers, bloggers, advertisers, and those who publish endorsements on social media after using a product. In discussing § 255.1(d) of the FTC, the Federal Register states that "if the advertiser initiated the process that led to these endorsements being made – e.g., by providing products to well-known bloggers or to endorsers enrolled in word of mouth marketing programs – it potentially is liable for misleading statements made by those consumers."<sup>125</sup>

As stated in the Endorsement Guides at 16 C.F.R. § 255.5, entitled *Disclosure of Material Connections*:

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed.<sup>126</sup>

In determining if an advertisement is deceptive, the FTC first looks at the advertisement from the perspective of a "reasonable consumer" which the FTC defines as "the typical person looking at the ad."<sup>127</sup> In 2015 the FTC issued its "Enforcement Policy Statement on Deceptively Formatted

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<sup>121</sup> See Notice of Adoption, *supra* note 111, at 53128.

<sup>122</sup> See *id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53124, 53127 (Oct. 15, 2009).

<sup>126</sup> 16 C.F.R. § 255.5 (2010) (offering additional guidance concerning endorsements by listing nine hypothetical examples and suggesting appropriate disclosure solutions).

<sup>127</sup> *Advertising FAQ's: A Guide for Small Business*, FED. TRADE COMM'N (Apr. 2001), <https://www.ftc.gov/tips-advice/business-center/guidance/advertising-faqs-guide-small-business> [<https://perma.cc/H9YT-JDN2>].

Advertisements.”<sup>128</sup> In it, the FTC articulated the test as set forth in its 1983 policy statement: “a representation, omission, or practice is deceptive if it is likely to mislead consumer acting reasonably under the circumstances and is material to consumers; in other words, it is likely to affect the consumer’s conduct or decision with regard to a product or service.”<sup>129</sup> In this 2015 Enforcement Policy Statement, the FTC further elaborated on the nature of the “reasonable consumer.”<sup>130</sup> To be reasonable, “an interpretation or response of consumers to a particular ad need not be the only one nor shared by a majority of consumers.”<sup>131</sup> Rather, “[i]nterpretations that advertisers intend to convey about an advertisement’s nature or source are presumed reasonable.”<sup>132</sup> Thus, in “evaluating whether reasonable consumers would recognize ads . . . the Commission will consider the particular circumstances in which the ad was disseminated, including customary expectations based on consumers’ prior experience with the media in which it appears and the impression communicated by the ad’s format.”<sup>133</sup> Hence, by way of simple illustration, a consumer who sees Shaquille O’Neal advertising Carnival Cruise Lines in a television commercial, or hears Steph Curry promoting Adidas in a newspaper ad, would reasonably assume a material connection between the celebrities and the brands.

The FTC then went on, in this document, to define the “reasonable consumer” in the context of advertising and promotional messages directed toward a specific target audience, stating that “[i]ncreasingly, in digital media, advertisers can target natively formatted ads to individual consumers and even tailor the ad’s messaging to appeal to the known preferences of these consumers.”<sup>134</sup> The FTC concluded that “[t]o the extent that an advertisement is targeted to a specific audience, the Commission will consider the effect of the ad’s format on reasonable or ordinary members of *that targeted group* (emphasis added).”<sup>135</sup> Although this FTC guidance was primarily in the context of native advertising, its clarification of what constitutes a “reasonable consumer” is still instructive. Ultimately, whether or not there is

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<sup>128</sup> *Enforcement Policy Statement on Deceptively Formatted Advertisements*, FED. TRADE COMM’N (Dec. 22, 2015), available at [https://www.ftc.gov/system/files/documents/public\\_statements/896923/151222deceptiveenforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf) [https://perma.cc/REN5-EVBL].

<sup>129</sup> *Id.* at 1.

<sup>130</sup> *Id.* at 11.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 11-12.

<sup>134</sup> *Id.* at 12.

<sup>135</sup> *Id.*

sufficient disclosure of a material connection depends on who the “reasonable consumer” is.<sup>136</sup>

The Endorsement Guides reiterate the FTC’s expectation that all bloggers and persons who endorse products or services on the Internet, as well as celebrities or well-known athletes who do the same, disclose any contractual relationship, or other material connection, that they have with a company in any situations where the audience would not reasonably expect that a material connection exists.<sup>137</sup> As stated above, the FTC’s mission is to “protect consumers and competition.”<sup>138</sup> With the growing popularity of influencer marketing on social media platforms over the past several years, the FTC has stepped up its enforcement not only against brands, but more importantly against the social media influencers themselves, as demonstrated in the CSGO Lotto case.<sup>139</sup>

In some instances, brands and Robots are beginning to adhere to the FTC’s disclosure guidelines in various ways on different channels. Instagram added the “Paid Partnership With” tag in March 2017<sup>140</sup> which is visible in Miquela Sousa’s controversial Calvin Klein post. Many posts include various hashtags such as #ad, #sponsored, and #paid, and the FTC has generally voiced its approval of these hashtags as a method for disclosing a material connection, provided the hashtag’s meaning is commonly understood, and provided it is not buried in a string of other hashtags in which it would be less likely to be clearly noticed.<sup>141</sup> Given, however, that the Endorsement Guides were written prior to the advent of the virtual influencer industry,

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<sup>136</sup> See generally Celine Shirooni, *Native Advertising in Social Media: Is the FTC’s “Reasonable Consumer” Reasonable?*, 56 WASH. U. J.L. & POL’Y 221 (2018).

<sup>137</sup> 16 C.F.R. § 255.5 (2010).

<sup>138</sup> *About the FTC*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc> [<https://perma.cc/L4N8-XLSM>] (last visited May 19, 2020).

<sup>139</sup> See *CSGO Lotto Owners Settle FTC’s First-Ever Complaint Against Individual Social Media Influencers*, FED. TRADE COMM’N, available at <https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against> [<https://perma.cc/9QUH-BUHD>]. See *In the Matter of CSGO Lotto, Inc., Agreement Containing Consent Order*, File No. 162-3184, FED. TRADE COMM’N (Nov. 29, 2017), [https://www.ftc.gov/system/files/documents/cases/1623184\\_csgolotto\\_agreement\\_and\\_decision\\_and\\_order.pdf](https://www.ftc.gov/system/files/documents/cases/1623184_csgolotto_agreement_and_decision_and_order.pdf) [<https://perma.cc/4TYQ-V5NA>]. The FTC ordered two social media influencers to “clearly and conspicuously disclose any material connections with an endorser or between an endorser and any promoted product or service.” See also Appendix A for a more comprehensive review of the FTC’s enforcement actions.

<sup>140</sup> *FTC Rules for Influencers - Here Are the Key Takeaways for Brands*, GRIN (Apr. 8, 2019), <https://www.grin.co/blog/ftc-rules-for-influencers> [<https://perma.cc/RQ6H-4PS2>].

<sup>141</sup> Fair, *supra* note 6, at 5.

the increasing popularity and prominence of Robots has raised important questions as to how they must or can abide by them. According to Columbia University marketing professor Olivier Toubia, “There is room for consumers to be confused.”<sup>142</sup> Syracuse University communications Professor Jennifer Grygiel echoed a similar sentiment: “It’s not obvious that she (lilmiquela) is a CGI [robot] and it’s not obvious on the post level. It’s deeply problematic.”<sup>143</sup>

#### IV. HOW SHOULD THE FTC HANDLE ROBOTS?

Regardless of whether a social media influencer is human or computer-generated, one cannot argue the merits of the Endorsement Guides: to prevent the “reasonable consumer” from being misled or deceived by messages that are designed and intended to “influence” these consumers. To date, however, the FTC has not established guidelines specifically addressing the issues attendant to Robots other than to publicly announce that the Endorsement Guides “do apply.”<sup>144</sup> Given the challenges of applying the current language and interpretations of the FTC Guides to Robots, we propose that the FTC can go one of two ways.

One path is to apply the FTC Guides, with specific rules for Robots, because they are masquerading as a human endorser of products. The second path is that the FTC simply cannot apply the Guides to Robots as they are not human beings. We examine both of these paths below in more detail.

##### A. *Apply the FTC Endorsement Guides with Specific Rules for Robots*

Perhaps the strongest argument for a clear application of the Endorsement Guides to Robots is the fact that the Guides apply a duty on the part of the companies and brands seeking to use social media influencers to have those influencers follow the Endorsement Guides when promoting their products and services.<sup>145</sup> In other words, regardless of whether the influencer is a human being or a CGI Robot, the Endorsement Guides place an equal onus on the endorsed brand to ensure that its influencers disclose any material connections. In fact, until fairly recently, the bulk of the FTC’s enforce-

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<sup>142</sup> Kaya Yurieff, *Instagram Star Isn’t What She Seems but Brands Are Buying In*, CNN (June 25, 2018, 11:23 AM), <https://money.cnn.com/2018/06/25/technology/lilmiquela-social-media-influencer-cgi/index.html> [https://perma.cc/ESR6-866S].

<sup>143</sup> *Id.*

<sup>144</sup> Jain & Kessler, *supra* note 26.

<sup>145</sup> Telephone interview with Jim Dudukovich, Counsel, Bryan Cave Leighton Paisner, LLP, (Dec. 28, 2019).

ment actions have come against companies and brands, not against the influencers.<sup>146</sup> Hence, from this perspective, the argument holds that “even if they’re not real, CGIs can still exert influence, and so people still have the right to know that they are somehow being compensated, and so the brand that hires the [Robot] CGI should mandate that it make a disclosure.”<sup>147</sup>

Conceding this point, however, we contend that consumers then *also* have the right to know that Robots, who are endorsing products that consumers are considering buying, are not *real people*. The CGI production companies, obviously not the Robots, may indeed be receiving some material compensation.<sup>148</sup> The Robot’s endorsement of the product or service is in no way based upon its *bona fide* use of the product or service, nor is it based upon personal opinions, beliefs, or experiences with or about the product or service because the Robots never use a product. Toward this end, we propose that if the Endorsement Guides are to apply, the FTC develop and promulgate specific rules for the use of CGIs as virtual influencers in order to alleviate any potential misleading or deceptive behavior.<sup>149</sup>

Since Robots are masquerading as humans who are endorsing products, the guides should apply to Robots and their creators. Just as Twitter has developed the “blue check” to serve as a proof of authentication of an influencer account, the FTC could develop a universal icon (such as a small red gear cogwheel) applicable to all social media platforms that all Robot accounts are required to prominently display.<sup>150</sup> Second, the top of the landing page of each social media platform used by a Robot could be required to provide a prominent disclosure statement such as the following: “I’m a computer-generated image created by XYZ Company which is compensated for brands that I promote on this social media channel.”<sup>151</sup> One potential issue with this tactic is that this statement may not “travel” with a particular

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> In reality, it is the CGI production companies behind the virtual influencers who are being compensated.

<sup>149</sup> 16 C.F.R. § 255.1(a) and (b) (2009).

<sup>150</sup> Alternatively, the FTC could require each social media platform to develop an appropriate icon for its platform that would immediately indicate to consumers that the influencer is a CGI. Granted, one could argue that consumers might not know what the icon means. However, as with Twitter’s blue check, eventually, the users of this social media platform quickly came to learn what the icon means.

<sup>151</sup> This type of approach to disclosure of materials connections has been deemed appropriate by the FTC. For an example of this approach involving New Orleans Saints quarterback Drew Brees. See Natasha T. Brison et al, *Tweets and Crumpets: Examining U.K. and U.S. Regulation of Athlete Endorsements and Social Media Marketing*, 23 J. LEGAL ASPECTS SPORT 55, 70 (2013).



post, and so it would only be effective for posts when they are seen on that particular landing page. The third approach, and admittedly likely the least impactful, would be to require all Robots to prominently disclose their identity by including #ROBOT in all places in which it should otherwise include a material connection disclosure (such as #adv) pursuant to the Guide's requirements on hashtag usage generally.<sup>152</sup> We can think of little on its face that may be more potentially deceptive and misleading than trying to pawn off CGI Robots as "real people."<sup>153</sup> Hence, if the purpose of the Endorsement Guides is to protect consumers from deceptive and misleading advertising, we believe that the above measures would be a good start to effectively accomplishing this mission.

#### *B. Endorsement Guides Need Not Apply to Robots*

In the alternative, there are two separate and distinct approaches we take in arguing that the Endorsement Guides should simply be discarded in the context of Robots, who are not human, although they are pretending to be human endorsers. The FTC guides were simply not written for non-human beings. In addition, the FTC Guides should not apply to Robots because of the growing sophistication of consumers. We contend that the reasonable consumer can, or certainly should, be able to distinguish real people from Robots. Put another way, a reasonable consumer should be able to understand fact from fiction. The time has come for the FTC to better align its "reasonable consumer" test with the sophistication and expectations of today's typical users of social media. We further explain and examine these arguments below.

On the simplest and most literal level, the language of the Endorsement Guides cannot apply to non-humans for a number of reasons. First, the Guides identify endorsements and testimonials as any advertising messages that consumers are likely to believe reflect "the honest opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser."<sup>154</sup> As consumer-generated images, Robots are quite literally incapable of forming any such opinions or beliefs with regard to products or services. They are also literally incapable of having "findings" or real-life experiences within the meaning and purpose of this provision of the Guides. Second, the Guides

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<sup>152</sup> *Id.*

<sup>153</sup> One might even make the argument that the creators of Robots may be liable for fraudulent behavior in violation of 15 U.S.C. § 57(a)(2) (2010) if they attempted to trick people into believing that a Robot was a real person and secured some benefit based on this trickery.

<sup>154</sup> 16 C.F.R. § 255.0(b) (2009).

require that endorsers disclose “material connections” that exist between the “endorser” and the sponsoring company.<sup>155</sup> While it may be true that the *creators* of the Robots may be receiving some material benefit—i.e., free product or monetary compensation—or otherwise have a material connection with the brand, it is again literally impossible for a Robot to receive or accept any such material benefit. Finally, the Guides require that when the advertisement represents that the endorser uses the endorsed product, said endorsers must be “bona fide user[s] of it at the time the endorsement was given.”<sup>156</sup> While one might stretch the argument that a Robot can actually “wear” clothes or cologne, this cannot happen in the literal sense any more so than it can be said that soccer Robot Alex Hunter drinks Coca-Cola products. In sum, applying the Endorsement Guides to Robots, when they were specifically designed to apply to human individuals and incorporations, is inappropriate on its face.

Our second line of analysis in relation to the applicability of the Endorsement Guides to Robots is premised on the growing sophistication of social media consumers within the context of how we define the “reasonable consumer.”<sup>157</sup> We contend that the “reasonable consumer” can, or should, be able to distinguish real people from Robots.<sup>158</sup> Certainly, we readily expect such discernment of real versus fictional characters in mediums such as movies, literature, and video games. This argument is further strengthened when one considers that the FTC’s criteria is that 25% of consumers tested must be misled by the advertisement.<sup>159</sup> Put another way, more than a quarter of reasonable consumers would need to be deceived into believing not only that a Robot is a real person but, within the context of the Enforcement Guides, is also expressing its genuine opinions, beliefs, and experiences with the product, as well as being a “bona fide” user of the product.

Building upon our argument that the Endorsement Guides should not apply to Robots due to the increasing sophistication of the “reasonable consumer,” we turn first to the FTC’s historical notion of the “reasonable con-

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<sup>155</sup> 16 C.F.R. § 255.5 (2009).

<sup>156</sup> 16 C.F.R. § 255.1(c) (2009).

<sup>157</sup> See Shirooni, *supra* note 136.

<sup>158</sup> A consumer who is unable to make this distinction might be otherwise called an “ignorant consumer,” whom the FTC is not responsible for protecting from him or herself. See generally Ivan Preston, *Reasonable Consumer or Ignorant Consumer: How the FTC Decides?*, 8 J. CONSUMER AFFS. 131, 131-43 (1974).

<sup>159</sup> See Brison et al., *supra* note 151, at 65 (citing Basak Cali, *On Interpretivism and International Law*, 20 EUR. J. INT’L L. 805, 807 (2009)). The FTC’s 25% standard is a less rigorous standard as compared to the U.K. standard whereby an advertisement could be banned if there is the potential for one consumer to be misled. *Id.*

sumer.”<sup>160</sup> As already noted, the FTC, in its December 22, 2015 *Enforcement Policy Statement on Deceptively Formatted Advertisements*, reiterated that “a representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers – that is, it would likely affect the consumer’s conduct or decision with regard to a product or service.”<sup>161</sup> Further, in the same 2015 policy statement, the FTC elaborated on the nature of the “reasonable consumer” when “evaluating whether reasonable consumers would recognize ads . . . the Commission will consider the particular circumstances in which the ad was disseminated, including customary expectations based on consumers’ prior experience with the media in which it appears and the impression communicated by the ad’s format.”<sup>162</sup>

Especially given the constant emergence of new technologies, the FTC has continued to grapple with the question of how to establish clear guidelines for advertisers, and also human influencers, so that the “reasonable consumer” is aware of material connections between the advertiser and the influencer.<sup>163</sup> As suggested by Shirooni, the notion of what is a “reasonable consumer” has evolved with the differing type of media.<sup>164</sup> Certainly, when an average consumer sees a television advertisement or hears a radio advertisement featuring a spokesperson, he or she reasonably knows that there is some material connection between the advertiser and the spokesperson. In the early days of social media, one can see how a reasonable consumer could be misled or deceived by influencers. However, over time, and particularly given the sophistication of the younger users of social media,<sup>165</sup> one can argue that as platforms like Twitter and Instagram have become ubiquitous, promotional messaging has become no different than that which appears on television or radio. Today’s “reasonable consumer” knows that someone

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<sup>160</sup> See Shirooni, *supra* note 136.

<sup>161</sup> See *Enforcement Policy Statement*, *supra* note 128. Although this particular policy statement addressed advertising and promotional messages integrated into and presented as non-commercial content, this language represents essentially the same test for social media posts.

<sup>162</sup> *Id.* at 11.

<sup>163</sup> See Fair, *supra* note 6.

<sup>164</sup> See Shirooni, *supra* note 136.

<sup>165</sup> *Id.* at 234. Shirooni argues that “in stark contrast to the consumers of the past, the consumers of social media are undoubtedly unique. There are many defining characteristics of the social media consumer that separate them from the consumers of print, radio, or television media . . . [I]t is undeniable that the ‘reasonable consumer’ of social media advertisements is not an ‘average consumer.’” *Id.*

touting a product or service is receiving some type of material compensation for doing so.<sup>166</sup>

Prior to the creation of social media, consumers intuitively expected that celebrities endorsing products and services on television, radio, and in-print were somehow being compensated.<sup>167</sup> It is reasonable to assume, arguably, that today's habitual user of social media would likewise expect that celebrities whom they see or hear endorsing products and services on social media platforms are being somehow compensated. Indeed, the Endorsement Guides themselves recognize this phenomenon in its example of a movie star endorsing a food product.<sup>168</sup> The example states, in relevant part: "regardless of whether the star's compensation for the commercial is a \$1 million cash payment or a royalty for each product sold by the advertiser during the next year, no disclosure is required *because such payments likely are ordinarily expected by viewers.*"<sup>169</sup> As Shirooni insightfully contends:

"When a celebrity is seen in her professional capacity, for example at a press junket, in a film or television show, or on the red carpet, it can safely be assumed that a consumer will realize that the celebrity is being compensated to wear or use a particular brand. . . . social media consumers arguably *expect* that Instagram posts from celebrities raving about a product are paid endorsements, even without a disclosure. The Instagram post has therefore become an additional arena for celebrities to behave in their professional capacities. The social media post is the new red carpet."<sup>170</sup>

Indeed, the landscape of social media has quickly evolved to a point necessitating that the FTC broaden its outdated test of what constitutes a "reasonable consumer."<sup>171</sup> Today's typical user of social media is most likely very computer literate and comfortable with technology.<sup>172</sup> Social media platforms like Twitter and Instagram have become ubiquitous enough that,

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<sup>166</sup> The FTC accepted this concept in a 2009 incident involving Gwyneth Paltrow, who posted favorably on her personal blog about a hotel resort without disclosing her complimentary hotel stay. The FTC declined to take further action against Paltrow, reasoning that for some celebrities, consumers automatically assume that they have been compensated for their tweet or blog, and hence disclosure is not necessary. See Jeff Bercovici, *How the FTC's Endorsement Rules Unfairly Favor Celebrities*, AOL (Jan. 6, 2010, 6:30 PM), <https://www.aol.com/2010/01/06/how-the-ftcs-endorsement-rules-unfairly-favor-celebrities/> [https://perma.cc/6B8U-MY6T].

<sup>167</sup> Shirooni, *supra* note 136, at 226.

<sup>168</sup> 16 C.F.R. §255.5 (2009).

<sup>169</sup> *Id.* (emphasis added).

<sup>170</sup> Shirooni, *supra* note 136, at 238.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 234.

from a commercial standpoint, they are in many ways no different than what television and radio was in the past. As such, the “reasonable consumer” of social media influencers is wise enough to discern what is going on as they are “in on the secret.”<sup>173</sup> Hence if we conclude that disclosures are increasingly no longer required for human celebrities acting as influencers, one can then make the same argument for Robots.

## V. CONCLUSION

As the social media landscape continues to grow and evolve, the FTC faces an ongoing challenge with regard to how to handle and instruct influencers in the overall economy and the sports and entertainment space. Exacerbating the challenge is the notion that, arguably, social media is fast becoming, if it hasn't already become, just another form of media whereby the “reasonable consumer” expects that influencers, and celebrity and athlete influencers, are being compensated for promoting products and services. Yet, while the Endorsement Guides and subsequent documents have been written to address humans, the FTC has yet to elaborate on how its Guides are to apply to the growing universe of Robots. We likewise don't have the answer. We have, however, attempted to present and analyze the options. Thus, we propose one approach in which Robots would be required to disclose any material connections, but through a specific set of tactics designed to clearly and unequivocally identify them as Robots so as to eliminate the potential of misleading or deceiving the consumer. The second approach we propose is that, when it comes to Robots specifically, no disclosures be required either because the Guides cannot, in a purely literal sense, be applied to Robots and/or because of the increasing sophistication of today's “reasonable consumer.”

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<sup>173</sup> *Id.* at 236.

APPENDIX A – COMPREHENSIVE TIMELINE OF FTC GUIDANCE  
AND ENFORCEMENT ACTIONS<sup>174</sup>

Over the years, the FTC has taken a number of actions to enforce the principles articulated in the Endorsement Guides, including the following:

**April 2010:** FTC issues closing letter to Ann Taylor Stores<sup>175</sup> for providing gifts to bloggers in exchange for their attendance at an event it hosted for its LOFT collection. The FTC voiced concerns that the bloggers who attended were likely to post about the event and the collection without disclosing that they had received a gift. The FTC opted not to take enforcement action due to the small number of bloggers who actually attended, the fact that several of them who blogged included a disclosure, and Ann Taylor's issuance of a written policy not to issue gifts to bloggers without advising them of their responsibility to disclose it.

**August 2010:** FTC announces Consent Order with Reverb Communications, a PR firm that encouraged its employees to post positive reviews of its clients' apps in the iTunes store without disclosing their relationship.<sup>176</sup>

**March 2011:** FTC announces Consent Order with Legacy Learning Systems for its affiliate marketing practices, through which affiliates would post positive reviews of its instructional DVDs without disclosing their connection to Legacy Learning and receive commissions from sales made via hyperlinks posted with those reviews.<sup>177</sup>

**May 2012:** FTC hosts a public workshop entitled *In Short: Advertising & Privacy Disclosures in a Digital World*.<sup>178</sup>

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<sup>174</sup> Again, the authors wish to thank Jim Dudukovich, Counsel with Bryan Cave Leighton Paisner, LLP, for contributing to the research in Appendix A.

<sup>175</sup> AnnTaylor Stores Corp., File No. 102-3147, FED. TRADE COMM'N (Apr. 20, 2010), *available at* [https://www.ftc.gov/sites/default/files/documents/closing\\_letters/anntaylor-stores-corporation/100420anntaylorclosingletter.pdf](https://www.ftc.gov/sites/default/files/documents/closing_letters/anntaylor-stores-corporation/100420anntaylorclosingletter.pdf) [<https://perma.cc/PW5Z-PT8F>].

<sup>176</sup> In the Matter of Reverb Communications, Inc., et al., File No. 092 3199, FED. TRADE COMM'N (Nov. 26, 2010), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/092-3199/reverb-communications-inc> [<https://perma.cc/VZ7C-252N>].

<sup>177</sup> In the Matter of Legacy Learning Systems, Inc., et al., File No. 102-3055, FED. TRADE COMM'N (June 10, 2011), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/102-3055/legacy-learning-systems-inc-et-al-matter> [<https://perma.cc/3V8F-FFAL>].

<sup>178</sup> In Short: Advertising & Privacy Disclosures in a Digital World, FED. TRADE COMM'N (May 30, 2012), *available at* <https://www.ftc.gov/news-events/events-calendar/2012/05/short-advertising-privacy-disclosures-digital-world> [<https://perma.cc/JD53-WC92>].

**March 2013:** FTC issues *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*.<sup>179</sup>

**Feb. 2014:** FTC issues closing letter to Village Green Network in connection with its practice of acting as an intermediary between marketers and its network of bloggers to facilitate payments from the marketers to the bloggers to promote their products.<sup>180</sup> The FTC opted not to take enforcement action based on its being a case of first impression (e.g., involving an intermediary network) and the small number of blog postings that were deficient. But the FTC made clear that in order to be compliant, intermediaries like Village Green must inform their bloggers of their responsibility to be transparent.

**March 2014:** FTC announces Consent Order with ADT for hiring spokespeople to appear on television programming as home security, child safety, or technology experts and to recommend ADT systems without disclosing they were paid endorsers.<sup>181</sup>

**March 2014:** FTC issues closing letter to Cole Haan in connection with its “Wandering Sole” contest, which required participants to post five photos of Cole Haan shoes on a Pinterest board and tag it #WanderingSole for a chance to win a \$1,000 shopping spree; this was a case of first impression, so the FTC opted not to take enforcement action, but the FTC opined that going forward these types of contest entries should be considered endorsements and require a clear disclosure of a material connection (such as #ColeHaanContest).<sup>182</sup>

**Sept. 2014:** FTC issues closing letter to Yahoo in connection with the posting by Yahoo employees of positive reviews of Yahoo apps in the iTunes store without disclosing that they were employees. The FTC opted not to take enforcement action based on the small number of them, the fact that Yahoo didn’t encourage or incentivize the activity, the fact that the app was free, and Yahoo’s commitment to improving its social media policy.<sup>183</sup>

**March 2015:** FTC announces final orders with Sony and its advertising agency Deutsch in connection with a campaign which (a) made misleading statements about Sony’s PS Vita product, and (b) involved a

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<sup>179</sup> *Supra* note 10.

<sup>180</sup> Village Green Network, FTC File No. 132-3267, FED. TRADE COMM’N (Feb. 18, 2014), available at [https://www.ftc.gov/system/files/documents/closing\\_letters/village-green-network/140218villagegreenetter.pdf](https://www.ftc.gov/system/files/documents/closing_letters/village-green-network/140218villagegreenetter.pdf) [<https://perma.cc/69TB-TNJP>].

<sup>181</sup> *Home Security Company ADT Settles FTC Charges that Endorsements Deceived Consumers*, FED. TRADE COMM’N (Mar. 6, 2014), <https://www.ftc.gov/news-events/press-releases/2014/03/home-security-company-adt-settles-ftc-charges-endorsements> [<https://perma.cc/F9LK-GW45>].

<sup>182</sup> Cole Haan, FTC File No. 142-3041, FED. TRADE COMM’N (Mar. 20, 2014), available at [https://www.ftc.gov/system/files/documents/closing\\_letters/cole-haan-inc./140320colehaanclosingletter.pdf](https://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320colehaanclosingletter.pdf) [<https://perma.cc/8AU3-J4BU>].

<sup>183</sup> Yahoo App Reviews, File No. 142-3092, FED. TRADE COMM’N (Sept. 3, 2014), [https://www.ftc.gov/system/files/documents/closing\\_letters/yahoo-app-reviews/140903zwillingletter.pdf](https://www.ftc.gov/system/files/documents/closing_letters/yahoo-app-reviews/140903zwillingletter.pdf) [<https://perma.cc/N77F-GXPB>].

concerted effort by Deutsch to have its employees promote the product on social media without disclosing that they worked for Sony's agency.<sup>184</sup>

**May 2015:** FTC issues *The FTC Endorsement Guides: What People are Asking*.<sup>185</sup>

**March 2016:** FTC announces Consent Order with Lord & Taylor for a campaign in which it (a) paid for misleading native advertising promoting its collection in Nylon magazine (ads that looked like editorial posts), and (b) gave 50 fashion influencers a dress and paid them to post pictures of themselves wearing it without disclosing that they were paid or given something.<sup>186</sup>

**March 2016:** FTC announces Consent Order with Machinima for a campaign in which Machinima had been hired by Microsoft's agency to promote Microsoft's Xbox One system and several games and, without Microsoft's or its agency's knowledge, paid YouTube influencers to post videos promoting them without disclosing that they were paid.<sup>187</sup>

**July 2016:** FTC announces Consent Order with Warner Bros. for a campaign in which WB paid influencers anywhere from hundreds to tens of thousands of dollars to post and promote positive gameplay videos for WB's *Shadow of Mordor* game.<sup>188</sup>

**April 2017:** "Educational" letters are sent by FTC to 90 influencers and brands.<sup>189</sup>

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<sup>184</sup> *FTC Approves Final Orders Related to False Advertising by Sony Computer Entertainment America and Its Ad Agency Deutsch LA for PS Vita Game Console*, FED. TRADE COMM'N (Mar. 31, 2015), <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-approves-final-orders-related-false-advertising-sony-computer> [<https://perma.cc/SB6G-47UJ>].

<sup>185</sup> *Supra* note 11.

<sup>186</sup> *Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 "Fashion Influencers"*, FED. TRADE COMM'N (Mar. 15, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through> [<https://perma.cc/ZYJ8-P8ZD>].

<sup>187</sup> *FTC Approves Final Order Prohibiting Machinima, Inc. from Misrepresenting that Paid Endorsers in Influencer Campaigns are Independent Reviewers*, FED. TRADE COMM'N (Mar. 17, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/ftc-approves-final-order-prohibiting-machinima-inc> [<https://perma.cc/F4WG-MRGE>].

<sup>188</sup> *Warner Bros. Settles FTC Charges It Failed to Adequately Disclose It Paid Online Influencers to Post Gameplay Videos*, FED. TRADE COMM'N (July 11, 2016), <https://www.ftc.gov/news-events/press-releases/2016/07/warner-bros-settles-ftc-charges-it-failed-adequately-disclose-it> [<https://perma.cc/8WUQ-KBCB>].

<sup>189</sup> *FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*, FED. TRADE COMM'N (Apr. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose> [<https://perma.cc/PX6Y-Y69W>].



**Sept. 2017:** Actual *warning letters* issued by FTC to 21 of those influencers.<sup>190</sup>

**Sept. 2017:** FTC announces Consent Order with owners of CSGO Lotto for promoting the CSGO Lotto service without disclosing that they were owners of the service; this was the first-ever complaint filed by the FTC against individual social media influencers (who, as noted, also happened to be the owners of the company being promoted).<sup>191</sup>

**Sept. 2017:** FTC issues updated version of *The FTC Endorsement Guides: What People are Asking*, which includes 20 additional questions and answers.<sup>192</sup>

**Sept 20, 2017:** FTC hosts a Twitter Q&A on influencer marketing.<sup>193</sup>

**Nov. 2018:** FTC announces Consent Order with Creaxion for running a campaign promoting its client's mosquito repellent using misleading native advertising and endorsements by gold medal athletes who did not disclose that they were compensated.<sup>194</sup>

**Feb. 2019:** FTC announces Consent Order with Cure Encapsulations, a company that bought fake Amazon reviews for its products to boost its average rating.<sup>195</sup>

**April 2019:** FTC announces Consent Order with UrthBox based on its practice of furnishing free products to consumers who posted positive reviews of UrthBox without any disclosure that they were being compensated.<sup>196</sup>

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<sup>190</sup> Warning Letter, FED. TRADE COMM'N (Sept. 6, 2017), [https://www.ftc.gov/system/files/attachments/press-releases/los-propietarios-de-csgo-lotto-resuelven-la-primera-demanda-jamas-entablada-contra-influyentes-de-instagram\\_influencer\\_warning\\_letter\\_template\\_9-6-17.pdf](https://www.ftc.gov/system/files/attachments/press-releases/los-propietarios-de-csgo-lotto-resuelven-la-primera-demanda-jamas-entablada-contra-influyentes-de-instagram_influencer_warning_letter_template_9-6-17.pdf) [https://perma.cc/4UE4-J7GM].

<sup>191</sup> *Supra* note 139.

<sup>192</sup> *Supra* note 11.

<sup>193</sup> *FTC to Hold Twitter Chat on Social Media Influencer Disclosures*, FED. TRADE COMM'N (Sept. 18, 2017), <https://www.ftc.gov/news-events/press-releases/2017/09/ftc-hold-twitter-chat-social-media-influencer-disclosures> [https://perma.cc/W42L-VCHU].

<sup>194</sup> *PR Firm and Publisher Settle FTC Allegations They Misrepresented Product Endorsements as Independent Opinions, Commercial Advertising as Editorial Content*, FED. TRADE COMM'N (Nov. 13, 2018), <https://www.ftc.gov/news-events/press-releases/2018/11/pr-firm-publisher-settle-ftc-allegations-they-misrepresented> [https://perma.cc/5YQJ-FG56].

<sup>195</sup> *Cure Encapsulations, Inc.*, File No. 172-3113, FED. TRADE COMM'N (JUNE 4, 2019), <https://www.ftc.gov/enforcement/cases-proceedings/172-3113/cure-encapsulations-inc> [https://perma.cc/CU7V-C2B3] (last updated June 4, 2019).

<sup>196</sup> *FTC Approves Final Consent Order against UrthBox, Inc. and its Principal Related to Compensated Online Reviews and "Free" Trial Offer*, FED. TRADE COMM'N (May 17, 2019), <https://www.ftc.gov/news-events/press-releases/2019/05/ftc-approves-final-consent-order-against-urthbox-inc-its> [https://perma.cc/2LKZ-6CQM].

**Oct. 2019:** FTC announces a Court Order in the Southern District of Florida against Devumi, LLC, and its owner and CEO, German Calas, Jr. for their unlawful practice of selling fake indicators of social influence, including fake followers, subscribers, likes, and views. The order includes an injunction and a monetary judgment of \$2,500,000, the amount Devumi was paid under its scheme; upon payment of \$250,000, the remainder of the judgment was suspended based on Mr. Calas's representations about his financial condition.<sup>197</sup>

**Oct. 2019:** FTC announces Consent Order against Sunday Riley and its namesake founder and CEO<sup>198</sup> for its scheme of posting fake reviews (by Ms. Riley herself and her employees) to promote the brand. Of note is that Commissioners Chopra and Slaughter issued a dissent<sup>199</sup> in which they voiced their frustration that the lack of any financial penalties in the settlement sends the wrong message to the marketplace and will not deter similar activities.

**Nov. 2019:** FTC issues *Disclosures 101 for Social Media Influencers*, the first guidance document targeted specifically at influencers.<sup>200</sup>

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<sup>197</sup> Devumi, LLC, File No. 182-3066, FED. TRADE COMM'N (May 17, 2019), <https://www.ftc.gov/enforcement/cases-proceedings/182-3066/devumi-llc> [https://perma.cc/7XB9-DHQR].

<sup>198</sup> In the Matter of Sunday Riley Modern Skincare, LLC, File No. 192-3008, FED. TRADE COMM'N (Oct. 21, 2019), <https://www.ftc.gov/enforcement/cases-proceedings/192-3008/sunday-riley-modern-skincare-llc-matter> [https://perma.cc/X33J-EXTZ].

<sup>199</sup> Statement of Commissioner Chopra Joined by Commissioner Slaughter Regarding Sunday Riley, FED. TRADE COMM'N (Oct. 21, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1550127/192\\_3008\\_final\\_rc\\_statement\\_on\\_sunday\\_riley.pdf](https://www.ftc.gov/system/files/documents/public_statements/1550127/192_3008_final_rc_statement_on_sunday_riley.pdf) [https://perma.cc/EW96-43RT].

<sup>200</sup> Disclosures 101 for Social Media Influencers, FED. TRADE COMM'N, [https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508\\_1.pdf](https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf) [https://perma.cc/V9UZ-XZPT] (last visited May 17, 2020).











