

SPORTS & ENTERTAINMENT LAW JOURNAL

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Chris Ryan



UNIVERSITY of
DENVER

STURM COLLEGE OF LAW

VOLUME XVII

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EDITOR'S NOTE

The Sports and Entertainment Law Journal is proud to complete its tenth year of publication. Over the past decade, the Journal has strived to contribute to the academic discourse surrounding legal issues in the sports and entertainment industry by publishing scholarly articles.

Volume XVII has six featured articles discussing issues and proposing solutions for hot topics we face in the sports and entertainment industry.

The first article, written by Kaine Hampton, a May 2015 graduate of American University Washington College of Law, discusses the crossroads between U.S. copyright law and musician advocacy. The article proposes a solution that would adequately address both the interests of musicians and music licensees.

Switching into the sports industry, Matthew Akers writes the second article regarding the international tax regimes for athletes playing in various countries across the world and recommends a proposal for countries to use tax regimes in an effective way that attracts international athlete talent.

The third article, by Jason Cruz, talks about the illegality of Mixed Martial Arts in New York, and whether MMA will become constitutionally protected in the future, under the First Amendment.

The fourth article, written by Professor John Fortunato, discusses *Jenkins v. National Collegiate Athletic Association* and how sponsors can have positive implications in collegiate athletics.

Continuing with the discussion of sports, the fifth article, written by Zachary Paterick, Timothy E. Paterick, and Sandy Sanbar, explores the physical and verbal aggressiveness between student-athletes and coaches, and discusses possible ways to better protect the interests of both in college sports.

In the sixth article, Christopher Ryan talks about the perceptual change of American legal practice, and why television has impacted the current opinion of lawyers.

We are truly pleased with Volume XVII's publication and would like to thank the authors for all of their hard work. We would also like to thank our wonderful faculty advisor, Professor Stacey Bowers, and our two wonderful Deans, Dean Emmerich and Dean Moffat, for their invaluable advice and guidance. To the editorial board and staff editors, I appreciate the endless effort and hard work that has perfected the Journal. I am so proud of what we have accomplished!

Last, I would like to thank my best friend who has always supported me throughout law school. I could not have achieved my accomplishments without you.

NADIN SAID
EDITOR-IN-CHIEF (ACADEMIC YEAR 2014 -2015)
DENVER, COLORADO
MAY 2015

AT THE CROSSROADS: THE INTERSECTION OF SYNCHRONIZATION LICENSING AND MUSICIAN ADVOCACY

Kaine Hampton*

I. INTRODUCTION

When you hear the immortal, politically conscious, but yet soulful song, *What's Going On*, Marvin Gaye is likely the first person you think of, not Chet Forest, the talented drummer heard in the background of the track.¹ Or when you hear the twenty-two prophetic lines of *Imagine*, you likely think of John Lennon's vocal chords rather than Klaus Voormann's bass guitar playing throughout the track.² The same goes for The Beach Boys' *Good Vibrations*, not many people recognize Larry Knechtel as the skillful organist fueling the track's instrumentals.³

Commonly, listeners do not identify musicians in a band other than the lead vocalist. Ironically, the job of the songwriters and band members are just as important as that of the lead vocalist.

* Kaine Hampton, J.D. Candidate, May 2015, American University Washington College of Law; B.A. Finance, 2010, University of Houston. My interests encompass intellectual property, entertainment law, and corporate finance. Many thanks to my colleagues in the Rights & Clearance department at BET Networks, special thanks to Michelle Proctor Rogers for providing invaluable insight on this topic and the legal background. Further, I want to extend my appreciation to my family and friends for providing me with countless hours of support throughout the research and writing process. I would like to specially note my parents, Annie M. Carmon and Arlette Hampton for their patience and assistance, as well as my friends Alija, Dominique, Meshu, and Shantel. Your contributions were not overlooked.

¹ See Richard Buskin, *Marvin Gaye 'What's Going On?'*, SOUND ON SOUND (July 2011), <http://www.soundonsound.com/sos/jul11/articles/classic-tracks-0711.htm>.

² *Klaus Voorman*, IMDB, <http://www.imdb.com/name/nm0903399/> (last visited Jan. 1, 2015).

³ *The Beach Boys—Pet Sounds*, GENIUS, <http://genius.com/The-beach-boys-pet-sounds-credits-lyrics/> (last visited Jan. 2, 2015).

Fortunately for songwriters, their royalty compensation likely makes up for this lack of notoriety. Under United States law, licensors are required to compensate writers for the use of their compositions, but not the other musicians that participate in the recording session.⁴ Like the writer, should a drummer receive royalty compensation every time the track is played on television? While copyright law does not require licensors to pay royalty fees to other musicians, union obligations require such payments through contractual new-use fees.

This paper examines the goals of U.S. copyright law and the American Federation of Musicians' ability to accomplish what the Copyright Act has declined to do. This analysis further explores the music-licensing paradigm and how new-use contractual obligations have increased financial pressure on licensees, which has affected the audience's experience. Lastly, this paper proposes reform to the current licensing landscape that would further promote musician advocacy and allow licensees greater access to musical content.

II. THE GOVERNANCE OF THE COPYRIGHT ACT

The Copyright Act of 1976 (the "Act")⁵ allows music users to license musical compositions from songwriters and music publishers. Under the Act, copyright owners are afforded the exclusive rights to perform or authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;

⁴ See AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 83 (4th ed. 1992) (explaining that songwriters receive music publishing income through several primary sources including: (1) public performance income; (2) mechanical reproduction income; (3) synchronization license income; and (4) international subpublishing).

⁵ 17 U.S.C. § 101 (2010).

- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.⁶

Generally, copyright is defined as the exclusive right to copy a work. This exclusivity provision indicates that it is illegal for anyone other than the copyright owner to make a copy or perform a work without the permission of the owner. Copyright law essentially works to protect the interests of authors and allows for the useful sharing of science and art with the public.⁷ Consequently, if authors are not compensated for the use of the works they create, few authors could “afford to devote sufficient efforts to fully exercise their talents.”⁸ By providing a means through which “talented authors can earn a living by creating works of authorship, regardless of their economic background,” the Act allows for more works of authorship to be created⁹ while “society benefits [because] more original works of authorship are created by a greater

⁶ 17 U.S.C. § 106 (2010).

⁷ See *Copyright Basics*, COPYRIGHT 101, <http://copyright101.byu.edu/module1/page3.htm> (last visited Dec. 15, 2014).

⁸ Kohn, *supra* note 4, at 349.

⁹ Kohn, *supra* note 4, at 349.

number of talented individuals from a wide variety of backgrounds.”¹⁰

When a composer writes a song, they retain an ownership right in the composition. This copyright exists at the moment the work is fixed into a tangible form.¹¹ Thus, when a music user desires to use the composition, they must seek permission from the songwriter or the music publisher.¹² This permission is recorded in a licensing contract and its use is subject to certain terms and conditions in exchange for a fee. Because U.S. copyright law only requires licensing fees be paid to the songwriter and the owner of the recording, the other musicians that contribute to a track usually seek redress through a work for hire agreement.¹³ While this work made for hire arrangement may not bear as much income for a musician as licensing does for songwriters, this is sometimes the only means for a musician to be paid for their contribution.

III. NEW USE FEE AND SYNCHRONIZATION LICENSING

A. American Federation of Musicians’ New Use Fees: Creating a Royalty Where the Copyright Act Did Not

When using copyrighted property that was originally created pursuant to a union contract, music users obligate themselves to

¹⁰ Kohn, *supra* note 4, at 349.

¹¹ See generally Kohn, *supra* note 4, at 348.

¹² See generally Sound Recording, *Common Music Licensing Terms*, ASCAP.COM, <http://www.ascap.com/licensing/termsdefined.aspx> (last visited Apr. 29, 2015) (detailing that the copyright in a song encompasses the words and music and is owned by the songwriter or music publisher).

¹³ See generally Kohn, *supra* note 4, at 352 (describing a work made for hire as a work prepared by an employee within the scope of his employment or a work that is specially ordered in writing and falls within one of the categories enumerated in copyright law such as a contribution to a collective work).

conditions with that union. One of the more popular unions, the American Federation of Musicians (the “AFM”), is the largest organization in the world representing the interests of professional musicians. The AFM’s mission is to raise industry standards and place professional musicians in the foreground of the cultural landscape through “negotiating fair agreements, protecting ownership of recorded music,” lobbying legislators, and securing benefits such as health care and pension.¹⁴

In the television-broadcasting context, a common obligation owed to the AFM from music users is a new-use fee. A *new-use* of a tune is created when a sound recording that is included in an artist’s album is used in a medium that is not an album or cd.¹⁵ In theory, this fee has created a royalty for musicians. Currently, a new-use fee is determined by the duration of the recording sessions and the number of musicians involved in the making of the song, which is recorded on a B-4 session report.¹⁶ Thus, the bigger the band and the more time put into making the recording, the more expensive the new-use fee will be for music users.¹⁷ For a song with a large band, such as Earth, Wind & Fire’s *September*, the new-use fee would be pricey. The AFM collects the lump sum and divides the fee amongst all of the musicians involved in the recording.

¹⁴ See *About AFM*, AFM.ORG, <http://www.afm.org/about> (last visited Jan. 6, 2015) (discussing the union’s mission to advocate on behalf of musicians).

¹⁵ *New Use*, AFM.ORG, <http://www.afm.org/departments/electronic-media-services-division/new-use> (last visited Jan. 6, 2015) (defining new-use and identifying the way new-uses are monitored).

¹⁶ See generally *Sound Recording Labor Agreement*, AMERICAN FEDERATION OF MUSICIANS, <http://www.afm.org/uploads/image/srlafinal.pdf> (Page 7, Paragraph 21) (last visited May 2, 2015) (explaining a new use is implicated when a phonograph record is used outside its original purpose); see also *Sound Recording Scales*, THE AMERICAN FEDERATION OF MUSICIANS LOCAL 47, http://www.promusic47.org/scales/SRLA_Scale_Summary_2015_ext.pdf (last visited May 2, 2015) (detailing the more musicians used and the longer the original phonograph recording session, the more expensive the use of recording).

¹⁷ *Id.*

In order to use a song in a television program, television broadcasters would be responsible for paying a new-use fee in addition to the synchronization-licensing fee owed to the songwriter.¹⁸ Through synchronization licenses, broadcasters are able to synchronize music with an audiovisual work making this type of licensing a major source of income for writers and publishers while being a great expense for licensees. Therefore, paying the AFM's new-use fees can unduly burden television broadcasters.

B. Music Television: The Effect New-Use Fees have on the Audience Experience

The importance of television and movie broadcasters having access to musical compositions is quite obvious. Could you imagine watching Rose and Jack fly from the bow of the Titanic, without hearing Céline Dion's *My Heart Will Go On*?¹⁹ The music that plays in film and television broadcasts work in powerful unison with the actors and plot to evoke emotion from the audience. Some may argue that it is the ice cream in the sundae, rather than just the cherry on top.

Television networks such as BET, MTV, VH1, and CMT²⁰ engage in some of the heavier uses of music content; whether it is licensing music for their live performances during an award show, a musician's documentary, or the use of music in a television series. Because the collision of music and television happened on the airwaves of these stations, audiences expects these broadcasters to project the most popular and relevant musical compositions of the current era. Combining the audience's expectations with the

¹⁸ Kohn, *supra* note 4, at 84 (a synchronization license is required for music that is embodied in motion pictures for theatrical distribution and television broadcasts).

¹⁹ CÉLINE DION, *My Heart Will Go On*, on TITANIC: MUSIC FROM THE MOTION PICTURE (Columbia 1997).

²⁰ Also known as: (1) Black Entertainment Television ("BET"); (2) Music Television ("MTV"); (3) Video Hits 1 ("VH1"); and (4) Country Music Television ("CMT").

broadcaster's bottom line goals can easily conflict with the new-use obligation set forth by union contract.

With new-use fees and standard synchronization licensing fees at play, music users are forced to be more strategic in their musical selections. If television broadcasters are not prudent in their musical selections, musical composition licensing could far exceed the realized profit from a program. For example, over the course of the twelve episodes of MTV's second season of *Teen Wolf*, approximately 115 songs were used with about eight songs used per episode.²¹ If all of these songs fall within AFM's new-use definition, this could raise the program's cost drastically. Because of this rising cost, it is not uncommon for music users to analyze the cost-benefit of licensing a musical selection in determining whether to use a particular composition. But with new-use fees joining this analysis, broadcasters are incentivized to license tracks that have small bands, less instruments, and recorded in minimal time. The applied pressure forces broadcasters' concerns to shift from delivering content that audiences enjoy to delivering content that is inexpensive. With one of the goals of copyright law being to share and promote creativity, overly expensive access to music can be a hurdle in achieving this goal.

IV. MOVING TOWARDS A VIABLE SOLUTION

A. Establishing an Accessible Digital Database of Recording Session Reports

Although the music industry has a history of being heavily influenced by emerging technology,²² the industry's operations are

²¹ See *Music From Teen Wolf*, TUNE FIND, <http://www.tunefind.com/show/teen-wolf/season-2> (last visited May 1, 2015).

²² See generally Nia Cross, *Technology vs. The Music Industry: Analysis of the Legal and Technological Implications of MP3 Technology on the Music Industry* (Spring 1999) (unpublished final paper for New Media Law course, Colum-

still archaic in some aspects. As a way to promote cost predictability for licensees, an accessible database of recording session reports should be established. Currently, no such database exists. Since session reports lay out how many musicians are a part of the recording and the length of a recording,²³ access to this information will allow licensees to budget music programming accordingly. Since the label is already responsible for maintaining this information and the AFM needs this information for enforcement purposes,²⁴ the cost of setting up this database can be shared between the union and the artists' music label. Establishing this level predictability will help create more transparency and a marriage between the music user and the union.

B. Setting a Maximum on New-Use Fees

Another avenue to achieve cost-predictability is by placing a cap on new-use fees. If a maximum amount is set, regardless of the number of band members that participated in a recording session, licensees can proceed with some budgeting expectation. Setting a maximum fee would also lessen administrative costs for the AFM, as it would not have to allocate as many resources towards billing research as it does to date.

C. Creating a Royalty Scheme through Statute

Alternatively, if the Act provided a royalty for musicians, there would be no need for new-use fees to serve as a royalty. Amending the Act to give participating musicians some ownership rights in the sound recording would ultimately allow the drummer

bia Law School) (available at <http://cyber.law.harvard.edu/columbia/niapaper.pdf>).

²³ See *B-4 Session Report*, THE AMERICAN FEDERATION OF MUSICIANS LOCAL 47, <http://www.promusic47.org/forms/EMD/B-4.pdf> (last visited May 2, 2015).

²⁴ See generally *Sound Recordings*, AFM.ORG, <http://www.afm.org/departments/electronic-media-services-division/sound-recordings> (last visited Jan. 5, 2015) (discussing the union's mission to advocate on behalf of musicians).

and the organist a piece of the royalty pie. As with songwriters, the ownership percentage can be allocated proportionate to the musician's contribution. By adding a royalty scheme to the Act, it will create a viable solution for the licensees since they would incur licensing costs upfront when seeking permission to use the song. Overall, the costs would be significantly less because the musicians' proportional share is calculated in the licensing fee, rather than a set amount for every musician a part of the recording session. Creating a royalty for musicians also doubles as an effective remedy because it would allow musicians to collect a fee whenever their composition is used, as opposed to only when a new-use is formed.

V. CONCLUSION

The goal of music users and musicians is not mutually exclusive. Essentially, both parties want to share creative work product with the general public. Where both music users and musicians are responsible for finding the most efficient means for this goal to be met, a new veil of predictability, or a revised legal framework, could create a happier marriage between musician advocates and television broadcasters.

A RACE TO THE BOTTOM? INTERNATIONAL INCOME TAX REGIMES' IMPACT ON THE MOVEMENT OF ATHLETIC TALENT

Matthew Akers*

Introduction

As the world has become increasingly global, so too have sports expanded on the international stage. While in the past, athletes may have rarely competed outside of their home countries with the exception of events such as the Olympic Games and world championships, athletes today routinely compete in a number of different countries throughout a single season.¹ In 2013, ninety-two foreign-born players, representing thirty-nine countries, were featured on National Basketball Association (NBA) opening night rosters, breaking the previous league record of eighty-four, set in 2010.² Meanwhile, English Premier League (EPL) rosters for the

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¹ For example, in 2013, American golfer Tiger Woods competed in five different countries including Turkey, China, and the United Kingdom. *2013 Schedule & Results*, TIGERWOODS.COM, <http://www.tigerwoods.com/onTour/scheduleAndResults?year=2013> (last visited Jan. 28, 2014). Serbian tennis pro Novak Djokovic's 2013 schedule included stops in twelve countries including the United States, China, France, and Italy. *Tour*, NOVAKDJOKOVIC.COM, <http://novakdjokovic.com/en/results/2013/> (last visited Jan. 28, 2014).

² *NBA Tips Off 2013-14 Season With Record International Player Presence*, NBA GLOBAL (Oct. 29, 2013), http://www.nba.com/global/nba_tips_off_201314_season_with_record_international_presence_2013_10_29.html.

2013-14 season included 347 players from sixty-four different foreign nations.³

One result of the globalization of professional athletics is an increasing number of high-earning, transient taxpayers who must navigate the tax regimes of each of the countries in which they compete. Income is generally taxed where it is earned, and as each country fights to receive its fair share of an athlete's income, the risk of double taxation increases. In addition, because athletes' income is not limited to salary or prize money, and often includes large amounts of compensation from endorsement deals, conflicts regarding the characterization and apportionment of such income are a key concern for many athletes.⁴

The United Kingdom's taxation of Phil Mickelson, an American golfer and the 2013 British Open Champion, provides an excellent example of the enormous tax liability to which international athletes are often exposed. In addition to tax rates of 40% on income over £32,010 and 45% on income over £150,000 applied to Mickelson's tournament winnings, the U.K. also collects income tax on endorsement income from nonresident athletes based on the amount of time the athlete spends competing in the country.⁵ As a result of these taxes, Mickelson paid 61% of the nearly \$2.2 million he earned over the course of his stay for the British Open to the U.K.⁶

³ *Premier League Foreign Player 2013/2014*, TRANSFERMARKT.COM, http://www.transfermarkt.com/en/premier-league/gastarbeiter/wettbewerb_GB1.html (last visited Jan. 28, 2014).

⁴ *See, e.g., Goosen v. Commissioner*, 136 T.C. 547, 547 (2011); *Garcia v. Commissioner*, 140 T.C. No. 6, at *1 (2013) (regarding the allocation of endorsement earnings between royalty and personal service income).

⁵ Kurt Badenhausen, *Phil Mickelson Wins Historic British Open and Incurs 61% Tax Rate*, FORBES (July 22, 2013, 11:14 AM), <http://www.forbes.com/sites/kurtbadenhausen/2013/07/22/phil-mickelson-wins-historic-british-open-and-incurs-61-tax-rate/>.

⁶ *Id.*

Every country taxes nonresident athletes differently, and there is often a general lack of understanding among athletes as to their tax liability in the individual countries in which they compete.⁷ Although international income tax treaties, such as that between the United States and the United Kingdom,⁸ protect the majority of nonresident taxpayers from double tax liability, athletes are generally exempted from these protections, and must rely on their country of residency to eliminate double taxation through the provision of foreign tax credits or a statutory exemption.⁹ As a result of the differences in countries' tax regimes, lack of treaty protection from double taxation, and a general lack of understanding of the international tax system by athletes, certain countries — specifically the U.S. and the U.K., have been labeled by many international athletes as unfavorable.¹⁰

Considering the sizable incomes earned by professional athletes, the impact of a country's tax regime on its teams' ability to recruit athletic talent becomes apparent. For example, a Spanish soccer club, operating under Spain's favorable tax system that taxes nonresidents, as well as new Spanish residents, at a flat rate of 24%,¹¹ can provide a player with \$5 million in after-tax income

⁷ See Andrew D. Appleby, *Leveling the Playing Field: A Separate Tax Regime For International Athletes*, 36 BROOK. J. INT'L L. 605, 639 (2011) (suggesting that even for tax attorneys navigating "the various withholding and characterization traps" utilized by different countries can prove to be extremely challenging).

⁸ Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, U.S.-U.K., July 24, 2001 [hereinafter U.S.-U.K. Income Tax Treaty].

⁹ Stephanie Evans, *U.S. Taxation of International Athletes: A Reexamination of the Artistes and Athletes Article in Tax Treaties*, 29 GEO. WASH. J. INT'L L. & ECON. 297, 309 (1995); see discussion *infra* Part I.B.1.

¹⁰ Jamaican track star Usain Bolt has been particularly vocal regarding his disagreement with the United Kingdom's tax treatment of nonresident athletes, and has gone as far as boycotting U.K. competitions. *Usain Bolt Tax Bill: Why Sports Stars Won't Compete in Britain*, THE WEEK (Aug. 14, 2012), <http://www.theweek.co.uk/olympics/london-2012/48467/usain-bolt-tax-bill-why-sports-stars-wont-compete-britain>.

¹¹ Appleby, *supra* note 7, at 630-31.

with a \$6.7 million contract.¹² At the same time, an English club attempting to sign the same player would have to offer an \$8.3 million contract to provide the same post-tax benefit.¹³ As demonstrated by this example, income tax regimes have the potential to act as a driving force behind the movement of athletic talent around the world. As up-and-coming sporting nations seek to challenge the established leaders, boost their reputations within the international sporting community, and encourage elite athletes to compete in leagues and events hosted within their country, favorable tax treatment of foreign athletes may be used as a valuable recruiting tool.

This Article begins in Part I by introducing the general framework under which countries collect income taxes from foreign athletes, while presenting in greater depth the tax systems of established sporting powers — the United States and United Kingdom, and several up-and-coming sporting nations — Spain, Brazil, and Russia. Part II outlines the current place of athletics in the global economic and social landscapes. Part III discusses issues presented by the U.S. and the U.K.'s tax treatment of international athletes, as well as those nations' recognition of those issues. Part IV examines tax treatment of athletes by up-and-coming nations as a tool to recruit talent away from the U.S. and the U.K. Finally, Parts V and VI discuss the future of the taxation of international athletes, and provide recommendations for nations seeking to more effectively use their tax regimes to attract international athletic talent.

¹² Gabriele Marcotti, *Taxes Reign in Spain*, WALL ST. J. (Nov. 8, 2009, 7:42 PM), <http://online.wsj.com/news/articles/SB125769766022636765>. However, some of this favorable treatment may be limited by a recent amendment to Spanish tax law. See discussion *infra* Part I.A.3.b.

¹³ Marcotti, *supra* note 12.

I. Legal Background: Overview of the Taxation of International Athletes

Professional athletes are highly mobile taxpayers, and often earn income in multiple countries over the course of a tax year.¹⁴ Therefore, the calculation of an athlete's tax liability in a particular country begins with a determination of the athlete's residency status.¹⁵ If the athlete is determined to be a resident of the country in which the income in question was earned, the taxation of that income will simply be decided by an application of the country's tax code.¹⁶ However, if the athlete is determined to be a nonresident, the applicability of any income tax treaties between the athlete's country of residence and the country in which the income was earned must be established.¹⁷ If an applicable income tax treaty is not in place, or if an income tax treaty is in place but is inapplicable to the athlete, the taxation of the income earned in the source country will be based on that country's tax code as it relates to the taxation of nonresident aliens.¹⁸

A. Treatment Under a Tax Code

Tax codes are the primary method by which countries govern the assessment and collection of income tax from individuals earning income sourced to the country. Tax residents of a country, along with nonresidents from countries with which the taxing country does not have an income tax treaty, will be taxed exclusively under the provisions of the source-country's tax code.¹⁹ Meanwhile, the tax treatment of nonresidents from treaty countries,

¹⁴ See *supra* note 1 (discussing the competition schedules of Tiger Woods and Novak Djokovic).

¹⁵ Stephen Taylor, "Are You Not Entertained? Is This Not Why You Are Here?" *U.S. Taxation of Foreign Athletes and Entertainers*, 16 VILL. SPORTS & ENT. L.J. 375, 379 (2009).

¹⁶ See, e.g., I.R.C. § 861(b) (2013).

¹⁷ Taylor, *supra* note 15, at 389 (treatment under the tax treaty, including provisions for residency status determination, will generally be controlling).

¹⁸ Appleby, *supra* note 7, at 616.

¹⁹ Evans, *supra* note 9, at 308-09.

while generally established by the relevant treaty, may also defer to the source-country's tax code in some situations.²⁰ One such situation, a treaty's inclusion of an "Artiste and Athlete" provision, has a major impact on athletes, who are exempted from coverage under most treaties by such a provision.²¹

Because athletes are generally exempted from coverage under income tax treaties, an understanding of the varying tax treatment of athletes by individual countries' tax regimes is foundational for assessing income taxation as a driver behind the movement of athletic talent around the world. If the calculation of an athlete's tax liability in a particular country falls under the country's tax code, key considerations will include the respective tax treatment of residents and nonresidents, any applicable withholding requirements, and the characterization of the income earned by the athlete.²²

1. The United States

The United States is a world hub for professional athletics. Home to the National Basketball Association National, the Football League (NFL), the National Hockey League (NHL), Major League Baseball (MLB), the Ultimate Fighting Championship (UFC), and the Professional Golf Association (PGA) Tour, American professional sporting leagues and events attract premier athletic talent from around the world.

The United States taxes citizens and resident aliens on their income earned both within the U.S. and abroad.²³ However, a system of foreign tax credits gives citizens and resident aliens who earn income abroad credits to offset their domestic tax liability and

²⁰ *Id.* (in some instances an income tax treaty may specifically call for tax liability to be calculated in accordance with the source country's tax code).

²¹ *Id.*; see also discussion *infra* Part I.B.1.

²² See Appleby, *supra* note 7, at 615-622 (discussing the United States' tax treatment of residents and nonresidents, as well as the characterization and withholding of income earned by such individuals).

²³ See I.R.C. §§ 861, 862.

eliminate double taxation.²⁴ In contrast, nonresident aliens are generally taxed only on their U.S.-source income,²⁵ although a distinction is made between the treatment of income effectively connected with a U.S. trade or business, and income not effectively connected with a U.S. trade or business.²⁶ Under the Internal Revenue Code (I.R.C.), an athlete's tax liability is thus primarily determined by residency status, and if the athlete is determined to be a nonresident, the characterization of the income earned.

a. Residency Status

The first step in calculating a foreign athlete's U.S. tax liability is a determination of residency status. Resident aliens are generally taxed in the same manner as U.S. citizens,²⁷ while nonresident aliens are subject to different treatment under I.R.C. § 871. The determination of whether a foreign athlete is a nonresident or resident alien is governed by I.R.C. § 7701(b). An athlete who satisfies either the "Permanent Residency Test" (also known as the Green Card test) or the "Substantial Presence Test" will generally qualify as a resident alien,²⁸ whereas an athlete who fails to satisfy

²⁴ See I.R.C. §§ 901, 904. Citizens are allowed a foreign tax credit in "the amount of any income . . . accrued during the taxable year to any foreign country. . . ." I.R.C. § 901(b)(1) (2013). Resident aliens are allowed a foreign tax credit in "the amount of any such taxes paid or accrued during the taxable year to any foreign country . . ." I.R.C. § 901(b)(3).

²⁵ See I.R.C. § 871

²⁶ I.R.C. § 871(a)-(b).

²⁷ *Taxation of U.S. Resident Aliens*, IRS, <http://www.irs.gov/Individuals/International-Taxpayers/Taxation-of-Resident-Aliens> (last updated Dec. 6, 2013). However, a U.S. resident alien from a treaty country who satisfies the tiebreaker rule provided by the treaty will be taxed in the foreign country. I.R.S. PUB. 519 (Jan. 21, 2014) at 6, *available at* <http://www.irs.gov/pub/irs-pdf/p519.pdf>.

²⁸ I.R.C. § 7701(b)(3)(B) provides an important exception to the "Substantial Presence Test," under this exception an individual who is present in the U.S. for less than 183 days in the current year and establishes a closer connection to a foreign country is a nonresident alien for purposes of U.S. income tax liability. I.R.C. § 7701(b)(3)(B).

either of these tests will be classified as a nonresident alien.²⁹ Under the “Permanent Residency Test,” an individual who is at any time lawfully admitted for permanent residence in the United States will be considered a resident alien for tax purposes.³⁰ To satisfy the “Substantial Presence Test,” an individual must be “present in the United States on at least 183 days during a three year period that includes the current year. [E]ach day of presence in the current year is counted as a full day. Each day of presence in the first preceding year is counted as one-third of a day and each day of presence in the second preceding year is counted as one-sixth of a day.”³¹

b. Taxation of Nonresident Athletes

Under the I.R.C., taxation of nonresident alien athletes is limited to income received from sources within the United States.³² U.S. source income that is not effectively connected with a U.S. trade or business is subject to a 30% flat rate tax,³³ while income that is effectively connected with a U.S. trade or business is taxed using the same graduated rates as applied to income earned by citizens and resident aliens.³⁴ The performance of personal services within the United States is included under the I.R.C.’s definition of “trade or business within the United States.”³⁵ As a result, salaries, bonuses and prize money will be treated as “effectively connected income.”³⁶

²⁹ I.R.C. § 7701(b)(1)(A)(i), (b)(3).

³⁰ I.R.C. § 7701(b)(1)(A)(i).

³¹ Treas. Reg., 26 C.F.R. § 301.7701(b)-1(b) (2008).

³² See I.R.C. § 871.

³³ I.R.C. § 871(a).

³⁴ I.R.C. § 871(b) (such income is subject to deductions, and the graduated tax rates established by I.R.C. § 1).

³⁵ I.R.C. § 864(b).

³⁶ Taylor, *supra* note 15, at 384.

c. Characterization of Income

Because U.S.-source income earned by nonresident alien athletes is taxed differently depending upon whether or not it is effectively connected with a U.S. trade or business,³⁷ the characterization of a nonresident alien's U.S. source income is of key importance in determining the individual's U.S. income tax liability. Income earned by athletes generally falls into one of three categories: athletic performance income,³⁸ endorsement and sponsorship income, and signing bonus income.³⁹

The characterization of athletic performance and signing bonus income is generally straightforward. Athletic performance income, including salaries and prize money, is paid to the athlete in return for the performance of personal services conducted in the United States, and therefore is treated as being effectively connected to a U.S. trade or business under I.R.C. § 864(b).⁴⁰ In regards to signing bonus income, IRS Revenue Ruling 2004-109 treats signing bonuses as wages.⁴¹ Therefore, income earned in the U.S. by a nonresident athlete that is properly characterized as a salary, prize, or signing bonus will be taxed at the same graduated rates applied to U.S. citizens,⁴² barring more favorable treatment under an applicable treaty provision. The greatest challenge regarding the calculation of U.S. tax liability on athletic performance and signing bonus income is the allocation of the income between United States and any foreign sources.⁴³ In the case of an athlete earning income allocable to multiple countries, the allocation will general-

³⁷ I.R.C. § 871(a)-(b).

³⁸ Athletic performance income may include salaries, bonuses, and prize money.

³⁹ Athletic performance income may include salaries, bonuses, and prize money. See Appleby, *supra* note 7, at 619-22.

⁴⁰ I.R.C. § 864(b).

⁴¹ Rev. Rul. 2004-109, 2004-2 C.B. 958 (2004), available at http://www.irs.gov/irb/2004-50_IRB/ar07.html ("Amounts an employer pays as bonuses for signing or ratifying a contract in connection with the establishment of the employer-employee relationship are wages . . .").

⁴² See I.R.C. § 871(b), *supra* note 34.

⁴³ Appleby, *supra* note 7, at 619.

ly be based on the number of days during the tax year the athlete performed personal services in the U.S. in relation to the total number of days the athlete spent performing personal services.⁴⁴

The characterization of endorsement and sponsorship income is more challenging. Income attributable to an athlete's endorsement and sponsorship deals, depending on the facts, can be characterized as either royalty or personal service income.⁴⁵ Income will be characterized as a royalty if it is the result of the use of the athlete's name or likeness.⁴⁶ Alternatively, if the athlete is required to perform personal services in connection with the receipt of the income, such as playing in tournaments or using the sponsor's equipment, the income will likely be considered, at least in part, personal service income.⁴⁷ In many cases, an endorsement contract will include compensation for both royalties and personal services, and an allocation between the two is required.⁴⁸ In light of two recent U.S. Tax Court cases involving professional golfers, the IRS's treatment of the allocation of endorsement income between royalty and personal service income remains somewhat of a gray area.⁴⁹ This lack of clarity represents one of the many challenges faced by nonresident athletes obligated to pay taxes in the

⁴⁴ Treas. Reg., 26 C.F.R. § 1.861-4(b) (2005). "The amount of compensation for labor or personal services performed within the United States determined on a time basis is the amount that bears the same relation to the individual's total compensation as the number of days of performance of the labor or personal services by the individual within the United States bears to his or her total number of days of performance of labor or personal services." Treas. Reg., 26 C.F.R. § 1.861-4(b)(2)(E) (2005).

⁴⁵ Appleby, *supra* note 7, at 619. Royalty income is not considered to be effectively connected with a U.S. trade or business, and thus subject to the final 30% gross withholding tax.

⁴⁶ Goosen v. Comm'r, 136 T.C. 547, 559 (2011).

⁴⁷ *See id.* at 559-60.

⁴⁸ *See id.* at 562.

⁴⁹ *See id.* at 562-63; Garcia v. Comm'r, 140 T.C. No. 6, 10-11 (2013); *see also* discussion *infra* Part III.A.1 (highlighting the U.S. Tax Court's treatment of endorsement income in *Garcia* as evidence of recognition of some of the key issues caused by the U.S.'s taxation of nonresident athletes).

U.S. Like athletic performance income, endorsement and sponsorship income sourced to both the U.S. and foreign countries must also be properly allocated between the U.S. and those other foreign sources. Personal service income will be allocated in the manner discussed above,⁵⁰ while royalties are allocated between the U.S. and foreign sources based on where the royalties are used.⁵¹

2. The United Kingdom

Like the United States, the United Kingdom is one of the most established sporting nations in the world. Based on revenues, the EPL is the most successful soccer league in the world, bringing in €1 billion more than its nearest competitor during the 2011-12 season.⁵² The U.K. also plays host to golf and tennis majors, is home to elite professional cricket and rugby leagues, and showcased a number of new athletic facilities during the 2012 Summer Olympic Games in London.

As in the U.S., U.K. residents are generally taxed on their worldwide income, while nonresidents are taxed on their U.K.-source income.⁵³ To address an alleged annual loss of £75 million resulting from the failure to tax foreign athletes and entertainers making appearances in the U.K., a withholding regime was implemented as part of the Income Tax (Sportsman and Entertainers)

⁵⁰ See 26 C.F.R. § 1.861-4(b), *supra* note 44.

⁵¹ *Goosen*, 136 T.C. at 563 (citing I.R.C. §§ 861(a)(4), 862(a)(4)). While an endorsement contract may specify how royalty income should be sourced, courts are free to make their own determination if the allocation is determined to be unreasonable. *Id.* at 563-64. Sales of the endorsed product and the comparative sizes of the markets for the endorsed product are factors that may be used by the court in determining the appropriate apportionment of royalty income. *Id.* at 565-66.

⁵² *Annual Review of Football Finance 2013- Highlights*, SPORTS BUSINESS GROUP (Deloitte, U.K.), June, 2013, at 6 [hereinafter *Review of Football Finance*], available at http://www.deloitte.com/view/en_GB/uk/industries/sportsbusinessgroup/sports/football/annual-review-of-football-finance/.

⁵³ *Appleby*, *supra* note 7, at 623.

Regulations of 1987.⁵⁴ As a result of this amendment, nonresident athletes and entertainers are subject to a withholding tax that is not applied to other nonresidents.⁵⁵

a. Residency Status

Established by the 2013 Finance Act, the Statutory Residency Test (SRT) is used to determine U.K. tax residency.⁵⁶ Under the SRT, an individual will be considered a resident of the U.K. if he/she (1) spent 183 days in the U.K. during the tax year,⁵⁷ (2) meets the requirements of one of two additional “U.K. tests,”⁵⁸ or (3) meets the “sufficient ties test.”⁵⁹ Additionally, if an individual satisfies any of three “automatic overseas tests,” he/she will not be considered a U.K. resident, and the “U.K. tests” and “sufficient ties test” will not be considered.⁶⁰ Although the SRT is more complex

⁵⁴ DANIEL SANDLER, *THE TAXATION OF INTERNATIONAL ENTERTAINERS AND ATHLETES: ALL THE WORLD’S STAGE* 121-22 (1995).

⁵⁵ *Id.* at 122.

⁵⁶ *Guidance Note: Residence, Domicile and Remittance Basis*, HM REVENUE & CUSTOMS, Oct. 2013, at 12 (U.K.), available at <http://www.hmrc.gov.uk/cnr/rdr1.pdf>.

⁵⁷ *Guidance Note: Statutory Residency Test (SRT)*, HM REVENUE & CUSTOMS, Dec. 2013, at 8 (U.K.), available at <http://www.hmrc.gov.uk/international/rdr3.pdf>.

⁵⁸ *Id.* at 18, 23. The first of these additional tests applies only to individuals who own a home in the U.K., while the second requires an individual to have worked full-time in the U.K. during a 365 day period. *Id.* at 23.

⁵⁹ *Id.* at 28. The sufficient ties test is applied to individuals who do not meet the requirements of the U.K. tests or automatic overseas tests; the test considers both the number of days an individual spent in the U.K. during the tax year, and the individual’s number of U.K. connections. *Id.* U.K. connections may include family ties, accommodation ties, work ties, 90-day ties, and country ties. *Id.*

⁶⁰ *Id.* at 8-10. An individual will satisfy an “automatic overseas test” if (1) the individual was a U.K. resident for one or more of the three preceding years and spends fewer than 16 days in the U.K. during the tax year; (2) was not a U.K. resident for any of the three preceding years and spends fewer than 46 days in the U.K. during the tax year; or (3) the individual works full-time overseas during the tax year without any significant breaks, spends fewer than 91 days in the U.K. during the tax year, and the number of days in the tax year on which the individual works for more than three hours in the U.K. is less than 31. *Id.*

than many other countries' residency tests, Her Majesty's Revenue and Customs (HMRC), the U.K.'s tax authority, has provided taxpayers with substantial guidance in applying the test.⁶¹

b. Taxation of Nonresident Athletes

The United Kingdom employs a schedular income tax system.⁶² Under this system, income paid to team sport athletes will generally be classified as employment income, whereas income earned by individual athletes will be classified as self-employed "trade or profession" income.⁶³ While both employment income and "trade or profession" income are taxed at the same progressive rates, "[t]rade or profession income is generally subject to lower social security taxes and more generous business expense deductions."⁶⁴ For the 2013-14 and 2014-15 tax years, the U.K.'s progressive tax rates include a top rate of 45% for income over £150,000.⁶⁵

Employment income is withheld under a "Pay as You Earn" system, which is applied to both resident and non-resident employees.⁶⁶ However, the U.K. generally does not withhold tax on trade or profession income,⁶⁷ and prior to the 1987 Income Tax (Sportsman and Entertainers) Regulations, tax avoidance by non-resident athletes was common.⁶⁸ The 1987 Regulations address tax avoidance through a withholding regime that applies to entertainers

⁶¹ *Id.* at 6.

⁶² Appleby, *supra* note 7, at 624. As a result of the scheduler system, "all income must be traced to a specific type of source to determine the extent of taxation."

Id.

⁶³ *Id.* at 624.

⁶⁴ *Id.*

⁶⁵ *Income Tax Rates and Allowances*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/rates/it.htm> (last visited Feb. 1, 2014).

⁶⁶ SANDLER, *supra* note 54, at 132.

⁶⁷ Appleby, *supra* note 7, at 624.

⁶⁸ *Id.*

and sportsmen in any kind of entertainment or sport,⁶⁹ and covers any appearance in the U.K. for which a payment is made.⁷⁰ Under this withholding regime, payments to nonresident athletes are subject to a 20% withholding tax,⁷¹ thus limiting the athlete's ability to wholly avoid U.K. taxation.

c. Characterization of Income

For team sport athletes in the U.K., characterization of personal service income is unnecessary as a result of the "Pay as You Earn" system because an athlete's employer (the team) will be responsible for deducting the appropriate income tax from the athlete's pay.⁷² For individual athletes, the key issue relating to the characterization of income is whether the income falls under the previously discussed withholding regime. The regime has broad reach. The term "athlete" is interpreted very broadly,⁷³ and any appearance within the U.K. made for pay⁷⁴ qualifies for withholding. Furthermore, a direct link between the appearance and payment is not required;⁷⁵ for example, "[endorsement fees paid to a tennis player using sports equipment in a UK tournament would be linked [to the U.K. appearance]."⁷⁶

In terms of characterizing endorsement and sponsorship income, the U.K. system is significantly more straightforward than that of the U.S. In the U.K., royalties are not considered separate

⁶⁹ The Income Tax (Entertainers and Sportsmen) Regulations, 1987, S.I. 530, art. 2, ¶ 1 (U.K.).

⁷⁰ *A Guide to Paying Foreign Entertainers*, HM REVENUE & CUSTOMS, http://www.hmrc.gov.uk/leaflets/feu50_0300.htm (last visited Feb. 1, 2014).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* ("The following list is not exhaustive. [Athletes], golfers, cricketers, footballers, tennis players, boxers, snooker players, darts players, motor racing drivers, jockeys, ice skaters, contestants in chess tournaments . . .").

⁷⁴ "Payment" is interpreted broadly, and may include appearance fees, TV rights, tournament winnings, prize money, advertising income, and endorsement fees. *See id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

intellectual property, but instead are categorized as personal service income along with all other endorsement income.⁷⁷ As in the U.S., a nonresident athlete is only subject to U.K. taxation on endorsement income sourced to the U.K.⁷⁸ However, as a result of the House of Lords' holding a 2006 case involving American tennis star Andre Agassi, even sponsorship payments from nonresident companies to nonresident taxpayers are considered to be sourced to the U.K.,⁷⁹ making avoidance of U.K. taxation on sponsorship income very difficult.⁸⁰ This treatment of endorsement income has been, and continues to be, a major point of contention between nonresident athletes and the U.K.⁸¹

3. Spain

Spain is quickly rising as one of the global leaders in professional athletics. In addition to being home to La Liga, one of the largest and most successful professional soccer leagues in the world, Spain is the world's top importer of professional basketball players,⁸² and has produced many professional golfers and tennis players. Spain's growth in the ranks of professional athletics serves as a premier example of the potential benefits available to a country that implements a tax regime favorable to foreign athletes. Spanish law is unique in that it law allows certain new Spanish residents to elect between resident and nonresident income tax

⁷⁷ Appleby, *supra* note 7, at 626.

⁷⁸ *Id.*

⁷⁹ Agassi v. Robinson, [2006] UKHL 23 (appeal taken from EWCA) (U.K.).

⁸⁰ Appleby, *supra* note 7, at 626.

⁸¹ See discussion of Usain Bolt's criticism of the U.K. tax system, *infra* Part III.

⁸² INTERNATIONAL BASKETBALL FEDERATION, INTERNATIONAL BASKETBALL MIGRATION REPORT 6 (2012), [hereinafter FIBA MIGRATION REPORT] available at

http://www.cies.ch/fileadmin/documents/Research/2012_FIBA_IBMR_light.pdf

treatment —providing Spanish teams a comparative advantage in recruiting foreign athletes.⁸³

a. Residency Status

An individual is a resident of Spain for tax purposes as determined by the satisfaction of one of three tests. If “(1) . . . [the individual] spends more than 183 days in Spain in the calendar year; (2) [t]he center of [the individual’s] economic interests is located in Spain; or (3) . . . [the] center of [the individual’s] vital interests is in Spain,”⁸⁴ the individual will be considered a Spanish resident.

b. Taxation of Nonresident Athletes

Spain applies a final flat rate tax of 24% to nonresidents’ Spanish-source income under a gross withholding regime.⁸⁵ This flat rate is applied to both employment and personal service income, as well as to royalty and endorsement income.⁸⁶ Spanish residents are subject to progressive tax rates on net income of up to 52%.⁸⁷

One of the most preferential aspects of the Spanish tax system from the perspective of a professional athlete competing in Spain is Royal Decree 687/2005 — more commonly known as the

⁸³ See Appleby, *supra* note 7, at 631; Henrik Klevin et al., *Taxation and the International Migration of Superstars: Evidence from the European Football Market* 17 (Nat’l Bureau of Econ. Research, Working Paper No. 16545, 2010) available at <http://www.nber.org/papers/w16545>.

⁸⁴ Appleby, *supra* note 7, at 631 (quoting ROMERO, FELIX P., GUIDE ON SPORTS-PERSON TAXATION IN CERTAIN RELEVANT JURISDICTIONS 144 (2008)).

⁸⁵ *Id.* at 630-31.

⁸⁶ *Id.* at 632.

⁸⁷ *Spanish Income Tax Rates 2012 to 2014*, ADVOCO, <http://www.advoco.es/hot-topics/102-spanish-income-tax-rates.html> (last visited Feb. 19, 2014) (the 52% rate applies to income earned over €300,000). Significant “temporary” increases in tax rates applicable to Spanish residents are in effect for the 2012 to 2014 tax years. *Id.* Prior to these increases the top marginal rate applied to residents was 43%. Appleby, *supra* note 7, at 631.

Beckham Law.⁸⁸ The Beckham Law allows new Spanish residents who have recently moved to Spain in the course of their employment to elect between resident and nonresident tax treatment for the year of their move and the following five years.⁸⁹ To be eligible for the election, a new Spanish resident must, “(1) not have been a Spanish resident in the ten years prior to the move; (2) have moved to Spain as a consequence of employment; (3) effectively perform work in Spain, for a Spanish resident; and (4) not be exempt from income tax.”⁹⁰ In 2010, the Spanish Parliament amended the Beckham Law, and a €600,000 income cap for favorable tax treatment was initiated.⁹¹

c. Characterization of Income

For nonresident athletes, the characterization of income is only necessary when determining tax liability under a treaty because, under Spanish tax law, all of a nonresident’s Spanish-source income is subject to the 24% flat withholding tax.⁹² When determining the tax liability of nonresident athletes under a treaty, characterization of image rights income is significant. However, Spanish courts have been inconsistent in their characterization of such income.⁹³ This unpredictable treatment by Spanish courts has created uncertainty and difficulty in tax planning for nonresident athletes.⁹⁴

For athletes who are Spanish residents, endorsement income is characterized as either personal service or royalty in-

⁸⁸ Klevin, *supra* note 83, at 17.

⁸⁹ Appleby, *supra* note 7, at 631.

⁹⁰ *Id.*

⁹¹ *Beckham’s Law Survives*, ADVOCO, <http://www.advoco.es/advice/8-personal-tax/70-beckhams-law.html> (last visited Feb. 8, 2014).

⁹² Appleby, *supra* note 7, at 632.

⁹³ *See id.* at 633. In recent cases Spanish courts have held nonresidents’ image rights income to be a general royalty subject to a 15% withholding tax, analogous to a copyright and subject to a “preferential withholding-rate of 0-5% under most treaties,” and finally a business tax subject to no withholding tax. *Id.*

⁹⁴ *Id.*

come.⁹⁵ Regardless of its characterization, endorsement income is subject to the athlete's marginal tax rate, however, deductions are allowed in connection with personal service income, but not in connection with royalty income.⁹⁶

4. Brazil

Brazil is the fifth-largest country in the world in geographical area, and home to the eighth-largest economy in terms of GDP.⁹⁷ During the 2012 Summer Olympics, Brazilian athletes won seventeen medals, including gold in women's volleyball and men's soccer.⁹⁸ The Brazilian men's national soccer team is currently ranked tenth by the Federation Internationale de Football Association (FIFA),⁹⁹ and features star players such as Kaka, Neymar, and Ronaldinho. In addition, Brazil's top professional soccer league, Série A, is among the world's elite.¹⁰⁰ In the coming years, Brazil will find itself at the forefront of the international sporting stage as it prepares to host the 2014 World Cup¹⁰¹ and the 2016 Summer Olympic Games.¹⁰² In terms of the taxation of nonresident athletes earning income in Brazil, Brazil utilizes a final withholding tax regime similar to that of Spain.

⁹⁵ *Id.* at 632.

⁹⁶ *Id.*

⁹⁷ *Brazil*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/br.html> (last updated Jan. 28, 2014).

⁹⁸ *Official Olympic Games Results*, OLYMPIC.ORG, <http://www.olympic.org/olympic-results/> (search "Search For Medalist" for "Brazil" and "London 2012") (last visited Feb. 8, 2014).

⁹⁹ *FIFA/Coca-Cola World Ranking*, FIFA, <http://www.fifa.com/worldranking/rankingtable/> (last updated Jan. 16, 2014).

¹⁰⁰ *The Strongest National League of the World*, IFFHS (Jan. 29, 2014), <http://www.iffhs.de/the-strongest-national-league-of-the-world/#more-187>.

¹⁰¹ *FIFA World Cup*, FIFA, <http://www.fifa.com/worldcup/> (last visited Feb. 8, 2014).

¹⁰² RIO 2016, <http://www.rio2016.org/en> (last visited Feb. 8, 2014).

a. Residency Status

Brazil employs a straightforward method of determining an individual's residency status. Individuals who live permanently in Brazil or have a permanent or temporary visa¹⁰³ are considered Brazilian residents for income tax purposes,¹⁰⁴ while all other individuals are deemed nonresident aliens.

b. Taxation of Nonresident Athletes

Brazilian residents' income, regardless of characterization, is withheld at progressive rates of up to 27.5%.¹⁰⁵ Nonresidents are taxed at flat rates of 25% on gross personal service income, and 15% on sponsorship and image rights income.¹⁰⁶ It is interesting to note that Brazilian residents who make royalty payments to nonresidents are subject to a 10% contribution tax,¹⁰⁷ causing the royalty payment to be taxed at the same effective rate as personal service income, but providing a benefit to the nonresident taxpayer. An understanding of the taxation of nonresident athletes under the Brazilian tax code is especially important to American athletes competing in Brazil, as there currently is no income tax treaty between the countries.

¹⁰³ "If the individual has a temporary visa, they will not become a resident until: (1) arrival date if visa is for employment, (2) after 184 days in Brazil, or (3) the date they obtain a permanent visa or employment." Appleby, *supra* note 7, at n. 226 (citing ROMERO, FELIX P., GUIDE ON SPORTSPERSON TAXATION IN CERTAIN RELEVANT JURISDICTIONS 24 (2008)).

¹⁰⁴ *Id.* at 635 (citing Instrução Normativa No. 208, de 27 de Setembro de 2002, D.O.U. de 11.3.2004. (Braz.)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* The 15% flat rate tax on sponsorship and image rights is not dependent on the characterization of the income as either royalty payments or personal service income as it is in countries such as the United States. *Id.*; see discussion *supra* Part I.A.1.a.

¹⁰⁷ Appleby, *supra* note 7, at 635 (it is unclear whether this contribution tax is applied to image rights payments, or just those payments characterized as royalty payments).

c. Other Sports Related Taxes

While not directly related to the taxation of foreign athletes, Brazil has an interesting history of tax laws passed to benefit sport-related employers, and to facilitate the growth of athletic infrastructure. In 2006, Brazil implemented the “Club Mania Law,” which exempted soccer clubs from taxation through 2011 to assist the clubs in recovering from massive tax debts.¹⁰⁸ In 2007, in preparation for the upcoming World Cup and Olympic Games, Brazil implemented the Growth Acceleration Program, which provides tax relief to infrastructure projects.¹⁰⁹ Also in preparation for the 2014 World Cup, the Brazilian legislature implemented several federal tax exemptions applicable to, among others, FIFA (the organizer of the World Cup) and nonresidents hired to work the World Cup events.¹¹⁰ Brazil’s historical willingness to pass tax laws designed to benefit its sporting leagues and events suggests the potential for further tax related legislation as a tool for recruiting international athletes.

5. Russia

Russia presents an interesting case study on the taxation of nonresident athletes when considering the migration of international athletes to compete in the 2014 Winter Olympic Games and 2018 World Cup, as well as the recent growth of its professional

¹⁰⁸ Appleby, *supra* note 7, at 634.

¹⁰⁹ *Investing in the Country of Soccer*, THE WORLD LAW GROUP, http://www.theworldlawgroup.com/files/file/docs/BRAZIL-WORLD_CUP_IN_BRAZIL_MAY_BRING_INVESTMENT.pdf (last visited Feb. 8, 2014) (infrastructure projects include the construction of airports and toll roads).

¹¹⁰ *Brazil Corporate- Tax Credits and Incentives*, PRICEWATERHOUSECOOPERS, <http://taxsummaries.pwc.com/uk/taxsummaries/wwts.nsf/ID/JDCN-89HRSD> (last updated June 6, 2013). The “World Cup Law” as it is known, has been challenged on constitutional grounds in a case currently sitting before the Brazilian Supreme Court. Poonam Majithia, *Does Brazil’s World Cup Law violate its constitution?*, LAW IN SPORT (Oct. 28, 2013), <http://www.lawinsport.com/blog/poonam-majithia/item/does-brazil-s-world-cup-law-violate-its-constitution>.

hockey league, the Kontinental Hockey League (KHL).¹¹¹ Furthermore, Russia is unique in its taxation of nonresidents athletes, who are taxed at a 17% higher rate than residents, unlike the other nations highlighted in this Article, which generally tax residents at higher rates than nonresidents.¹¹²

a. Residency Status

The determination of whether an individual is a Russian resident for income tax purposes is straightforward under the Russian tax code. An individual will be considered a resident “if he/she is physically present in Russia for 183 or more days during the consecutive 12 month period.”¹¹³ According to the Russian Ministry of Finance, “the 183-day check should be made in relation to the particular calendar year.”¹¹⁴ Individuals who do not reach the 183-day threshold are deemed nonresidents for the purpose of calculating their Russian income tax liability.

b. Taxation of Nonresident Athletes

Russian residents are generally subject to a 13% flat rate tax on their worldwide income.¹¹⁵ In contrast, nonresidents are generally subject to a 30% flat rate tax on Russian-source income.¹¹⁶ All tax on personal service income must be withheld by a

¹¹¹ Many former NHL players have left the NHL to play in the KHL, most notably former all-star Ilya Kovalchuk. Jameson Sempey, *Rankign Former NHL Players Who Left for the KHL in 2013-14*, BLEACHER REPORT (Sep. 8, 2013) <http://bleacherreport.com/articles/1753504-ranking-former-nhl-players-who-left-for-the-khl-in-2013-14/page/1>.

¹¹² For example, as discussed *supra*, Spain taxes Spanish residents up to a 28% higher rate than nonresidents. See *supra* note 87 and accompanying text.

¹¹³ *Tax Ties: Russia*, KPMG (June 1, 2013), <http://www.kpmg.com/global/en/issuesandinsights/articlespublications/taxation-international-executives/russia/pages/income-tax.aspx>.

¹¹⁴ *Id.*

¹¹⁵ *Id.* Several exceptions exist; however, none relate directly to the compensation generally collected by athletes. *Id.*

¹¹⁶ *Id.* Again, there are several exceptions that would be unlikely to impact the taxation of income received by an athlete. See *id.*

taxpayer's employer, and remitted to the Russian finance authorities.¹¹⁷ Because Russia taxes both residents and nonresidents at flat rates on both personal service and royalty income,¹¹⁸ income characterization is not a major concern when determining an athlete's Russian tax liability.

If not made clear by the tax code, the determination of what income is attributable to sources in the Russian Federation and what income is attributable to sources outside the Russian Federation will be determined by the Ministry of Finance of the Russian Federation.¹¹⁹ For nonresidents with income that is attributable in part to both Russian and other foreign sources, if there is no provision for an unequivocal attribution of the income set forth in the code the determination will also be left up to the Ministry of Finance.¹²⁰

Of particular significance to American athletes competing in Russia is the fact that unlike most income tax treaties, the income tax treaty between the United States and the Russian Federation does not include an Artiste and Athlete provision.¹²¹ As a result, American athletes competing in Russia and Russian athletes competing in the U.S. will receive preferential treaty treatment not provided to athletes under most other income tax treaties.¹²² An American athlete who is in Russia for 153 days or less during the tax year and is paid by a non-Russian employer will not be subject to Russian tax on employment income under Article 14 of the treaty.¹²³ Furthermore, provided that certain requirements are met,

¹¹⁷ *Id.*

¹¹⁸ *See id.*

¹¹⁹ *Id.*

¹²⁰ НАЛОГОВЫЙ КОДЕКС РОССИЙСКОЙ ФЕДЕРАЦИИ [NK RF] [Tax Code] art. 208 ¶ 4 (Russ.), *translated in Tax Code of the Russian Federation*, <http://www.russian-tax-code.com/PartII/Section8/Chapter23.html> (last visited Feb. 11, 2014).

¹²¹ Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, U.S.-Russ., Jan. 1, 1994 [hereinafter U.S.-Russ. Income Tax Treaty].

¹²² *See* discussion *infra* Part I.B.1.

¹²³ U.S.-Russ. Income Tax Treaty, *supra* note 117, at art. 14.

Article 12 provides that royalty income will only be taxed in the athlete's country of residence, and Article 13 provides similar treatment for independent personal services income.¹²⁴

B. Treatment Under an Income Tax Treaty

When considering that most countries tax residents on worldwide income, and tax nonresidents on income sourced to the country, the risk of double taxation for individuals earning income in multiple countries becomes significant. To address the issue of double taxation, income tax treaties have been adopted between many nations.¹²⁵ However, the use of income tax treaties to address double taxation is an imperfect solution. The present regime of income tax treaties lacks uniformity, and features primarily bilateral treaties between individual countries.¹²⁶ In contrast to bilateral treaties, multilateral treaties offer a potential uniform solution to double taxation. While multilateral treaties have not been successfully implemented on a broad scale,¹²⁷ some commentators have argued that such a treaty is the ideal solution to double taxation of international athletes because it would provide uniform treatment of this unique group of taxpayers and simplify allocation determinations.¹²⁸

1. Bilateral Treaties

Although bilateral income tax treaties are the generally accepted method of addressing double taxation, there is not a single model for their formation.¹²⁹ In addition, the treaty network is not

¹²⁴ *Id.* at arts. 12-13.

¹²⁵ Evans, *supra* note 9, at 304.

¹²⁶ *Id.* The result is an incomplete treaty network. *See* discussion *supra* Part I.A.4.b (highlighting the lack of an income tax treaty between the U.S. and Brazil).

¹²⁷ *See id.* at 318.

¹²⁸ *See* Appleby, *supra* note 7, at 643-46.

¹²⁹ Evans, *supra* note 9, at 305 (this contributes to the lack of uniformity in the current treaty network).

comprehensive,¹³⁰ and in the absence of a treaty, the determination of income tax liability will defer to the involved countries' tax codes — increasing the uncertainty caused by the current system.

Due to the inconsistencies in tax treaties currently in use, the Organization for Economic Co-operation and Development (OECD) Model Convention (*hereinafter* Model Convention) provides an ideal starting point for the discussion of bilateral treaties.¹³¹ The Model Convention is used as a guide for negotiating tax treaties by member countries, is used as a reference in negotiations between both member¹³² and non-member¹³³ countries, and has provisions that “are globally recognized and are incorporated into a majority of bilateral tax treaties.”¹³⁴

Taxation of international athletes is governed by several key provisions of the Model Convention; Article 7: “Business Profits,” Article 15: “Income From Employment,” and most significantly, Article 17: “Artistes and Sportsmen.”¹³⁵ Articles 7 and 15 provide for favorable treatment of nonresidents earning income in a Contracting State. Article 7 provides that business profits of a Contracting State resident will only be taxable in the country in which the individual is a resident, unless the individual has a

¹³⁰ Appleby, *supra* note 7, at 607-08.

¹³¹ See Evans, *supra* note 9, at 305. Other model income tax treaties include the U.S. Model Treaty and the United Nations Model Double Taxation Convention between Developed and Developing Countries. United States Model Income Tax Convention, U.S., Nov. 15, 2006; U.N. DEP'T OF INT'L ECON. & SOC. AFFAIRS, U.N. MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, U.N. Doc. ST/ESA/PAD/SER.E/21 (2001).

¹³² Members of the OECD include the U.S., the U.K., and Spain. *Members and Partners*, OECD, <http://www.oecd.org/about/membersandpartners/> (last visited Feb. 1, 2014).

¹³³ Non-member countries include Brazil and Russia. *See id.*

¹³⁴ Evans, *supra* note 9, at 306.

¹³⁵ See Comm. on Fiscal Affairs, Org. for Econ. Co-Operation & Dev., Model Tax Convention on Income and on Capital, (Mar. 1, 1994) [*hereinafter* OECD Model Convention]. *See also*, Evans, *supra* note 9, at 307-11.

“permanent establishment” in the source country,¹³⁶ while under Article 15, employment income is not taxable in the source country if (1) the employee is in the country for 183 days or fewer in any twelve month period “commencing or ending in the fiscal year concerned;” (2) the employee is paid by a nonresident employer; and (3) the payment “is not borne by a permanent establishment which the employer has in the [source country].”¹³⁷

Article 17, “Artistes and Sportsmen,” specifically addresses the taxation of athletes, and eliminates the beneficial treatment provided for by Articles 7 and 15, stating that “[n]otwithstanding the provisions of Articles 7 and 15, income derived by a resident of a Contracting State as . . . a sportsman, from his personal activities as such exercised in the [source country], may be taxed in that [country].”¹³⁸ As drafted by the OECD, the Artistes and Sportsmen provision has a broad reach. “Sportsman” is defined broadly to include participants in traditional athletic events, as well as individuals engaged in other sporting activities, such as racing drivers, and billiards players.¹³⁹ Additionally, the Article’s application is extended to advertising and sponsorship income both directly and indirectly related to an athlete’s performance or appearance in a Contracting State.¹⁴⁰

As a result of the Artistes and Sportsmen provision, an athlete earning income in a Contracting State will be taxed in accordance with that country’s tax code, and the treaty will not restrict taxation.¹⁴¹ This treatment highlights both the important role of tax codes in the calculation of a nonresident athlete’s tax liability, as

¹³⁶ OECD Model Convention, *supra* note 135, at M-22. Permanent establishment is defined by Article 5 as, “a fixed place of business through which the business of an enterprise is wholly or partly carried on.” *Id.* at M-16.

¹³⁷ *Id.* at M-39.

¹³⁸ *Id.* at M-42.

¹³⁹ *Id.* at C(17)-2.

¹⁴⁰ *Id.* at C(17)-3.

¹⁴¹ Evans, *supra* note 9, at 309. One reason for the singling out of athletes for different treatment by the Model Convention is athletes’ ability to earn large amounts of income during a short visit to foreign country. *Id.* at 311.

well as the perceived failure of bilateral tax treaties in regulating the taxation of international athletes.¹⁴² The elimination of double taxation is left up to the country of residence, generally through either the exemption or credit method.¹⁴³ For example, the U.S.-U.K. Income Tax Treaty provides specifically in Article 24 for application of the credit method to eliminate double taxation.¹⁴⁴

2. Multilateral Treaties

Multilateral treaties, as the name suggests, are generally formed among a number of nations. While not the prevalent approach, multilateral income tax treaties serve as an alternative means to address double taxation. The OECD has recognized that while the implementation of a multilateral tax convention would be very difficult, it may be possible for certain groups of member countries to consider a multilateral tax convention to suit their particular purposes.¹⁴⁵ From an athlete's perspective, a multilateral treaty represents an ideal alternative to the current network of bilateral treaties — a multilateral treaty would provide for the elimination of uncertainty caused by the current inconsistent tax treatment of athletes around the world, better information sharing between countries, efficient allocations of athletes' income, and a platform for the elimination of double taxation.¹⁴⁶ However, the

¹⁴² *See id.* at 320-26.

¹⁴³ *Id.* at 309 (“[Under] the exemption method- income that is taxable in the source country is exempted in the country of residence . . . [while under] the credit method- income that is taxable in the source country is subject to tax in the country of residence, but the tax levied by the source country is credited against the tax levied by the country of residence on such income.”).

¹⁴⁴ U.S.-U.K. Income Tax Treaty, *supra* note 8, at art. 24.

¹⁴⁵ OECD Model Convention, *supra* note 135, at I-11. Examples of successfully implemented multilateral treaties include the Nordic Convention on Income and Capital, and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAAT). Evans, *supra* note 9, at 318. MAAT, of which the U.S. is a signatory, provides for the exchange of information and administrative assistance in recovering tax claims between member countries. *Id.*

¹⁴⁶ *See Appleby*, *supra* note 7, at 639-43; Evans *supra* note 8, 320-22, 327-29. Some commentators have suggested that although a multilateral treaty could facilitate the elimination of double taxation, the current prevalence of Artiste

creation and adoption of a multilateral treaty to address the taxation of international athletes would require a significant amount of cooperation between nations around the world. Because of the competing interests of many of these nations, including the collection of revenue through the taxation of high-income athletes and the recruitment of foreign athletes away from rivals, the successful implementation of such a treaty in the near future appears unlikely.

II. Factual Background: The Current Place of Sports in the Global Economic and Social Landscapes

Sports undoubtedly play a major role in modern society. Professional sports are a multi-billion dollar industry,¹⁴⁷ and while game attendance and television revenue figures serve as quantitative evidence of sports' place in society, sports' social and political impact should not be discounted. Especially in the context of events such as the World Cup and the Olympic Games, sports serve as an outlet for nationalism,¹⁴⁸ and countries expend great

and Athlete provisions in bilateral treaties indicates countries are more concerned with retaining their share of foreign athletes income. Evans, *supra* note 9, at 327.

¹⁴⁷ In 2009, the global professional sports industry was estimated to be worth between \$480 and \$620 billion. Patrice Zyband & Hervé Collignon, *The Sports Market*, A.T. KEARNEY (May 2011), http://www.atkearney.com/paper/-/asset_publisher/dVxv4Hz2h8bS/content/the-sports-market/10192#.

¹⁴⁸ See Sheela Lal, *Nationalism, Competition, and Diplomacy: Asia at the 2012 London Olympics: An Interview with Victor Cha*, THE NAT'L BUREAU OF ASIAN RESEARCH (July 24, 2012), <http://www.nbr.org/research/activity.aspx?id=264#.UwEILn0FnE> ("Nationalism is intense in China, and I believe that if the Chinese are pitted against the Americans in any event, there will be special attention paid to every victory as yet another sign of China's rise.").

amounts of resources to maintain and grow competitive leagues and national teams.¹⁴⁹

The United States and the United Kingdom are currently positioned as global leaders in professional sports. These two nations are home to many of the world's premier professional leagues, and some of the most recognized and respected events in all of sports — attracting elite athletes from around the world.¹⁵⁰ However, the United States and the United Kingdom are certainly not alone, for in recent years, nations such as Spain, Brazil, and Russia have experienced considerable growth in their professional leagues and great success in international competition.¹⁵¹

A. The Place of the United States and the United Kingdom as Global Leaders in Professional Sports

The United States is the pinnacle of professional sports. The U.S. “big four,” consisting of the NFL, NBA, NHL, and MLB, are the premier leagues in the world in each of their respective sports, and draw athletes from around the world. In 2012, the NFL had revenues of \$9.5 billion,¹⁵² MLB revenues reached \$7.5 bil-

¹⁴⁹ For example, the United States Olympic Committee had expenses of \$249 million in 2012, including \$101 million attributable to sports programming. USOC, ANNUAL REPORT (2012).

¹⁵⁰ See, e.g., *supra* notes 2-3 and accompanying text.

¹⁵¹ Spain and Brazil are international soccer powers, winning the 2010 and 2002 World Cups respectively. *World Cup Previous Winners*, TOP END SPORTS, <http://www.topendsports.com/events/worldcupsoccer/winners.htm> (last visited Feb. 4, 2014). Russia took home 15 medals at the 2010 Winter Olympic Games and 30 at the 2012 Summer Olympic Games. *Official Olympic Games Results*, OLYMPIC.ORG, <http://www.olympic.org/olympic-results> (last visited Feb. 4, 2014).

¹⁵² Daniel Kaplan, *The Road to \$25 Billion*, SPORTS BUSINESS DAILY, Jan. 28, 2013, at 20, available at <http://www.sportsbusinessdaily.com/Journal/Issues/2013/01/28/In-Depth/NFL-revenue-streams.aspx>.

lion,¹⁵³ and NBA revenues totaled \$5 billion.¹⁵⁴ In addition to its leagues, the United States also plays host to many preeminent events; including golf's U.S. Open and Masters tournaments, tennis' U.S. Open, and many mixed martial arts and boxing matches, as well as international events in a variety of sports, including beach volleyball,¹⁵⁵ track and field,¹⁵⁶ and skiing and snowboarding.¹⁵⁷

The United Kingdom, like the United States, is home to many highly successful leagues and events. From a revenue standpoint, the EPL is the most successful professional soccer league in the world, recording revenues of €2.9 billion, or approximately \$4 billion, in 2011-12.¹⁵⁸ The United Kingdom also features some of the best cricket and rugby leagues in the world, and plays host to golf and tennis majors — the British Open,¹⁵⁹ and Wimbledon. In 2012, the United Kingdom was at the center of the international athletic stage as London hosted the Summer Olympic Games.

While the United States and the United Kingdom each have had significant success in recent international competitions, what has established these countries as global leaders in professional sports is the combined financial success of their respective leagues

¹⁵³ Matt Snyder, *Report: MLB revenues in 2012 were \$7.5 billion*, CBS SPORTS (Dec. 9, 2012, 3:42 PM), <http://www.cbssports.com/mlb/eye-on-baseball/21335810/report-mlb-revenues-in-2012-were-75-billion>.

¹⁵⁴ *Stern Estimates Revenue Up 20 Percent to \$5B*, NBA.COM (Nov. 13, 2012, 6:48 PM), <http://www.nba.com/2012/news/11/13/stern-nba-revenue.ap/>.

¹⁵⁵ *Competition Calendar*, FIVB.ORG, <http://www.fivb.org/EN/BeachVolleyball/calendar.asp> (last visited Feb. 4, 2014).

¹⁵⁶ *Competitions*, IAAF.ORG, <http://www.iaaf.org/competition> (last visited Feb. 4, 2014).

¹⁵⁷ *Calendar*, FIS.COM, <http://data.fis-ski.com/global-links/calendar.html> (last visited Feb. 4, 2014).

¹⁵⁸ *Review of Football Finance*, *supra* note 52, at 6.

¹⁵⁹ The 2013 British Open, like the 2013 U.S. Open, featured an \$8 million purse— among the largest in professional golf. *British Open Prize Money*, GOLF AND COURSE (July 21, 2013) <http://www.golfandcourse.com/news/british-open-prize-money>.

and events, and their ability to attract athletes from around the world to compete in these leagues and events. The attraction of international athletic talent to the United States and the United Kingdom has in many cases allowed the rich to get richer, and has enabled the countries' leagues and events to continue to grow with minimal competition for the world's top-level talent in their respective sports.

B. Up-and-Coming Countries in the Landscape of Professional Sports

Highly successful leagues and sporting events are not exclusive to the United States and the United Kingdom. While the United States and the United Kingdom may be considered established leaders as a result of the sustained success and economic prosperity of their leagues and events, a shift is taking place, beginning with countries such as Spain, Brazil, and Russia. During the 2011-12 season, the top Spanish soccer league, La Liga, recorded revenues of €1.8 billion, third highest among European soccer leagues.¹⁶⁰ In addition, Spain's top professional basketball league, Liga ACB, is among the most competitive in the world.¹⁶¹ In 2012, Spanish basketball leagues imported 428 foreign players, the most of any country.¹⁶²

Brazil and Russia present interesting examples of up-and-coming nations in the professional sporting landscape. Together they will host the next Winter Olympic Games (Sochi 2014), the next Summer Olympic Games (Rio 2016), and the next two World Cups (2014 and 2018). These major international events will contribute to the development of facilities and venues, and bring Russia and Brazil to the forefront of the world sporting stage. Considering the ability of leagues and events in Brazil and Russia to compete for talent with leagues and events located in more established sporting nations, Brazil's top soccer league, Série A, is

¹⁶⁰ *Review of Football Finance*, *supra* note 52, at 6.

¹⁶¹ FIBA MIGRATION REPORT, *supra* note 82, at 16.

¹⁶² *Id.* at 6.

currently ranked by the International Federation of Football History & Statistics as the fifth strongest league in the world, and is home to five of the world's top clubs.¹⁶³ Meanwhile, the upstart Russian KHL serves as an intriguing example of a league that has successfully attracted talent away from an established American league such as the NHL.¹⁶⁴

C. The Race to the Bottom Theory

Professional athletes are highly paid,¹⁶⁵ and generally fall in the top tax brackets of the countries in which they earn income. As a result, the income tax implications of professional athletes' decisions about where to compete can be significant. Based on the comparable economic size of leagues such as the NHL and KHL, or the EPL and La Liga,¹⁶⁶ it is unlikely that professional teams from countries outside of the United States and the United Kingdom will be able to offer salaries comparable to those offered by teams in more established nations to more than perhaps a handful of players. However, the income tax regimes of these up-and-coming countries represent a potential tool for leveling the playing field to some extent.

The use of tax laws as a recruiting tool to support the import of athletic talent creates the potential for what can be described as a "race to the bottom."¹⁶⁷ In the context of taxing nonresident athletes, a race to the bottom theory would suggest that if one country implements favorable income tax provisions that

¹⁶³ *The Strongest National League of the World*, *supra* note 100; *Club World Ranking*, IFFHS (Jan. 8, 2014) <http://www.iffhs.de/club-world-ranking/>.

¹⁶⁴ Sempey, *supra* note 111.

¹⁶⁵ In 2013, the average yearly salary of athletes competing in U.S. leagues and tours ranged from \$5.2 million for NBA players, to \$162,000 for women's golf (LPGA). *Professional Sport Average Salary*, STATISTIC BRAIN, <http://www.statisticbrain.com/professional-sports-average-salary-revenue-salary-cap/> (last updated July 28, 2013).

¹⁶⁶ For example, the EPL had revenues €1 billion greater than La Liga in 2011-12. *Review of Football Finance*, *supra* note 52, at 6.

¹⁶⁷ Appleby, *supra* note 7, at 641.

allow its teams to provide nonresident athletes with effectively greater compensation, other countries will follow suit in an effort to remain competitive in the global market for athletic talent.

The potential impact of a particularly favorable tax scheme on teams' ability to recruit and sign talent in a competitive international market may be best illustrated through an analogy to the competition for free agents in American professional leagues involving teams located in states without a state income tax.¹⁶⁸ For example, in 2010, despite the NBA's salary cap, the Miami Heat were able to sign three of the top players in the league; LeBron James, Dwayne Wade, and Chris Bosh.¹⁶⁹ Florida does not have a state income tax, and as a result the Heat were essentially able to offer James, Wade, and Bosh greater compensation than other teams, such as Los Angeles and Chicago, who were competing for the players' services, while still remaining under the league's salary cap.¹⁷⁰ The contracts offered by the Heat to James, Wade, and Bosh were comparatively more valuable to the players than identical or even higher offers from teams in states with state income taxes, providing the Heat with a significant advantage in the recruitment of these premier players.¹⁷¹

III. Issues Presented by the Tax Treatment of Nonresident Athletes in the United States and the United Kingdom

The tax regimes of the United States and the United Kingdom have been the recent subject of criticism by several high-

¹⁶⁸ See generally, Mitchell L. Engler, *The Untaxed King of South Beach: LeBron James and the NBA Salary Cap* 48 San Diego L. Rev. 601 (2011) (discussing the competitive impact of salary caps on professional sports leagues).

¹⁶⁹ *Heat Stars Sign 6-Year Deals*, ESPN (July 10, 2010), <http://sports.espn.go.com/nba/news/story?id=5368003>.

¹⁷⁰ See Engler, *supra* note 168, at 602-03.

¹⁷¹ This concept is not exclusive to team sports, and can also be applied to individual sports where individual events compete to add elite athletes to their fields.

profile athletes. Jamaican sprinter Usain Bolt has been critical of the United Kingdom's taxation of nonresident athletes, specifically its treatment of endorsement income, and has gone so far as to boycott competitions held in the United Kingdom.¹⁷² Spanish tennis star Rafael Nadal has also skipped events in the United Kingdom for tax reasons.¹⁷³ In November 2013, Filipino boxer Manny Pacquiao fought in Macau, China, his first fight outside of the United States since 2006.¹⁷⁴ Tax implications played a large role in Pacquiao's decision to fight in China,¹⁷⁵ where nonresident athletes are subject to significantly lower tax rates on athletic performance income.¹⁷⁶ These examples highlight athletes' awareness of the income tax implications of their decisions regarding where to compete, as well as their willingness to avoid countries they feel do not provide them with favorable tax treatment. Furthermore, the Pacquiao example emphasizes the role of emerging markets, such as China, in the international movement of athletic talent, and the role those markets play in providing alternative venues for athletes who have traditionally competed in the United States and the United Kingdom.

The criticisms of athletes such as Bolt, Nadal, and Pacquiao are not without merit. The United States and the United Kingdom generally tax nonresident athletes at higher rates than other countries.¹⁷⁷ Other aspects of the U.S. and the U.K. tax systems that

¹⁷² See *Usain Bolt Tax Bill: Why Sports Stars Won't Compete in Britain*, *supra* note 10.

¹⁷³ *Id.*

¹⁷⁴ Matt Blumenfeld, *Pacquiao Takes Fight in Macau, U.S. Federal Income Tax Rate Proves Too High*, AMERICANS FOR TAX REFORM (May 7, 2013, 11:01 AM) <http://www.atr.org/pacquiao-takes-fight-macau-u-s-a7603>.

¹⁷⁵ *Id.*

¹⁷⁶ See *id.* See also, Appleby, *supra* note 7, at 638.

¹⁷⁷ Nonresident athletes' U.S.-source income that is effectively connected to a U.S. trade or business is subject to a maximum progressive tax rate of 39.6%. I.R.C. § 1 (2013); see discussion *supra* Part I.A.1.b. The U.K. taxes nonresident athletes' U.K.-source income at a maximum progressive rate of 45%. See discussion *supra* Part I.A.2.b. Meanwhile, Spain taxes nonresident athletes at a

may create challenges for foreign athletes include comparatively complicated residency status determinations,¹⁷⁸ and in the United States, a lack of clarity in the characterization of endorsement income and the sourcing of royalty payments.¹⁷⁹ Additionally, tax authorities in both countries have specifically targeted nonresident athletes as part of strategies to increase tax revenue.¹⁸⁰

In 2006, in an effort to close the federal tax gap created by taxpayer noncompliance,¹⁸¹ the U.S. Department of Treasury issued a Comprehensive Strategy for Reducing the Tax Gap,¹⁸² which sought greater compliance through improved collection efficiency, and the sharing of information with foreign tax authorities to reduce international tax avoidance.¹⁸³ As part of this strategy, the IRS specifically targeted foreign athletes and entertainers through the Project on Foreign Athletes and Entertainers.¹⁸⁴ The IRS has continued to target foreign athletes through 2013, and has not indicated an intention to relax its efforts.¹⁸⁵ While the IRS has a justifiable interest in obtaining tax compliance from nonresident athletes,¹⁸⁶ the perception among many athletes is that the IRS unfairly singles them out to make examples of them.¹⁸⁷ In the

flat rate of 30%, Brazil at progressive rates of up to 27.5%, and Russia at a flat rate of 30%. See discussion *supra* Parts I.A.3.b, I.A.4.b, I.A.5.b.

¹⁷⁸ See discussion *supra* Parts I.A.1.a, I.A.2.a.

¹⁷⁹ See discussion *supra* Part I.A.1.c.

¹⁸⁰ See Taylor, *supra* note 15, at 391-95; The Income Tax (Entertainers and Sportsmen) Regulations, *supra* note 69.

¹⁸¹ See Taylor, *supra* note 15, at 391-92.

¹⁸² U.S. DEP'T OF TREASURY, A COMPREHENSIVE STRATEGY FOR REDUCING THE TAX GAP (2006).

¹⁸³ See *id.*

¹⁸⁴ See Taylor, *supra* note 15, at 396.

¹⁸⁵ *IRS Focus on Foreign Athletes and Entertainers*, IRS.GOV, <http://www.irs.gov/Individuals/International-Taxpayers/IRS-Focus-on-Foreign-Athletes-and-Entertainers> (last updated Sep. 3, 2013).

¹⁸⁶ See Taylor, *supra* note 15, at 398 (suggesting the IRS targets athletes "because they get the most bang for their buck in terms of publicity," and furthermore that nonresident athletes enjoy benefits and services from the countries in which they compete, and as a result should pay their fair share of taxes).

¹⁸⁷ See *id.* at 401.

United Kingdom, athletes have similarly been singled out for differential treatment under the 1987 Amendment, which subjects nonresident athletes and entertainers to a 20% withholding tax not applied to other nonresidents.¹⁸⁸ Similarly to the IRS's targeting of nonresident athletes through the Project on Foreign Athletes and Entertainers, the United Kingdom similarly targets nonresident athletes through the HMRC Foreign Entertainers Unit (FEU), a unit that tracks and manages the taxation of athletes and entertainers.¹⁸⁹

As a result of their treatment of nonresident athletes, a major issue facing the United States and the United Kingdom is athletes' recognition of this potentially unfavorable tax treatment, and willingness to consider competing in alternative locations. In turn, this willingness has created room for up-and-coming nations to recruit athletic talent away from the established leaders. However, the risk presented by athletes choosing to avoid competing in the United States and the United Kingdom is still largely speculative. No mass exodus of athletes has occurred, and the strength and reputation of the leagues and events in the United States and the United Kingdom, along with the size of the available salaries and purses, will continue to draw elite athletes, regardless of the income tax implications.

A. The Established Leaders' Recognition of Issues Presented by Their Current Tax Systems

In recent years, both the United States and the United Kingdom have taken actions that suggest recognition of nonresident athletes' negative perception of their respective tax systems. In the United States, the U.S. Tax Court has begun to provide some clarity as to the process under which endorsement income will be characterized,¹⁹⁰ and has repeatedly denied the IRS's attempts to

¹⁸⁸ The Income Tax (Entertainers and Sportsmen) Regulations, *supra* note 69.

¹⁸⁹ *Foreign Entertainers Unit*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/feu/feu.htm> (last visited Feb. 10, 2014).

¹⁹⁰ *See Garcia v. Commissioner*, 140 T.C. No. 6, at *8-11 (2013).

characterize nonresident athletes' U.S.-source endorsement income as entirely attributable to personal services.¹⁹¹ Meanwhile, in 2012, during the Summer Olympic Games in London, the United Kingdom amended its tax code to exempt nonresident athletes from U.K. taxation while competing in the Games.¹⁹² Although not comprehensive solutions to the issues discussed above, these actions taken by the United States and the United Kingdom serve as indicators of how issues regarding the taxation of nonresident athletes may be addressed in the future by both countries.

1. The U.S. Tax Court's Treatment of Endorsement Income in *Garcia v. Commissioner*

Two major criticisms of the U.S. tax system as it is applied to nonresident athletes, the IRS's targeting of foreign athletes, and the lack of clarity provided in regards to the characterization of endorsement income, have been addressed in recent cases before the U.S. Tax Court. In 2011, and 2013 respectively, professional golfers Retief Goosen (a South African resident) and Sergio Garcia (a Swiss resident), petitioned the Tax Court for redeterminations of income tax deficiencies arising from income received through endorsement deals with the equipment company TaylorMade.¹⁹³

In both cases, the IRS took the position that the taxpayers' endorsement income should be characterized as entirely personal service income¹⁹⁴ subject to the applicable progressive rates established by I.R.C. § 1,¹⁹⁵ as opposed to royalty income, which is

¹⁹¹ Seth W. Stern, *The IRS' Double Bogey: Goosen v. Commissioner Remains a Fairway to Characterize Endorsement Income for Nonresident Athletes in Garcia v. Commissioner*, 20 Jeffrey S. Moorad Sports L.J. 605, 628 (2013).

¹⁹² See *London 2012 Accredited Individuals: Income Tax Exemptions*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/2012games/tax-exemptions/accredited-individuals.htm> (last visited Jan. 14, 2014).

¹⁹³ See *Goosen v. Commissioner*, 136 T.C. 547, 547 (2011); *Garcia*, 140 T.C. at *1.

¹⁹⁴ *Goosen*, 136 T.C. at 563, *Garcia*, 140 T.C. at *11.

¹⁹⁵ I.R.C. § 1 (2013) (the top rate is 39.6% for income over \$250,000).

subject to a 30% flat rate tax.¹⁹⁶ In *Goosen*, the Tax Court held Goosen's endorsement income should be characterized as 50% personal service income and 50% royalty income,¹⁹⁷ while in *Garcia*, the Tax Court held Garcia's endorsement income should be characterized as 35% personal service income and 65% royalty income.¹⁹⁸ Although some confusion regarding the characterization of endorsement income still exists as a result of the Tax Court's differing allocations in *Goosen* and *Garcia*,¹⁹⁹ nonresident athletes earning endorsement income in the United States won a substantial victory, as the IRS's position that endorsement income should be characterized entirely as personal service income was rejected by the Tax Court in both cases.²⁰⁰

In regards to the characterization of endorsement income, the Tax Court distinguished *Garcia* from *Goosen*, focusing on Garcia's position as a "Global Icon" for TaylorMade, whereas Goosen was considered only a "brand ambassador."²⁰¹ While commentators have suggested that the Tax Court's characterization of Garcia's endorsement income represents an increasing willingness to characterize endorsement income as royalty income,²⁰² based on the differentiation of Goosen and Garcia's endorsement contracts, such favorable characterization may only be extended to the most elite, recognizable athletes in the future. However, based on the *Garcia* Court's analysis of *Goosen* in its decision, nonresident athletes should have significantly more guidance in the future regarding to the characterization of their endorsement income.

¹⁹⁶ See I.R.C. § 871(a) (2013); see also *supra* note 45.

¹⁹⁷ *Goosen*, 136 T.C. at 563.

¹⁹⁸ *Garcia*, 140 T.C. at *11

¹⁹⁹ *Goosen*, 136 T.C. at 563-64; *Garcia*, 140 T.C. at 151-52.

²⁰⁰ See *Goosen*, 136 T.C. at 563-64; *Garcia*, 140 T.C. at 151-52; see also Stern, *supra* note 191, at 628.

²⁰¹ *Garcia*, 140 T.C. at 154.

²⁰² Stern, *supra* note 191, at 628.

2. The U.K. Olympic Tax Amendment

As the 2012 Summer Games came to London, the United Kingdom addressed the concerns of athletes such as Usain Bolt by exempting nonresident athletes competing in the Games from paying U.K. income tax.²⁰³ The exemption provided by the Amendment, promulgated under the authority of the 2006 Finance Act,²⁰⁴ extended to all competitors in both the Olympic and Paralympic Games, and covered “any financial or other rewards received . . . as a result of . . . performance at the Games . . .,” as well as certain endorsement income.²⁰⁵ Although temporary,²⁰⁶ the United Kingdom’s specific tax exemption of nonresident athletes suggests an awareness of the strong criticisms of athletes such as Bolt, and an understanding of the impact of its tax code on such individuals, as well as a willingness to amend its tax system to promote the flow of elite athletic talent into the United Kingdom for major sporting events.

Some commentators have questioned the actual impact of the Olympic Tax Amendment because it would seem unlikely that an athlete would miss an event like the Olympics over a disagreement on tax policy.²⁰⁷ However, the purpose of the Amendment went well beyond the appeasement of individual foreign athletes.²⁰⁸ The tax exemptions implemented by the Amendment

²⁰³ *London 2012 Accredited Individuals: Income Tax Exemptions*, *supra* note 192.

²⁰⁴ Finance Act, 2006, c. 6 (U.K.).

²⁰⁵ *Additional Information For Non-UK Resident Competitors at the 2012 Games*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/2012games/tax-exemptions/competitors.htm> (last visited Feb. 17, 2014).

²⁰⁶ The exemption period ran from March 30, 2012 to November 8, 2012.

London 2012 Accredited Individuals: Income Tax Exemptions, *supra* note 192.

²⁰⁷ See Stern, *supra* note 191, at 628.

²⁰⁸ See *Accredited Individuals and 2012 Partner Workers: Business Profits Exemption*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/2012games/tax-exemptions/bus-profits-exemption.htm> (last visited Feb. 18, 2014) (providing a tax exemption for certain non-resident companies that engage in Games-related activities).

extended to the Game's organizers and sponsors as well.²⁰⁹ Furthermore, the United Kingdom has a history of sports related income tax exemptions, including an exemption for soccer players competing in the 2011 UEFA Champions League Final — a concession to UEFA, the game's organizer, in order to have the game played in London's Wembley Stadium.²¹⁰ This may suggest that even more so than the athletes themselves, organizers of international sporting events serve as a catalyst for the amendment of countries' tax laws. In the future, if a country like the United Kingdom wants to host events such as the Olympic Games or the World Cup it will have to be willing to concede to more favorable tax treatment of athletes, or lose the opportunity to a nation that will.

IV. Tax Treatment of Athletes by Up-and-Coming Sporting Nations - A Tool for Recruiting Athletic Talent

As previously discussed, the unfavorable tax treatment of athletes by the United States and the United Kingdom, both actual and perceived, has provided an opportunity for up-and-coming nations to establish a competitive advantage in the recruitment of international athletic talent.²¹¹ As illustrated by superstar athletes such as Manny Pacquiao, Usain Bolt, and Rafael Nadal, athletes are aware of the income tax implications of their competition schedules, and are willing to take action to avoid unfavorable jurisdictions. While countries' tax regimes serve a far broader purpose than the recruitment of athletes, that recognition should not downplay the potential significance the regimes have on the movement of athletic talent around the world.

²⁰⁹ See Finance Act, 2006, c. 6 (U.K.).

²¹⁰ Lee Boyce, *Olympic Stars Face Tax Sting in the Tail from London 2012*, MAIL ONLINE (June 28, 2011), <http://www.thisismoney.co.uk/money/news/article-2009104/Olympics-stars-face-taxed-promotional-work-London-2012.html>.

²¹¹ See discussion *supra* Part III.

Spain's Beckham Law serves as the principal example of a country using its tax laws to assist its sporting leagues in recruiting athletes.²¹² This amendment to the Spanish tax code has directly improved the ability of Spanish teams to recruit foreign players by providing certain new Spanish residents the opportunity to elect the 24% flat rate tax applied to nonresidents, as opposed to the graduated rates of up to 52% generally applied to residents.²¹³ Research conducted by the National Bureau of Economic Research (NBER) indicates that after passing the Beckham Law, Spanish soccer clubs experienced a sharp influx of "top-quality" foreign players.²¹⁴

A second example of a country's tax reform encouraging the movement of athletic talent into the country is Denmark's 1992 "Tax Scheme for Foreign Researchers and Key Employees."²¹⁵ Under this tax scheme, "foreign researchers and high-income foreigners in all other professions" are taxed at a flat rate of 25% as opposed to Denmark's progressive tax system with a top rate of over 60%.²¹⁶ NBER research established that like in Spain after the passing of the Beckham Law, migration of top-quality soccer players into Denmark also increased following the implementation of this reform — further quantitative evidence of tax reform's

²¹² See Klevin, *supra* note 83, at 17.

²¹³ Appleby, *supra* note 7, at 631 (the favorable treatment provided by the Beckham Law is applied the year of the taxpayer's move and the following five years).

²¹⁴ Klevin, *supra* note 83, at 17-18, fig. 2 (top-quality players are defined as players having played at least once over the career in the national team of [their] home country); see *Spanish Income Tax Rates 2012 to 2014*, *supra* note 87 (with the increases in the graduated rates applied to Spanish residents for the 2012-2014 tax years the favorable treatment of the Beckham Law will be magnified).

²¹⁵ See Klevin, *supra* note 83, at 19.

²¹⁶ *Id.* To qualify for the preferential treatment an individual must not have been tax liable for the three years prior, and earn over 765,600 Danish kroner (€103,000) annually. *Id.* Preferential treatment is limited to a period of 36 months. *Id.*

potential as a driver behind the international movement of athletic talent.²¹⁷

Even absent specific tax reform, tax regimes that provide favorable treatment to international athletes may similarly impact athletes' decisions regarding where to compete. Given the mobility and earning capacity of many athletes it is logical that, if provided with a choice, such athletes will choose to compete in countries that apply lower tax rates. The fact that athletes in many sports have relatively short careers supports the theory that athletes are motivated to maximize their earnings, and will be sensitive to the tax implications of their travel schedules. Furthermore, the growth of professional sports in up-and-coming countries such as Brazil, China, Spain, and Russia has provided athletes with a greater number of alternatives when planning their competition schedules. When comparing the rates applied to nonresidents by these countries with the rates applied by the United States and the United Kingdom, the potential for savings becomes clear. For example, Brazil applies a flat rate of 25% to nonresidents,²¹⁸ compared to the top progressive rates in the United States and the United Kingdom of 39.6% and 45% respectively.²¹⁹ As athletes continue to receive greater levels of compensation the impact of this difference in tax rates will be multiplied, improving the ability of countries such as Brazil to recruit elite athletes away from the established leaders.

V. The Future of Taxation of International Athletes

The creation of a system for the taxation of international athletes represents a balancing of interests between the athletes and the countries in which the athletes are competing and earning income. From the countries' perspectives, athletes represent a

²¹⁷ *See id.* at 19-21.

²¹⁸ Appleby, *supra* note 7, at 635.

²¹⁹ I.R.C. § 1(a)-(d) (2013); *Income Tax Rates and Allowances*, HM REVENUE & CUSTOMS, <http://www.hmrc.gov.uk/rates/it.htm> (last visited Feb. 1, 2014).

significant source of tax revenue, and a failure to maintain athlete compliance with the countries' tax laws may result in tax evasion among these high-earning individuals.²²⁰ Athletes enjoy benefits, services, and significant economic opportunities from the countries in which they compete; and from the countries' perspectives it is only right that athletes pay for their fair share of those benefits and opportunities.²²¹ On the other hand, athletes have a limited window of high earning potential, and want to take home as much of their earnings as possible, as well as to avoid any potential double taxation or differential tax treatment.

Taxation of international athletes presents a unique challenge because of the highly transitive nature of many athletes,²²² and the differences in the income tax regimes and treaties employed by countries around the world.²²³ Generally speaking, income tax is collected primarily for the creation of revenue, and encouraging the flow of athletic talent into a country is not a key function of any nation's tax system. Based on this Article's review of the income tax systems of both established leaders and up-and-coming nations in the international sporting landscape, countries are seemingly more likely to target athletes to ensure tax compliance because of their position as high-income earners than to provide favorable treatment to attract athletes to the countries' leagues and events.²²⁴ As a result, an all-out race to the bottom among countries in terms of providing foreign athletes with favor-

²²⁰ See Taylor, *supra* note 15, at 397. In 2008, race car driver Helio Castroneves was indicted on charges relating to tax evasion in the U.S., "IRS Commissioner Doug Shulman commented on the Castroneves situation, stating, '[t]his case sends a clear message that the IRS is committed to vigorously enforcing the tax laws and stopping offshore tax evasion.'" *Id.*

²²¹ *Id.* at 398.

²²² See *supra* note 1 (discussing the countries in which golfer Tiger Woods, and tennis star Novak Djokovic competed in during 2013).

²²³ See discussion *supra* Part I.A.

²²⁴ Spain's Beckham Law appears to be the major exception to this general trend. However, this law has been amended, and the beneficial treatment scaled back, in recent years. See Klevin, *supra* note 83, at 17; discussion *supra* Part I.A.3.b.

able income tax treatment as a recruiting tool is unlikely. However, because of international athletes' awareness of the income tax implications of their decisions about where to compete, specific amendments to a country's tax code and income tax treaties with foreign nations that provide favorable treatment to nonresident athletes will still serve as a valuable and effective recruiting tool for countries, such as Spain and Denmark,²²⁵ who are willing to forego some tax revenue. Even absent specific amendments designed to benefit nonresident athletes, the existing tax treatment of international athletes by both the established leaders and up-and-coming nations will continue to serve as a key driver behind the international movement of athletic talent.

Looking to the future, income tax treatment will likely impact the international movement of athletes in a number of specific ways. While much of this Article has discussed countries' tax treatment of nonresident athletes, team sport athletes such as hockey and soccer players may, depending on the length of their season, qualify as residents of the country in which they compete.²²⁶ As a result, a league like the KHL will have a comparative advantage over the more established NHL in recruiting players when considering Russia's 13% flat rate tax on the income of Russian tax residents²²⁷ in comparison to the United States' top progressive rate of 39.6%.²²⁸ For example, in 2013, hockey star Ilya Kovalchuk stood to earn \$46 million over the next four years of his contract with the NHL's New Jersey Devils. Instead, Kovalchuk

²²⁵ See discussion *supra* Part IV (highlighting Spain's Beckham Law and Denmark's Tax Scheme for Foreign Researchers and Key Employees).

²²⁶ For example, the NHL season runs from October through April, and the KHL season runs from September to March. *2013-2014 Regular Season*, NHL.COM, <http://www.nhl.com/ice/schedulebyseason.htm?navid=nav-sch-sea> (last visited Feb. 12, 2014); *Scores and Schedules*, KONTINENTAL HOCKEY LEAGUE, <http://en.khl.ru/calendar/244/00/> (last visited Feb. 12, 2014). As a result, players in both leagues would be deemed residents of the U.S. and Russia respectively for income tax purposes.

²²⁷ *Tax Ties: Russia*, *supra* note 113.

²²⁸ 26 U.S.C.A. § 1 (2014).

opted to retire from the NHL, and sign with the KHL's SKA St. Petersburg, where to match his after-tax earnings on the foregone remainder of his NHL contract he would have to sign a four-year contract at only \$6.6 million per year with the Russian club.²²⁹

Conversely, as much of this Article has discussed, non-team-sport athletes, such as golfers and tennis players, when considering the income tax implications of their competition schedules, will be drawn to those countries that provide the most favorable tax treatment to nonresidents. Non-team-sport athletes have significantly more say over their schedules, and are not tied to a league in a single country for an entire season; as a result, they are likely to compete in multiple countries throughout the course of a tax year, and will likely be classified as nonresidents by those countries. Boxer Manny Pacquiao's decision to fight in China instead of the United States suggests that boxers and mixed martial arts (MMA) fighters are some of the athletes most likely to consider taxes when scheduling their events.²³⁰ A trend moving forward may be for these fights to be scheduled outside of the traditional venues of Las Vegas and Atlantic City. The Ultimate Fighting Championship (UFC), the world's top MMA organization, has already scheduled 2014 events in Jaragua, Brazil, and Macao, China.²³¹

Another important consideration moving into the future is the impact of third parties such as event sponsors, event organizers, and international sporting federations on countries' tax treatment of foreign athletes. These third parties serve as an independent

²²⁹ Mike Sielski, *For Kovalchuk, a Tax Break Leaving New Jersey for Russia*, WALL ST. J. (July 15, 2013 6:54 PM), <http://online.wsj.com/news/articles/SB10001424127887323394504578607984088103500>.

²³⁰ The fact that boxing and MMA matches require a smaller number of athletes than many other sports makes them highly mobile, increasing the athlete's ability to be selective of the countries in which the compete.

²³¹ *Events*, UFC.COM, <http://www.ufc.com/schedule/event> (last visited Feb. 12, 2014).

source of pressure on countries to provide favorable tax treatment to athletes beyond the existing competition between nations for athletic talent. The trickle down economic benefits available to a country hosting a major sporting event are often significant,²³² and established leaders such as the United Kingdom have already conceded to the pressures placed on potential host nations by event organizers, as seen by the 2012 Olympic Tax Amendment²³³ and the exemption from income taxation of soccer players competing in the 2011 UEFA Champions League Final.²³⁴ Brazil's "World Cup Law"²³⁵ provides further evidence of the impact of event organizers and sporting federations on countries' policy making, and suggests that even if countries will not amend their tax codes to compete directly with each other, they will amend their tax codes or provide tax exemptions to satisfy these third parties who will serve a significant role in shaping the international taxation of athletes in the future.

Finally, while outside the scope of this Article, income tax treatment of both resident and nonresident athletes may play a significant role in the potential expansion of the "big four" American leagues outside of the United States and Canada.²³⁶ Depending on the income tax regimes of the countries selected for expansion, the expanding leagues could be forced to adjust the

²³² Andrew K. Rose & Mark M. Spiegel, *The Olympic Effect*, 121 THE ECON. J. 652, 675 (2011) (suggesting that countries that host the Olympic Games experience a significant permanent increase in trade).

²³³ Finance Act, 2006, c. 6 (U.K.); London 2012 Accredited Individuals: Income Tax Exemptions, *supra* note 192.

²³⁴ Boyce, *supra* note 210.

²³⁵ See *supra* note 110 and accompanying text.

²³⁶ Both NFL commissioner Roger Goodell, and NBA commissioner David Stern have expressed optimism that their respective leagues will expand into Europe in the future. Will Brinson, *Roger Goodell on LA or London team first: 'I want both'*, CBS SPORTS (Oct. 26, 2013), <http://www.cbssports.com/nfl/eye-on-football/24142624/roger-goodell-on-la-or-london-nfl-team-first-i-want-both>; Eric Freeman, *David Stern says there will be NBA teams in Europe in 20 years, 'for sure'*, YAHOO! SPORTS (Jan. 14, 2013), <http://sports.yahoo.com/blogs/nba-ball-dont-lie/david-stern-says-nba-teams-europe-20-years-160341699--nba.html>.

salary caps of foreign-based teams, or take other preventive measures to avoid the creation of a competitive advantage or disadvantage for new foreign based teams.²³⁷ American leagues expanding abroad may also play a role similar to major event organizers and use their economic power to dictate changes to the tax systems of the countries in which they choose to expand.

VI. Recommendations

As highlighted by this Article, individual countries take very different approaches to the taxation of international athletes — a highly transient, highly compensated group of taxpayers. As a result of the differences in countries' tax regimes and the objectives of those regimes, recommendations for an improved system of taxing foreign athletes are highly dependent on the perspective of the country being considered.

A. Relaxed Tax Treatment of Nonresident Athletes

For up-and-coming sporting nations, amended tax laws providing for relaxed or preferential treatment of nonresident athletes represent one strategy for attracting international athletic talent away from the established leaders. However, the implementation of such a system requires a balancing of interests, and potential consequences include foregone tax revenue, and unrest among other taxpayers who may consider the amendments discriminatory.²³⁸ Additionally, countries such as Brazil and Russia that already have comparably low tax rates may receive little to no benefit by amending their tax regimes to provide even more favorable treatment to certain individuals. Furthermore, although taxation of nonresident athletes serves as a driver behind the international movement of athletic talent, even the most favorable tax regime

²³⁷ See generally Engler, *supra* note 168.

²³⁸ See Majithia, *supra* note 110 (discussing the challenge of Brazil's "World Cup Law" on constitutional grounds).

may not be enough to encourage many athletes to leave the established leaders in the professional sporting landscape.

Conversely, as illustrated by Spain and Denmark, amendments to a country's tax regime that provide favorable treatment to nonresident athletes and other high-earning individuals are statistically proven to be an effective tool for recruiting athletes to a country's leagues and events.²³⁹ In the case of both Spain and Denmark, empirical evidence indicated an increase in top-level foreign athletes competing in the country's leagues following the passage of such amendments.²⁴⁰ In recent years, athletes who object to the tax systems employed by the United States and the United Kingdom have begun to turn to other nations; creating a window of opportunity for countries such as Spain who are willing to amend their treatment of foreign athletes. While such amendments may result in forfeited revenue, favorable tax treatment of athletes may represent the best way for up-and-coming nations to gain a competitive advantage over the established leaders in the arena of professional sports.

From the perspective of the established leaders, the United States and the United Kingdom, there is minimal incentive to provide nonresident athletes with preferred tax treatment. The reputation of these countries' leagues and events, along with the substantial salaries and prize money available to athletes competing in them, will continue to attract the world's best athletes regardless of the applicable tax treatment. The large number of foreign athletes currently competing in leagues such as the NBA, NHL, and EPL serve as evidence that the current tax regimes of the United States and the United Kingdom generally do not cause athletes to compete elsewhere. However, perhaps more so among individual sport athletes, the negative perception of the tax systems in the United States and the United Kingdom have in certain situations caused high profile athletes to compete in other coun-

²³⁹ See discussion *supra* Part IV.

²⁴⁰ Kleven, *supra* note 83, at 17-19, fig. 2.

tries.²⁴¹ While currently only a small minority of athletes seem to have specifically avoided the United States and the United Kingdom, the ability of athletes such as Manny Pacquiao and Usain Bolt to find alternative countries in which to compete, while reducing their exposure to tax liability, may represent a growing trend that should concern these established nations. Because much of the negative perception of the established leaders' income tax systems is based on athletes' belief that they are being singled out for particularly unfavorable treatment, the United States and the United Kingdom may consider moving away from the specific targeting of athletes for tax compliance through the U.S. Treasury's Project on Foreign Athletes and Entertainers and the HMRC's Foreign Entertainers Unit in an effort to avoid reducing the flow of elite level talent into the countries.²⁴²

B. Greater Transparency

As previously established, reform of the tax systems in the United States and the United Kingdom to provide athletes with tax treatment comparable to other, less economically-established countries is highly unlikely. However, because much of the negative sentiment athletes have towards the tax systems of these established nations is based on perception,²⁴³ education of athletes and greater transparency in the tax systems of both the United States and the United Kingdom as they apply to foreign athletes represent potential solutions that may diminish the impact tax treatment has on athletes' decisions about where to compete.

²⁴¹ See discussion of Manny Pacquiao and Usain Bolt *supra* Part III.

²⁴² See discussion *supra* Part III; Taylor, *supra* note 15, at 401 (“[T]he concept of focusing on artists and athletes seems to go against earlier Treasury sentiment of wanting to promote - or at least not hinder- the flow of talent into the United States.”)

²⁴³ Taylor, *supra* note 15, at 402 (suggesting foreign athletes may perceive an additional tax burden when competing in the U.S. based on their lack of understanding of the foreign tax credits provided to them through their country's tax treaty with the United States).

In the United Kingdom, the new Statutory Residency Test used to determine a taxpayer's residency status is significantly more complex than its predecessor. If clear guidance is not provided, athletes who are unclear as to their residency status will be more likely to avoid competition in the United Kingdom all together. Meanwhile, in the United States, one of the greatest areas of confusion caused by the current tax system is the characterization of endorsement income. Replacing the conflicting positions of the IRS and the U.S. Tax Court with a clear statement regarding the characterization of endorsement income will reduce the concerns of nonresident athletes competing in the United States and lead to greater compliance.²⁴⁴

Finally, some of international athletes' greatest concerns stem from the fear of double taxation. Artist and Athlete provisions in most income tax treaties do not eliminate double taxation, but instead place the burden on the athlete's country of residence to provide either an exemption or foreign tax credit.²⁴⁵ Because this method of double taxation elimination is often provided for within the treaty itself,²⁴⁶ better publication of these provisions could serve to eliminate a significant amount of athletes' tax related concerns.

Increased transparency and better education of foreign athlete taxpayers with regards the tax regimes of the United States and the United Kingdom will benefit both countries by reducing athletes' negative perceptions and apprehension towards competing within the countries, as well as increasing athlete tax compliance.

²⁴⁴ An analogy can be drawn to the U.S.'s treatment of signing bonuses. After thirty years of unclear treatment of signing bonuses, resulting in significant confusion among athletes, the IRS's clearly communicated position on signing bonus income in Revenue Ruling 2004-109 has eliminated almost all athlete concerns regarding the taxation of such income. See Appleby, *supra* note 7, at 621-22.

²⁴⁵ Evans, *supra* note 9, at 309.

²⁴⁶ See U.S.-U.K. Income Tax Treaty, *supra* note 8, at art. 24 (providing for the elimination of double taxation through the credit method).

Furthermore, this increased transparency will reduce some of the competitive advantage held by nations with tax regimes that provide more favorable treatment to athletes.

C. Recommendations for Athletes and Their Representation

The complexity of the international income tax system highlights the need for athletes to hire tax experts to help them navigate the various regimes they may be liable under during the course of a season or career. Taxes will have a major impact on athletes' ability to maximize their earning potential, and given the high profile nature of many athletes, being labeled a "tax cheat" may be especially damaging.²⁴⁷ For athletes competing internationally, a tax attorney may be more important than the athlete's agent; and as sports are becoming increasingly global, the ability to offer tax related services will differentiate firms seeking to represent athletes.

Conclusion

As professional sports continue to expand on the international stage, the income tax implications of athletes' decisions regarding where to compete will be increasingly significant. Although in most cases, leagues and events in up-and-coming sporting nations cannot compete directly with those from the established nations for the services of elite athletes, favorable income tax treatment of foreign athletes represents a valuable tool for closing the current gap in recruiting power. Because of the revenue available through the taxation of high-income earning individuals such as professional athletes, a race to the bottom in relation to the tax treatment of foreign athletes is unlikely. However, given the increasingly global nature of professional sports, the tax treatment of

²⁴⁷ See Appleby, *supra* note 7, at 641 (explaining athletes are their own brand, and bad publicity can cost them millions of dollars in endorsements).

foreign athletes around the world will serve as an important driver behind the international movement of athletic talent in the future.

SPORT AND SPECTACLE: SHOULD MMA BE PROTECTED UNDER THE FIRST AMENDMENT?

Jason J. Cruz^{*}

Should a sport where one individual chokes another individual until the person “taps out” receive First Amendment protection? A recent case in New York pitting a mixed martial arts (MMA) organization and the state of New York drew upon the overarching issue as to whether sports deserve First Amendment protection. This article will look at this recent challenge as an MMA organization sought protection under the First Amendment from a statewide ban on professional MMA.

MMA is grabbing mainstream appeal. Despite being ostracized by some for its violent overtones, the sport is the fastest growing in terms of popularity. A seven year television deal with the Fox Network solidified its relevance in the sports landscape.¹ Estimated at \$90 million dollars, the pact ensured that MMA’s biggest organization, the Ultimate Fighting Championships (UFC)², would be on Fox at least four times a year in its first full

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¹ Josh Gross, *UFC, Fox agree to seven year deal*, ESPN (August 18, 2011, 7:10 PM), http://espn.go.com/mma/story/_/id/6874530/ufc-reaches-seven-year-broadcast-deal-fox-networks.

² Ultimate Fighting Championships is owned by Zuffa, LLC. For purposes of this paper, the Plaintiffs in this lawsuit will be referred to as Zuffa instead of listing the complete lists of Plaintiffs.

year under the terms of the contract.³ Prior to the advent of Fox's new all-sports networks, FS1 and FS2, some of the organization's content was found on Fox cable network, FX.

When FS1 and FS2 launched in August 2013, the need for live sports was at a premium. Based on the first months of the network ratings, it became clear that UFC content was vital to the early success of the network.

Notwithstanding its national appeal, the UFC is expanding its footprint globally. It has brokered television deals in India⁴ and Latin America⁵ with the intent of filtering its product to an audience that will be intrigued to see more. It recently devised a strategy in which it is localizing its product and focusing on international expansion. In early 2014, it created a digital network, known as "Fight Pass," to provide fans with a library of its own content as well as events from organizations that Zuffa has acquired.⁶

Despite its success and global popularity, it is still not allowed in the biggest market in the United States – New York. 2014 saw Zuffa's chances end once again on the Assembly floor as a bill which would have legalized professional MMA stalled without a vote.⁷ The year prior, it contributed \$35,000 to New

³ Steve Cofield, *FOX and UFC announce official partnership; Four UFC fight cards on FOX and 32 live fight nights on FX each year*, YAHOO! SPORTS (August 18, 2011, 1:58 PM), http://sports.yahoo.com/blogs/mma-cagewriter/fox-ufc-announce-official-partnership-four-ufc-fight-175821520.html;_ylt=AwrTceEX2hlV1R4A890nnIIQ;_ylu=X3oDMTByNzhwY2hkBHNIYwNzcgRwb3MDMGRjb2xvA2dxMQR2dGlkAw--.

⁴ *UFC partners with SIX for TUF India*, UFC (September 11, 2012), <http://www.ufc.com/news/ufc-details-indian-expansion-091112-press-release>.

⁵ *UFC announces TUF Latin America*, UFC (April 29, 2014), <http://www.ufc.com/news/tuf-latin-america-press-release>.

⁶ Chuck Mindenhall, *Zuffa launches UFC Fight Pass as part of globalization efforts*, MMA FIGHTING (December 28, 2013, 6:58 PM), <http://www.mmafighting.com/2013/12/28/5251928/zuffa-launches-ufc-fight-pass-as-part-of-globalization-efforts>.

⁷ Steven Marrocco, *UFC's Marc Ratner on MMA in New York: 'We're not going to get it done this year.'* MMAJUNKIE (June 9, 2014, 4:30 PM),

York legislators in the first half of 2013 with the hopes of a vote, but to no avail.⁸ With other states such as Connecticut, Minnesota and South Carolina passing measures to legalize MMA in recent years, New York stands alone as the sole state in which professional mixed martial arts is not legalized.⁹

While it continues to plow forward each and every legislative session with hopes of getting closer to its goal, Zuffa, along with a plethora of its fighters and supporters filed a lawsuit in November 2011 against the state of New York seeking to invalidate the state ban on MMA.¹⁰

The lawsuit is as complex as it is long. This article, however will focus on the First Amendment claims made by Zuffa. The Plaintiffs claim that MMA is an expressive form of conduct and protected under the First Amendment. The legal theory is unique as the general standard is that sport is not protected under the First Amendment. In September 2013 the Southern District of New York dismissed the First Amendment claims, but did the court make the right decision?¹¹

Part I will look at what is MMA and summarize the procedural history of the lawsuit as well as the disposition of the legal theories as it has been mapped out through the motions by the parties. Part II will look at the court's dismissal of the First

<http://mmajunkie.com/2014/06/ufcs-marc-ratner-on-mma-in-new-york-were-not-going-to-get-it-done-this-year>.

⁸ Robert Harding, *Zuffa, UFC's parent company, contributes more than \$30,000 to the New York state legislators, party committees*, AUBURN CITIZEN (July 16, 2013, 3:08 PM), http://auburnpub.com/blogs/eye_on_ny/article_265a5022-ee44-11e2-b73e-0019bb2963f4.html#.UeXMjE6yVqg.twitter.

⁹ Alaska and Montana do not have Athletic Commissions and thus do not regulate the sport of mixed martial arts although professional MMA is legal in those states.

¹⁰ Post Staff Report, *UFC Files lawsuit arguing New York's fight ban violates First Amendment*, NEW YORK POST (November 11, 2011, 11:30 PM), <http://nypost.com/2011/11/15/ufc-files-lawsuit-arguing-new-yorks-fight-ban-violates-first-amendment/>.

¹¹ *Jones v. Schneiderman*, 974 F. Supp. 2d 322, 333 (S.D.N.Y. 2012).

Amendment claim and the important cases that hinged on the decision. Part III gives a scenario where MMA could satisfy the threshold elements for expressive conduct and Part IV concludes with several issues arising from Zuffa's unsuccessful claim.

PART I

A. What is MMA?

MMA is a full-combat sport that is a combination of amateur wrestling, boxing, jiu jitsu and other martial arts disciplines. The sport of MMA can trace its roots back to ancient Greece with a combat sport known as Pankration.¹² The combat sport of vale tudo which developed in Brazil was brought to the United States by the famed Gracie family in 1993.¹³ The term "Mixed Martial Arts" is thought to be coined by Los Angeles Times columnist Howard Rosenberg.¹⁴ A television reviewer, Rosenberg, spent the \$14.95 pay-per-view fee to watch UFC 1.¹⁵ Despite the sheer violence that occurred in the Octagon, Rosenberg wrote about the great sportsmanship the fighters had for one another.¹⁶

The Ultimate Fighting Championships, or UFC for short was the idea of promoter Rorion Gracie, pay-per-view entrepreneur Bob Meyrowitz and Southern California business executive Art Davie.¹⁷¹⁸ In its infancy in North America around the time of

¹² JOHN R. LITTLE & CURTIS F. WONG, *ULTIMATE MARTIAL ARTS ENCYCLOPEDIA* 29-32 (1st ed. 2000).

¹³ Can Sönmez, *UFC 1: The Beginning*, MIXED MARTIAL ARTS, <http://www.mixedmartialarts.com/news/364131/ufc>.

¹⁴ Howard Rosenberg, *'Ultimate' Fight Lives Up to Name : Television: Pay-Per-View Battle, Instead of Being Merely Gory and Funny, Gets Interesting After the First Two Bouts*, L.A. TIMES (November 15, 1993), http://articles.latimes.com/1993-11-15/entertainment/ca-57200_1_ultimate-fighting-championship.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ CLYDE GENTRY, III, *NO HOLDS BARRED: EVOLUTION* 24 (2001).

UFC 1, the sport had few rules, and there were questions about how it should be regulated.

Dubbed, “Human Cockfighting,” by Senator John McCain in 1997, the sport has evolved since the days when it was more spectacle than sport.¹⁹ Perceptions of the sport in its infancy drew the ire of those without an understanding of it. Famously, Bernard Hopkins appeared on an episode of The Jim Rome radio show denouncing the sport.²⁰ He also has been quoted as comparing the sport of MMA to gay pornography.²¹ Ironically, both McCain and Hopkins have made a 180 degree turn on the sport.²²

While McCain and Hopkins have warmed to the sport over the years since the first UFC, New York has not.

In 2001, Lorenzo and Frank Fertitta purchased the UFC from Semaphore Entertainment.²³ The acquisition was due in part

¹⁸ Matthew Miller, *Fertitta Brothers turn Ultimate Fighting Championship into a juggernaut*, WASH POST (August 8, 2012), http://www.washingtonpost.com/business/fertitta-brothers-turn-ultimate-fighting-championship-into-a-juggernaut/2012/08/10/eb88c618-e007-11e1-a19c-fcfa365396c8_story.html.

¹⁹ Dennis Cauchon, *Amateur Fighting rounds up crowds and controversy*, USA TODAY (March 27, 2006, 11:00 PM), http://usatoday30.usatoday.com/news/nation/2006-03-27-toughman-popularity_x.htm.

²⁰ Interview by Jim Rome with Bernard Hopkins (May 22, 2007).

²¹ Scott Haber, *Bernard Hopkins compares MMA to gay pornography*, (October 14, 2009), <http://www.bloodyelbow.com/2009/10/15/1086161/bernard-hopkins-compares-mma-to>.

²² Jesse Holland, *Video: 20 years after calling it 'human cockfighting,' Senator John McCain finally gives MMA its due*, MMAMANIA (Feb. 9, 2014, 12:01 AM), <http://www.mmamania.com/2014/2/9/5394282/video-20-years-after-human-cockfighting-senator-john-mccain-gives-mma-its-due-ufc> (last visited June 17, 2014);; Ariel Helwani, *Bernard Hopkins Changes Tune on MMA, Showers Fighters With Praise*, MMAFIGHTING (August 3, 2011, 7:21 PM), <http://www.mmafighting.com/2011/08/03/bernard-hopkins-changes-tune-on-mma-showers-fighters-with-prais>.

²³ Miller, *supra* note 18.

from the Fertitta's old friend, Dana White.²⁴ It was White that advised the Fertitta brothers of the opportunity.²⁵ Since its purchase, Zuffa, the company owning the UFC, have made changes to the old UFC structure. Some of the changes include adding weight divisions and outlawing some moves like head butts and kicking a downed opponent for a fighter's safety.²⁶

While success was not immediate, Zuffa grew in popularity as more fans began to embrace the sport. Despite the general acceptance of the sport, it still has its adamant detractors.²⁷

B. The New York Ban on MMA

The 2011 lawsuit stems from a law²⁸ that was drafted and enacted prior to the current evolution of the MMA sport.²⁹ The

²⁴ *Id.*

²⁵ *Id.*

²⁶ *UFC History*, COMPLETE MARTIAL ARTS, <http://www.completemartialarts.com/whoswho/ufc/ufchistory.htm> (last visited on September 22, 2014).

²⁷ Mike Ozanian, *Assemblyman Bob Reilly Tells Me Why He Does Not Want MMA in New York*, FORBES (June 10, 2011), <http://www.forbes.com/sites/mikeozanian/2011/06/10/assemblyman-bob-reilly-tells-me-why-he-does-not-want-mma-in-new-york/>.

²⁸ The law passed in 1997 which created a ban on professional MMA reads: "A "combative sport" shall mean any professional match or exhibition other than boxing, sparring, wrestling or martial arts wherein the contestants deliver, or are not forbidden by the applicable rules thereof from delivering kicks, punches or blows of any kind to the body of an opponent or opponents. " "For the purposes of this section, the term "martial arts" shall include any professional match or exhibition sanctioned by any of the following organizations: U.S. Judo Association, U.S. Judo, Inc., U.S. Judo Federation, U.S. Tae Kwon Do Union, North American Sport Karate Association, U.S.A. Karate Foundation, U.S. Karate, Inc., World Karate Association, Professional Karate Association, Karate International, International Kenpo Association, or World Wide Kenpo Association. The commission is authorized to promulgate regulations which would establish a process to allow for the inclusion or removal of martial arts organizations from the above list."

See N.Y. Unconsolidated Laws §8905-a (McKinney).

Subsection 3 of §8905-a provides that a person who "knowingly advances or profits" from a combative sport is guilty of a class A misdemeanor and, if

purpose of the bill was to “prevent any professional match or exhibition which constitutes a “combative sport” from being held within the State.”³⁰ A 1997 Memorandum introduced by New York State Senator Roy Goodman accompanied the legislation at issue. “Our State has recently witnessed the emergence of a new type of professional fighting event which is reminiscent of the ancient fight-to-the death matches which were undertaken by gladiators during Roman times.”³¹ New York argues that the legislative history reflects the fact the intent of the Legislature in 1997 “was to completely ban professional matches or exhibitions of the style of personal combat that was then known as ‘Ultimate Fighting’ or ‘Extreme Fighting.’”³² Although the New York ban on professional mixed martial arts originated from the early days of MMA which were unregulated by promoters, pitted recognizable mismatches between combatants and glorified violence, the latest version of the sport has made strides in disassociating itself from the sport in 1997. The evolution of the evolution of MMA has been highlighted by the success of Zuffa as the company attempted to rebrand the company from sideshow to sport. It is one of the reasons that MMA supporters push for overturning the legislative

convicted twice or more within a five-year period, of a class E felony. “Advancing” is defined to include conduct directed toward the creation, establishment or performance of a combative sport, acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, and the “solicitation or inducement of persons to attend or participate therein,” as well as the actual conduct, financing or promotional phases of the sport. “Profiting from” is defined as accepting or receiving money or other property with intent, or pursuant to an agreement or understanding to participate in the proceeds of a combative sport activity.

²⁹ N.Y. State S. Introducer’s Mem. in Supp. re L. 1997 Ch. 14.

³⁰ *Id.* The Memorandum was attached as an Exhibit in Support of New York State’s Memorandum in Support of Motion to Dismiss.

³¹ *Id.* It’s worthy to note that the “Statement in Support” indicates that five states passed legislation banning combative sporting events including Illinois, Missouri, Kansas, Ohio and South Carolina. All of these states now allow mixed martial arts.

³² Defendant’s Supplemental Memorandum of Law in Support of His Motion to Dismiss the First Amended Complaint at 3, *Jones v. Schneiderman*, 888 F. Supp. 2d 421 (S.D.N.Y.) (No. 46 Civ. 8215).

ban on professional mixed martial arts in New York.³³ However, a majority of legislators in the state of New York do not believe in the revolution.

C. Zuffa files its Original Complaint in New York

Zuffa filed its lawsuit against New York on November 15, 2011.³⁴ In its original Complaint, Zuffa argued that banning MMA because of its supposed violent message is unconstitutional.³⁵ It alleged that the live performance of MMA communicates a message to its audience in attendance.³⁶

“There can be no doubt that the live performance of MMA conveys a message: the perceived message of MMA was the primary reason that live professional MMA (and only live professional MMA) was banned in New York,”³⁷ according to the original Zuffa Complaint. Zuffa contends in its original Complaint that the lawmakers in New York misinterpret the message of MMA citing the New York lawmakers believe violence is the message.³⁸ Zuffa argues that “MMA may be about violence, but for most, MMA carries a message of discipline, challenge and inspiration.”³⁹

To combat the stigma, Zuffa argued that MMA is sport. “MMA is an organic process in which fighters are constantly testing new moves and responses to new moves, seeing what the human body can accomplish.”⁴⁰

Relying on *Brown v. Entertainment*, Zuffa argued that banning MMA because of the allegation that it has a violent message

³³ Amateur MMA is legal in the state of New York. However, there is no regulatory body governing the amateur fights.

³⁴ Complaint, *Jones v. Schneiderman*, 888 F. Supp. 2d 421 (S.D.N.Y. 2012) (No. 11 Civ. 8215 KMW).

³⁵ *Id.* para 112.

³⁶ *Id.* para 111.

³⁷ *Id.*

³⁸ *Id.* para 113.

³⁹ *Id.*

⁴⁰ *Id.* para 119.

is unconstitutional. The Supreme Court in *Brown* held that video games qualify for First Amendment protection.⁴¹ In that case, the Court struck down a California law imposing restrictions on violent video games.

D. Procedural History

After Zuffa filed its lawsuit, New York brought a motion to dismiss the claims from the lawsuit. On August 16, 2012, Judge Kimba Wood of the New York District Court for the Southern District ruled in favor of New York in dismissing Zuffa's claims for Equal Protection and Due Process violations.⁴² Zuffa was granted an opportunity to file an Amended Complaint.⁴³

E. Zuffa's First Amended Complaint

Zuffa's first Amended Complaint was considerably longer than the first. The first Amended Complaint brought back the Equal Protection and Due Process claims. New York requested the opportunity to file a Motion to Dismiss Zuffa's first Amended Complaint. After a hearing on the Motion to Dismiss, the court dismissed all but the claim that the New York law is vague on its face. Zuffa's six other claims were dismissed.

In its first amended Complaint it argued that banning MMA would be "a patent violation of the First Amendment."⁴⁴ Zuffa argues that, "[w]hile there surely are spectators who watch solely because of what they perceive as "violence," countless fans watch professional MMA because of its excitement as entertainment and because of the variety of positive messages conveyed.⁴⁵

⁴¹ *Brown v. Entm't Merch. Ass'n*, 131 S.Ct. 2729, 2733 (2011).

⁴² Order on Zuffa's Motion to Dismiss at 3, *Jones v. Schneiderman*, 888 F. Supp. 2d 421 (S.D.N.Y.) (No. 46 Civ. 8215).

⁴³ Order re Amendment of Pleadings and Defendant's Second Motion to Dismiss, *Jones*, 888 F. Supp. 2d 421 (2012) (No. 11 Civ. 8215).

⁴⁴ Complaint at 9, *Jones*, 888 F. Supp. 2d 421 (2012) (No. 11 Civ. 8215).

⁴⁵ *Id.*

As noted in the first Amended Complaint, MMA is part sport and part theatre. But, some opponents disapprove and believe it more spectacle than sport.⁴⁶

F. New York's Motion to Dismiss Zuffa's First Amended Complaint

A Motion to Dismiss is a formal request to the court to dismiss a claim in a pleading.⁴⁷ It allows a court to dismiss a complaint for failure to state a claim upon which relief can be granted.⁴⁸ In order for a claim to survive a CR 12(b)(6) motion, it “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”⁴⁹ In deciding such a motion, the court must take the allegations of the complaint to be true and “draw all reasonable inferences in favor of the plaintiff.”⁵⁰ A complaint will not be dismissed unless “it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief.”⁵¹

New York focused on the contention that MMA is not expressive conduct protected by the First Amendment. Zuffa claimed that the audience is the critical element in proving its claim as it is entertainment intended for an audience.⁵² However, New York argued that regardless of an audience, it cannot be the decisive factor on whether it should be protected by the First

⁴⁶Daphne Burnham, *A barbaric UFC spectacle demeans us all*, Vancouver Sun (June 16, 2014), <http://www.canada.com/vancouver/news/westcoastnews/story.html?id=8419a325-09e5-41f3-869c-8a756cacbf15>.

⁴⁷ See Fed. R. Civ. P. 12.

⁴⁸ Fed. R. Civ. P. 12(b)(6).

⁴⁹ See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

⁵⁰ *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996).

⁵¹ *Scutti Enters., LLC v. Park Place Entm't Corp.*, 322 F.3d 211, 214 (2d Cir. 2003).

⁵² Defendant Schneiderman's Reply Memorandum of Law in Support of His Motion to Dismiss the First Amended Complaint at 1, *Jones v. Schneiderman*, 888 F. Supp. 2d 421 (S.D.N.Y. 2012) (No. 1:11-cv-08215).

Amendment.⁵³ Rather, it is not who is watching or how many, but rather the particularity and comprehensibility of the intended message.⁵⁴

Under *Johnson* and *Spence*, the court looked to whether there is a “particularized message” and whether there is a “great likelihood” that the message will be understood by those viewing it.⁵⁵

G. The Motion to Dismiss Hearing

In March 2013, the case seemingly fell in Zuffa’s favor as the court questioned New York’s position. In a surprising twist to the litigation between the two sides, counsel for New York conceded that the statute exempts third parties identified in the text of the legislation that could feasibly sanction professional MMA in the state.⁵⁶ Based on this concession, the judge ordered the parties to mediation and held the motion to dismiss in abeyance until the conclusion of the mediation.

While the hearing seemed like a win for Zuffa, New York threw a wrench into this happy ending that may have allowed professional MMA in the state. New York cancelled the settle-

⁵³ *Id.*

⁵⁴ See *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Spence v. Washington* 418 U.S. 405, 410-411 (1974).

⁵⁵ *Johnson*, 491 U.S. at 404; *Spence*, 418 U.S. at 411.

⁵⁶ Luke Thomas, *Professional mixed martial arts in New York could soon become reality, but hurdles remain*, MMAFighting.com, (Feb. 13, 2013, 2:55 PM), <http://www.mmafighting.com/2013/2/15/3992360/professional-mma-mixed-martial-arts-new-york-reality-regulated-mma-news/>; See also Plaintiffs’ Response to Defendant’s Supplemental Memorandum of Law in Support of His Motion to Dismiss the First Amended Complaint *Jones v. Schneiderman*, 974 F. Supp. 2d 322 (S.D.N.Y. 2013) (No. 11-cv-08215) (citing Feb. 13 Hearing Tr. at 45-6, 49)

ment conference citing that it would not, under any circumstances, allow professional mixed martial arts in the state.⁵⁷

As a repercussion, additional briefing was allowed which addressed the issue of third party sanctioning and the effect of either allowing or prohibiting such sanctions.⁵⁸

In the additional briefing, New York claimed that the intent of the Legislature in 1997 “was to completely ban professional matches or exhibitions of the style of personal combat that was then known as ‘Ultimate Fighting’ or ‘Extreme Fighting.’”⁵⁹ New York went on to argue that “the exclusion of events sponsored by certain martial arts organizations from the definition of the prohibited ‘combative sport’ was not intended to permit practitioners of Ultimate Fighting to evade the purpose of the state.”⁶⁰

Zuffa argued that New York and the state attorney general had many interpretations of the MMA ban.⁶¹

⁵⁷ Jason Cruz, *New York Digs in Against Zuffa in Motion to Dismiss*, MMA PAYOUT (Apr. 22, 2013), <http://mmapayout.com/2013/04/new-york-digs-in-against-zuffa-in-motion-to-dismiss/>.

⁵⁸ Endorsed Order, *Jones v. Schneiderman*, *Jones v. Schneiderman*, 974 F. Supp. 2d 322 (S.D.N.Y. 2013) (No. 1:11-cv-08215).

⁵⁹ Defendant Schneiderman’s Reply Memorandum of Law in Support of His Motion to Dismiss the First Amended Complaint at 3, *Jones v. Schneiderman*, 974 F. Supp. 2d 322 (S.D.N.Y. 2013) (No. 1:11-cv-08215).

⁶⁰ *Id.*

⁶¹ Plaintiff’s Response to Defendant’s Supplemental Memorandum of Law In Support of His Motion to Dismiss the First Amended Complaint, *Jones v. Schneiderman*, 974 F. Supp. 2d 322 (S.D.N.Y. 2013) (No. 1:11-cv-08215-) (arguing that New York had at least 5 different positions of its interpretation of the MMA Law. 1) the ban effectively banned professional MMA but allows amateur MMA; 2) “the 1997 legislature provides a procedure by which a sport claiming to be a ‘martial art’ or to have similar characteristics can enter the New York market under the sponsorship of a listed organization.” (citing New York’s First Motion to Dismiss Reply Brief at 6); 3) there was a possibility under circumstances under the law if sanctioned with a listed organization; 4) professional MMA could be sanctioned by a listed organization; and 5) “exempt organizations apparently can sanction many combative sports, including those not mentioned in the ban, but not MMA”).

H. Court Dismisses Seven of Plaintiffs' Claims

On September 30, 2013, the court dismissed 7 of the 8 causes of action in Zuffa's lawsuit against New York. The only cause of action remaining for Zuffa was its claim that the New York statute banning professional MMA was constitutionally vague.⁶² Despite the dismantling of most of its claims, Zuffa remained positive about the remaining cause of action.⁶³

In dismissing Zuffa's First Amendment claim, it determined that "live, professional MMA intends to communicate a particularized message," but had "not established a great likelihood that its message will be understood by those viewing it."⁶⁴ The court opinion stated that if the person engaging in conduct intends thereby to express an idea, his or her conduct is not necessarily protected speech.⁶⁵ The court sided with the crux of New York's argument that despite a willingness to express conduct in front of an audience, if the audience does not understand that a message is being conveyed, it should not receive First Amendment protection. The court determined that professional MMA matches and exhibitions are not protected by the First Amendment.⁶⁶ Despite Zuffa's efforts, the court did not find a "greater likelihood" that viewers will understand the message that MMA intended to convey.⁶⁷

The court held that an actor's subjective intent is an important consideration but the court must also look to the objective component "that requires consideration of whether, under the circumstances, the particular conduct is likely to be understood or

⁶² Jones v. Schneiderman, 974 F. Supp. 2d 322, 327 (S.D.N.Y. 2013).

⁶³ *Federal Court Supports UFC's Fight for NY*, UFC Press Release, (October 2, 2013), <http://www.ufc.com/news/federal-court-supports-ufc-fight-for-mma-in-ny>.

⁶⁴ Jones, 974 F. Supp. 2d at 334.

⁶⁵ See *id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

perceived as expressing a particular message.⁶⁸ In dismissing Zuffa's First Amendment claim, the court cited *Church of Am. Knights of the Ku Klux Klan v. Kerik*, that, "[T]he party asserting that its conduct is expressive bears the burden of demonstrating that the First Amendment applies, and that party must advance more than a mere 'plausible contention' that its conduct is expressive."⁶⁹ The trial court essentially held that viewers will not have a "great likelihood" that they would understand the message. Unlike in *Spence* where the court held that displaying an American flag upside down conveyed some sort of expression, the court determined that an audience would not understand what would be conveyed by the fighters.⁷⁰

Without making an "esthetic [or] moral judgment[]" regarding MMA, the court concluded that the nature of professional MMA is such that the audience is not likely to receive the particularized artistic, technical, and personal messages that Plaintiffs allege MMA fighters *intend* to convey.⁷¹ It held that Zuffa did not carry its burden of demonstrating "more than a mere 'plausible contention'" that viewers are likely to perceive live, professional MMA as conveying the alleged expressive messages.⁷²

The court remained consistent in prior court rulings, which found sport, not protected under the First Amendment. The court held that "competitive conduct stands in sharp contrast to the public performances that courts have found communicating an expressive message."⁷³ While courts have held certain public performances are within the purview of the First Amendment,

⁶⁸ *Id.*; see also *Grzywna ex rel. Doe v. Schenectady Cent. Sch. Dist.*, 489 F. Supp. 2d 139, 146 (N.D.N.Y. 2006).

⁶⁹ 356 F.3d 197, 205 (2d Cir 2004) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984))

⁷⁰ *Jones*, 974 F. Supp. 2d at 334.

⁷¹ *Id.* (citing *Brown v. Entm't Merchs. Ass'n*, 131 S.Ct. 2729, 2733 (2011)).

⁷² *Id.*

⁷³ *Id.* (citing *Hurley*, 515 U.S. at 568; *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981); *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1049 (6th Cir. 2001)).

courts have “generally been unwilling to extend First Amendment protection to sports or athletics.”⁷⁴

In addressing Zuffa’s contention that martial arts styles and techniques exhibited in a professional MMA match or exhibition should receive First Amendment protection, it rebutted by determining that “[a]ll organized competition routinely involves contrasting styles, techniques, and strategy...”⁷⁵

The court provided two examples to analogize its rationale in determining that MMA should not receive protection under the First Amendment. First, it looked at a chess player’s decision to respond to certain chess maneuvers and defenses which may evince something about the player’s style. Next, the court queried the use of a professional Ultimate Frisbee player’s “decision to throw an outside-in forehand, rather than a hammer, may express a position on a preferred tactic or strategy.”⁷⁶

The two examples reflect the court’s posture with respect to its view on sports and the possibility of First Amendment protection. The court rationalized its decision by concluding that if constitutional protection would be granted in the above instances, “the line between conduct and speech would be meaningless.”⁷⁷

PART II

A. Sport and the First Amendment

The Free Speech Clause of the First Amendment “exists principally to protect discourse on public matters, but...it is diffi-

⁷⁴ *Id.* (citing *Maloney v. Cuomo*, 470 F. Supp. 2d 205, 213 (E.D.N.Y. 2007) *aff’d*, 554 F.3d 56 (2d. Cir. 2009)

⁷⁵ *Id.* at 335.

⁷⁶ *Id.*

⁷⁷ *Id.* (citing *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (“It is possible to find some kernel of expression in almost every activity a person undertakes.”)).

cult to distinguish politics from entertainment, and dangerous to try.”⁷⁸

Case law to date reflects the fact that First Amendment scrutiny is triggered by nude dancing⁷⁹, marching⁸⁰ and a violent video game.⁸¹ Yet, riding bicycles⁸², boxing⁸³ and roller skating⁸⁴ are not. There appears to be some incongruity between what is protected by the First Amendment and what is not protected.

The seminal point made by the courts in determining First Amendment protection is that it must be “sufficiently imbued with the elements of communication.”⁸⁵ The court determined that recognition of the message to be communicated is also made known.⁸⁶ According to *Johnson*, in providing constitutional protection, there should be, “at the very least, [1] an intent to convey a ‘particularized message’ along with [2] a great likelihood that the message will be understood by those viewing it.”⁸⁷ Commenters have concluded that “athletes in only a few sports are sufficiently close to being theatrical performers or dancers to merit constitutional protection.”⁸⁸ Others disagree with the legal premise that

⁷⁸ *Brown*, 131 S.Ct. at 2733.

⁷⁹ *Barnes v. Glen Theatre, Inc.* 501 U.S. 560, 581 (1991) (Souter J., concurring); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981).

⁸⁰ *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

⁸¹ *Brown*, 131 S.Ct..

⁸² *Five Borough Bicycle Club v. City of New York*, 684 F. Supp. 2d 423 (S.D.N.Y. 2010).

⁸³ *Top Rank, Inc. v. Fla. State Boxing Comm'n*, 837 So.2d 496, 498 (Fla. Dist. Ct. App. 2003).

⁸⁴ *Sunset Amusement Co. v. Board of Police Comm'rs of Los Angeles*, 101 Cal. Rptr. 768 (1972).

⁸⁵ *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

⁸⁶ *Jones v. Schneiderman*, 974 F. Supp. 2d 322, 333 (S.D.N.Y. 2013).

⁸⁷ *Zalewska v. Cnty. Of Sullivan, N.Y.*, 316 F.3d 314, 319 (2d Cir. 2003) (quoting *Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp. Of Bos.*, 515 U.S. 557, 569 (1995)).

⁸⁸ Michael T. Morley, “Exceedingly Vexed and Difficult”: Games and the First Amendment; *Weigand v. Village of Tinley Park*, 114 F. Supp. 2d 734 (N.D. Ill. 2000) 112 Yale L.J. 361, 368 (2002).

denies free speech protection to sports that are performed in front of and with the intention of being seen by an audience.⁸⁹

Courts appear to be apprehensive in affording sports activity First Amendment protection. A question has been raised as to what the difference is between sport and other audience-oriented entertainment such as movies and musical performances which receive such protection under the First Amendment.⁹⁰ According to one theory, courts have provided three explanations for denying sports.⁹¹

First, a court has determined that those participating in sport do not intend to communicate any ideas or information to their audience and thus their actions are not considered expressive acts.⁹² Under this premise, the court assumes that no message can be conveyed during a sporting event. This requires the court to determine that each participant involved in a sport does not intend to convey a message that someone in attendance may understand. This could be based upon the belief that since sporting events is not determined as it may be in a musical performance or play, that there could not be a communication.⁹³

Second, another court distinguished sports from art in that an audience would not necessarily know the message for which the athletes would be conveying.⁹⁴ However, with art, it is assumed that the artist intends to convey a certain message. In a case involving boxing, the court concluded in its opinion, “[W]e are not con-

⁸⁹ Genevieve Lakier, *Sport as Speech*, 16 U. Pa. J. Const. L. 1101 (2014), available at <http://ssrn.com/abstract=2247620>.

⁹⁰ *Id.* at 1117.

⁹¹ *Id.* at 1118.

⁹² See *Murdock v. Jacksonville*, 361 F.Supp. 1083, 1096 (M.D. Fla. 1973).

⁹³ In determining to dismiss Zuffa’s First Amendment claim, it held that competitive conduct such as MMA stands in “sharp contrast to the public performances that courts have found communicate an expressive message.” *Jones v. Schneiderman*, 974 F. Supp. 2d 322, 334 (S.D.N.Y. 2013).

⁹⁴ See *America’s Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982).

vinced that a boxing match, in which police officers participate, inexorably conveys any message other than that police officers can be pugilists.”⁹⁵ Nevertheless, the same could be said for an art display. While the artist might intend to communicate a message through their art, the viewer of the art may not necessarily know the message.

Finally, similar to the previous distinguishing factors, the courts have denied First Amendment protection for sport due to the competition component.⁹⁶ Due to the unknown nature of the result of the match, game or fight, there cannot be protection under the First Amendment.⁹⁷ Courts, as in the Zuffa lawsuit, have not considered the ancillary expressive activities occurring during the audience-oriented event.⁹⁸ Thus, activities which convey messages as fans waving signs, a fighter carrying an American flag to the ring as he or she walks out pre-fight or a fighter being interviewed in the ring post-fight are not considered by courts as expressive conduct when it comes to First Amendment protection.

In the Zuffa lawsuit, the court opined that Zuffa had not demonstrated a “great likelihood” that viewers will understand that message.⁹⁹ In its decision to dismiss Zuffa’s First Amendment claim, it highlighted the requirement that while the actor’s subjective intent is an important consideration, “there is an objective component that requires consideration of whether, under the circumstances, the particular conduct is likely to be understood or perceived as expressing a particular message.”¹⁰⁰ So, while Zuffa may contend that its fighters intend to convey a message when

⁹⁵ *Jones*, 974 F.Supp. 2d at 334 n.5 (citing *Fighting Finest, Inc. v. Bratton*, 898 F. Supp. 192, 195 (S.D.N.Y.1995)).

⁹⁶ *See Interactive Digital Software Ass’n v. St. Louis County*, 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002).

⁹⁷ *Jones*, 974 F.Supp. 2d at 334.

⁹⁸ *Jones v. Schneiderman*, 974 F.Supp.2d 322, 336 n.6 (S.D.N.Y. 2013) (citing *Rumsfeld v. Forum for Academic & Inst’l Rights, Inc.*, 547 U.S. 47, 66 (2006)).

⁹⁹ *Jones*, 974 F.Supp.2d. at 333.

¹⁰⁰ *Id.* *See also Grzywna ex rel. Doe v. Schenectady Cent. Sch. Dist.*, 489 F. Supp. 2d 139, 146 (N.D.N.Y. 2006).

they are performing inside the Octagon, the eight-sided cage in which the fighters battle, the court believes that the audience in attendance does not know the message the fighters intend to convey. The court would only concede that Zuffa could prove a “plausible contention” of expressing messages.¹⁰¹ Thus, on this basis, the court dismissed Zuffa’s claim.

1. Courts do not recognize out of sport conduct as form of expressive conduct

In its lawsuit, Zuffa described extracurricular activities occurring prior to and after the fight as expressive conduct and argued that these actions were protected under the First Amendment.¹⁰² It’s apparent that the music chosen to walkout to the fight, the apparel worn and the conduct made prior to a fight could be seen as expressive conduct.¹⁰³ However, the court determined that these things should not be considered when determining First Amendment protection.¹⁰⁴ In citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, the court did not consider “pre-fight and post-fight antics” whether MMA should be granted First Amendment protection.¹⁰⁵ The court stated that “[t]he primary conduct target by the Ban is professional MMA and conduct that materially aids a specific phase of an MMA event.”¹⁰⁶ It went on to state, “[i]t is this conduct, not the surrounding fanfare that

¹⁰¹ *Jones*, 974 F.Supp.2d. at 333.

¹⁰² Plaintiffs’ first amended Complaint, September 24, 2012, ¶¶208-256.

¹⁰³ See Ladan Shelechi, Note, *Say Uncle: New York’s Chokehold Over Live Performance of Mixed Martial Arts: Whether Combat Sports Are Protectable Speech and How Much Regulation is Appropriate for Inherently Dangerous Sports*, 33 Loy. L.A. Ent. L. Rev. 205, 228 (2013), available at <http://digitalcommons.lmu.edu/elr/vol33/iss2/4>.

¹⁰⁴ *Jones*, 974 F.Supp.2d. at 333 n.6.

¹⁰⁵ *Id.* (citing *Rumsfeld v. Forum for Academic & Inst’l Rights, Inc.*, 547 U.S. 47, 66 (2006) (“If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into ‘speech’ simply by talking about it.”)).

¹⁰⁶ *Id.*

must convey the particularized message likely to be understood by those viewing it.”¹⁰⁷

In deciding to dismiss Zuffa’s First Amendment claim, the court did not take into consideration any of the backstory of fighters, the dramatics of an entrance by a fighter to the Octagon or post-fight interviews. These were all items highlighted by Zuffa in its First Amended Complaint.¹⁰⁸ Yet, the court did not want to extend First Amendment protection to sports such as MMA for concern that it could be interpreted too broadly. The extreme example would be the belief that any conduct “done to engage or entertain an audience” is “automatically protected.”¹⁰⁹ As a result of this concern, the Supreme Court has not adopted a test for expressive conduct for a “live performance” or “entertainment.”¹¹⁰ Rather, it “has consistently protected only those activities sufficiently imbued with elements of communications.”¹¹¹

2. Brown v. Entertainment Merchants Association

In the first Amended Complaint, Zuffa cited the *Brown* ruling as evidence that the New York law banning professional MMA negates a presumptive violent message it may have had to some.¹¹² As indicated above, courts have denied First Amendment protection on the conclusion that sport does not intend to convey a message. However, the *Brown* ruling addresses this notion.

In *Brown*, the Supreme Court reviewed whether a California law imposing restrictions on violent video games comports with the First Amendment.¹¹³ The case was based upon a California state law which prohibited the sale or rental of “violent video

¹⁰⁷ *Id.*

¹⁰⁸ First Amended Complaint para. 220-38, *Jones*, 888 F. Supp. 2d 421 (2012) (No. 11 Civ. 8215).

¹⁰⁹ *Jones*, 974 F.Supp.2d. at 336 n.7.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² First Amended Complaint para. 10, *Jones*, 888 F. Supp. 2d 421 (2012) (No. 11 Civ. 8215).

¹¹³ *Brown*, 131 S. Ct. at 2733.

games” to minors requiring a label denoting one must be 18.¹¹⁴ The Court acknowledged that video games qualify for First Amendment protection.¹¹⁵

The Court identified that even though video games are “interactive” as the video game player “participates in the violent action on screen and determines its outcome” the violent action in video games is nothing new.¹¹⁶ The Court analogized the interactivity of video games where the player can choose their own result to literature by stating that “choose-your-own-adventure” stories have been a part of books since at least 1969.¹¹⁷ The Court cites Judge Posner in stating that “all literature is interactive” rationalizing that “the better it is, the more interactive.”¹¹⁸ In *Brown*, the Court states that books are similar in nature to video games when it comes to the interactive nature as each compels the player or reader to become involved. For video games, the player chooses their own way in the game. For literature, the reader determines how involved they are in the book (i.e., the characters, story, subject matter, etc.) and from that it encourages the reader to make decisions upon the characters based upon the book. The Court acknowledged the dissent’s take on books and video games as being “different in kind,” yet the Court did not believe that it was constitutionally significant.¹¹⁹

Zuffa utilizes *Brown* in rebutting any argument that the ban on professional MMA is legitimate due to the violent nature of the sport. Zuffa argued, “[e]ven if violence were the message of mixed martial arts, the Supreme Court has made clear that banning MMA, or anything that promotes it, for that reason is a patent

¹¹⁴ Adam Liptak, *Justices Reject Ban on Violent Video Games for Children*, N.Y. Times (June 27, 2011), <http://www.nytimes.com/2011/06/28/us/28scotus.html>.

¹¹⁵ *Brown*, 131 S. Ct. at 2733.

¹¹⁶ *Id.* at 2738.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2737 n. 4.

violation of the First Amendment.”¹²⁰ Zuffa contends that while outsiders may believe that MMA is premised upon violence, justifying a ban due to the violent nature of the sport would be prohibited by the Supreme Court ruling in *Brown*. As Zuffa articulates, “MMA is part sport and part theatre.”¹²¹

Taking this into consideration, First Amendment protection should be granted in sport if it is determined that a participant intends to convey a message and it would be understood by the spectators in attendance.

3. Spence v. Washington and Texas v. Johnson

While *Brown* is an important case in the Zuffa lawsuit, the two key elements to determine First Amendment protection were outlined in *Spence* and *Johnson*.

One of the underlying cases for which Judge Kimba Wood decided the First Amendment claim was centered on an individual violating a Washington state statute. A college student hung a United States flag from the window of his apartment on private property in Seattle, Washington.¹²² The student owned the flag. The flag was hung upside down and attached to the front and back was a peace symbol made of black tape.¹²³ The Seattle Police arrested Spence under Washington’s “improper use” statute.¹²⁴ Spence claimed that the flag display was in protest against the invasion of Cambodia and the killings at Kent State University¹²⁵. The basis of his protest was to indicate that America stood for peace.¹²⁶

¹²⁰ First Amended Complaint para. 10, *Jones*, 888 F. Supp. 2d 421 (2012) (No. 11 Civ. 8215).

¹²¹ *Id.*

¹²² *Spence v. Washington*, 418 U.S. 405, 405 (1974).

¹²³ *Id.* at 406.

¹²⁴ *Id.* Notably, charges were not brought regarding Washington’s flag desecration statute.

¹²⁵ *Id.* at 408.

¹²⁶ *Id.*

The State conceded that Spence was engaging in a form of communication and hanging the flag took the place of printed or spoken words.¹²⁷ While the Court was cautious on determining whether Spence's activity fell within the scope of the First and Fourteenth Amendments, it balanced this against freedom of speech.

The Court conceded that Spence engaged in a form of communication.¹²⁸ This was one of the factors when it concluded that the nature of Spence's activity, "combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression."¹²⁹

Similarly, *Texas v. Johnson*, decided by the U.S. Supreme Court 15 years after *Spence*, invalidated prohibitions on desecrating the American flag. The Court held that defendant Gregory Lee Johnson's act of flag burning was protected speech under the First Amendment.¹³⁰ Johnson burned a flag at a political demonstration at the 1984 Republican National Convention.¹³¹ Although no one was injured, he was convicted of flag desecration in violation of a Texas statute.¹³² The Supreme Court held that Johnson's conviction for flag desecration was inconsistent with the First Amendment.¹³³ The Court first determined that the First Amendment protected non-speech acts such as Johnson's act of burning the flag. As such, it also determined that his act constituted expressive conduct, which would permit him to invoke the First Amendment in challenging his conviction. While *Johnson* differed from

¹²⁷ *Id.* at 409.

¹²⁸ *Id.*

¹²⁹ *Id.* at 409-10.

¹³⁰ *Texas v. Johnson*, 491 U.S. 397, 397 (1989).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

Spence in certain aspects¹³⁴, the Supreme Court in both held that each had a right to First Amendment protection.

Applying the standards set in *Spence* and *Johnson* against Zuffa's claim that MMA should be protected by the First Amendment, the question of whether a message would be understood by those viewing it is key. In comparing Zuffa's claim with *Spence* and *Johnson*, the two cases involve improper use of the American flag and burning of the flag, the expressive conduct was certain as the defendants admitted the conduct. Moreover, the Courts concede that both actions in *Spence* and *Johnson* had the intent to convey a "particularized message." Undoubtedly the message in both cases would be understood by those viewing it. In *Spence*, hanging an American flag upside down with a peace sign conveyed a message that would be understood by those that would see it. In *Johnson*, the act of burning a flag at a demonstration conveyed a message that would be understood by those that saw it. The court in the Zuffa case ruled that it could not determine whether an audience would understand the message that its fighters would be communicating in the Octagon.¹³⁵

PART III

A. Presenting a Case for Expressive Conduct

Although the court determined that Zuffa had not met its burden to survive a Motion to Dismiss, there are examples of fighters expressing conduct that would satisfy the test in *Spence*. Moreover, the expressive conduct would have a greater likelihood to be understood by those viewing it. One such example involves one of the most popular fighters for the UFC.

¹³⁴ Notably, *Spence*'s flag display was on private property as opposed to *Johnson* burning the American flag in public after a demonstration. *Spence*, 418 U.S. at 405; *Johnson*, 491 U.S. at 397.

¹³⁵ *Jones*, 974 F.Supp.2d. at 334.

Arguably, Ronda Rousey is one of the UFC's biggest draw in 2014. She has been heralded as the UFC's biggest star ever by the UFC president Dana White.¹³⁶ Rousey is a female that is the top star in a male-dominated league. Despite being in the minority, her fighting style within the ring has made her a fan favorite. Her move of choice when attempting to win matches is an arm bar.¹³⁷ The move demands discipline, skill and technique in executing the move on her opponent. What makes Rousey's "finishing maneuver" so good is that many of her opponents specifically train to defend against her armbar. Thus, Rousey has produced counters to her opponents' defense and developed variations on how to get an opponent in the position of vulnerability. This should be considered a form of art. Similar to jazz or rap where musicians "freestyles," Rousey decides moves based on her opponents actions and reacts to them.

As indicated above, the elements that would provide constitutional protection include 1) an intent to convey a "particularized message" along with 2) a great likelihood that the message will be understood by those viewing it.¹³⁸ With Rousey's performances within the Octagon, she satisfies the elements as identified in *Spence*. First, it's clear that Rousey is conveying a message of determination and skill. The audiences, who have become accustomed to her fighting style, understand her message. But it is not the first element that would be the obstacle. Rather, it's whether there would be a "great likelihood" that the message would be understood by those viewing it. The court in *Zuffa* ruled that

¹³⁶ Kevin Iole, *Dana White's Unhinged Unadulterated Approach Provides Window Into Crazy UFC World*, Yahoo Sports: Cagewriter (Feb. 13, 2014, 11:15 PM), http://sports.yahoo.com/news/dana-white-s-unhinged--unadulterated-approach-provides-window-into-crazy-ufc-world-041549121-mma.html#content_body_0.

¹³⁷ *Technique: Ronda Rousey's armbar submission*, ESPN Photo, http://espn.go.com/espn/techniques/gallery/_/id/10476426/ronda-rousey-armbar-submission (last visited June 28, 2014).

¹³⁸ *Zalewska*, 316 F.3d at 319 (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995)).

sports are competitive conduct and inquires as to whether the activity is primarily communicative and expressive.¹³⁹ It's clear that Rousey will attempt to submit her opponent with the armbar. This, the audience understands and anxiously watches to see if Rousey can complete her goal or if her opponent can successfully defend it. Based on her performances within the Octagon, one might argue that she has transformed her fighting style inside the Octagon to that of expressive conduct.

As a woman, Rousey conveys another message whenever she steps into the Octagon. She is a role model to many female audience members that are either aspiring fighters or look to her as a sign of strength in a workplace that is predominantly male and a society that is male dominated.¹⁴⁰ Since this is the case, whenever she enters the Octagon, she conveys the message of strength. In a recent interview, she spoke about her image as a female fighter and specifically talked about her look which was defined as “strong and sexy.”¹⁴¹ One may argue that Rousey’s performances within the Octagon transcend the legal parameters from which the court decided to dismiss Zuffa’s First Amendment claim short of the discovery phase of litigation.

PART IV

A. Conclusion

On March 31, 2015, Judge Kimba Wood granted New York’s Summary Judgment motion which dismissed Zuffa’s cause

¹³⁹ *Jones*, 974 F.Supp.2d. at 334.

¹⁴⁰ While all of Rousey’s opponents are female, it is common for women fighters to spar with male fighters for a variety of reasons including the lack of women fighters involved in the sport at this time.

¹⁴¹ Bobbi Brown, *An Intimate Conversation with Ronda Rousey*, Yahoo! (Sept. 4, 2014), <https://www.yahoo.com/beauty/an-intimate-conversation-with-ufc-fighter-ronda-rousey-96113736978.html>.

of action that the New York law was unconstitutionally vague.¹⁴² In its opinion, the Court offered the advice in dicta, that Zuffa's claims might be best brought in state court to seek a declaratory judgment.¹⁴³ On April 23, 2015, Zuffa filed its Notice of Appeal with the Second Circuit Court of Appeals.¹⁴⁴ In a press release, Zuffa announced it had retained former U.S. Solicitor General, Paul Clement and his law firm to head up the appeal.¹⁴⁵ The appeal is pending as of the time of this writing.

The sport of MMA is deserving of First Amendment protection as it is expressive conduct that has a great likelihood that its message will be understood by the audience. Zuffa's argument that its sport should be protected by the First Amendment is a viable and should have lasted past the initial state for a Motion to Dismiss. The dismissal of Zuffa's First Amendment claim reflects the court's concern with extending the protection into sports. Despite the U.S. Supreme Court ruling in *Brown*, courts cannot reconcile protecting other expressive audience activities such as music and the arts but not sports. It is surprising that the court granted New York's Motion to Dismiss rather than allow the claim litigated. The court should have granted the opportunity for the parties to determine whether an audience would understand the message. Even if there is disagreement on this issue, there appeared to be sufficient evidence which would have negated a motion to dismiss.

There are several overarching issues that have been posed with the unsuccessful challenge for First Amendment protection by Zuffa. First, is there a real distinction between spectator sport and

¹⁴² Opinion & Order, Jones, et al. v. Schneiderman, et al., U.S. District Court of the Southern District of New York, 11-CV-8215(KMW)

¹⁴³ Id at 22.

¹⁴⁴ Notice of Appeal to the United States Court of Appeals for the Second Circuit, 11-cv-08215(KMW)(GWG), April 21, 2015

¹⁴⁵ "Former United States Solicitor General Paul Clement to represent UFC in Appeal of New York's (sic) MMA ban," UFC.com, April 21, 2015, <http://www.ufc.com/news/Former-United-States-Solicitor-General-Paul-Clement-to-Represent-UFC?id=>

art in light of the *Brown* decision? While art, music and literature have been afforded the protection of the First Amendment, sport has not due in part by the fact that the outcome is not known. Yet, this argument was mitigated in *Brown*.¹⁴⁶ Second, how particular must the message be for a court to determine that an audience understands what an individual (or team) is communicating? Under *Hurley*, the U.S. Supreme Court clarified *Spence* and the requirement of the type of message communicated to receive First Amendment protection. MMA should be able to satisfy this element of particularized message under this. Finally, how do courts define expressive conduct so that an activity may receive First Amendment protection? Here, the ruling dismissing Zuffa's First Amendment claim continues the hesitancy to allow sports to receive protection under the First Amendment.

In a 2014 interview with the New York Times, UFC Light Heavyweight Champion Jon Jones, a named plaintiff in the lawsuit, stated his "mission was to change the image...from modern-day barbarianism to an artful blend of martial arts."¹⁴⁷ Jones added, "[T]eaching martial art is moving us toward a more peaceful society."¹⁴⁸ He wants the UFC viewed as an artful blend of martial arts rather than modern-day barbarianism.¹⁴⁹ If Jones would be successful with his interpretation of how the sport of MMA should be, Zuffa would have a viable argument that MMA should receive First Amendment Protection.¹⁵⁰ Unfortunately for supporters of MMA, that is not the case.

¹⁴⁶ *Brown*, 131 S. Ct. at 2737-38.

¹⁴⁷ William Rhoden, *A Face of a Brutal Sport is Trying to Change Its Image*, N.Y. Times (Apr. 24, 2014), <http://www.nytimes.com/2014/04/25/sports/a-face-of-mixed-martial-arts-is-trying-to-change-its-brutal-image.html>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ In April 2015, Jones was stripped of his UFC Light Heavyweight title by the UFC and suspended indefinitely as a result of a hit and run accident in New Mexico in which Jones fled the scene. Jones was sought for a felony charge of leaving the scene of the accident involving personal injury. He was arrested and posted bail. The case is pending as of May 9, 2015. (See UFC Statement on Jon Jones, April 28, 2015, <http://www.ufc.com/news/UFC-Statement-on-Jon-Jones-042815>)

THE SPONSORSHIP FUNCTION IN COLLEGIATE ATHLETICS: DISCUSSING A POTENTIAL OUTCOME OF THE *JENKINS V. NCAA* LAWSUIT

John A. Fortunato, Ph.D.*

Abstract

The *Jenkins v. Nat'l Collegiate Athletic Ass'n* ("Jenkins") lawsuit is now at the forefront of the legal challenges that could forever alter the economic system of collegiate athletics. The *Jenkins* lawsuit claims that the NCAA and the five power conferences are violating antitrust laws by colluding in creating a system where all universities are restricted in only offering scholarships of equal value to players. The plaintiffs are seeking a ruling that will essentially create a system where there is competition in the recruitment and compensation of players. If a court ruling produces this open market system, universities will need additional financial resources to offer the requisite compensation packages to attract players. Sponsors would appear to be willing to provide those resources because of the advantages of this promotional communication strategy. The purpose of this article is to analyze the potential role that sponsors will have in a free market, collegiate athletics economic system.

Introduction

The economic system of compensating college athletes through a scholarship that only covers tuition, university fees, room and board, and required course books is facing unprecedented-

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ed legal and public scrutiny. The *Jenkins*¹ lawsuit is now at the forefront of the legal challenges that could forever alter the economic system of collegiate athletics. The *Jenkins* lawsuit claims that the National Collegiate Athletic Association (“NCAA”) and the five power conferences, Atlantic Coast Conference (“ACC”), Southeastern Conference (“SEC”), Big Ten, Pacific (“Pac”) Twelve, and Big Twelve (collectively, “power conferences”), have colluded in creating an economic system where all universities can only offer scholarships of the same value. The argument of the plaintiffs is that the fixed limits of the collegiate athletic scholarship system is a violation of antitrust laws because it has “artificial restraints imposed on athlete compensation”² and that legal action “is necessary to end the NCAA’s unlawful cartel, which is inconsistent with the most fundamental principles of antitrust law.”³

The plaintiffs are seeking a ruling against the NCAA and the power conferences that will essentially create a system where there is competition in recruiting players while allowing the players to receive compensation packages that will be commensurate with their talents. A certain result of a court ruling that produces this competitive open market system is that universities will need additional financial resources to offer the requisite compensation packages to attract players. Universities will be faced with a couple of options: (1) cut costs largely through eliminating non-revenue generating sports programs; (2) increase the subsidy that is provided to the athletic department; (3) increase donations; or (4) increase revenue from traditional sources, such as broadcast or sponsorship. With many collegiate conferences having signed

¹ Complaint and Jury Demand for Plaintiff, *Jenkins v. NCAA*, Case No.3:33-av-0001 (D.N.J. filed Mar. 17, 2014), *available at* http://a.espncdn.com/pdf/2014/0317/NCAA_lawsuit.pdf (last visited Mar. 27, 2015).

² *Id.* at 6.

³ *Id.* at 2.

broadcast contracts through the next decade,⁴ an increase in revenue through sponsorship surfaces as the most plausible option.

Sponsorship of sports properties has many advantages as a promotional communication strategy, including the ability to negotiate all of the parameters of the agreement, product category exclusivity, developing and communicating a brand association, and enhanced opportunities for brand exposure and brand recall in the hopes of obtaining sales. Sponsorship of collegiate athletics is particularly appealing because companies are reaching an age group that has not established brand preference in a variety of product categories. College sports fans have also been shown to be passionate and loyal toward their university with researchers demonstrating that these emotional characteristics can result in consistent behaviors, including the purchase of sponsors' products.

The purpose of this article is not to debate the legality of the collegiate athletic scholarship system on antitrust grounds. The purpose rather is to examine one particular ramification of a ruling against the NCAA: the potential role that sponsors will have in a free market, economic system of recruiting and compensating collegiate athletes. With the universities needing revenue, sponsors would appear to be willing to provide those resources because of the advantages of this promotional communication strategy. However, an increased presence of sponsorship money could very well have unintended consequences in the players recruitment and compensation process, making this potential outcome worthy of analysis.

In order to better analyze the *Jenkins* case from a sponsorship perspective, it is necessary to discuss the arguments of the plaintiffs, to understand the practice of sponsorship and the benefits of this promotional communication strategy, and to describe

⁴ Michael Smith & John Ourand, *ACC Turns Attention to Network of Its Own: Current College Television Deals*, STREET & SMITH'S SPORTS BUSINESS JOURNAL, 6 (May 6-13, 2013) (the Big Ten Conference is the next power five conference to negotiate new broadcast rights with its current contracts set to expire after the 2016-2017 collegiate season).

the current revenue sources, including sponsorship of the NCAA, collegiate conferences, and universities.

Jenkins v. NCAA Plaintiff Argument

The *Jenkins* lawsuit was filed on March 17, 2014, in the United States District Court in New Jersey.⁵ The lead plaintiffs are Division I athletes Martin Jenkins, Johnathan Moore, Kevin Perry, and William Tyndall.⁶ The class action covers all NCAA Division I football and basketball players who received or will receive a full athletic scholarship from the date of the complaint through the final resolution of the case, including appeals.⁷

The core allegation of the *Jenkins v. NCAA* lawsuit is that the NCAA has colluded with the five power conferences to create a system that restricts what universities can offer to athletes in the form of a scholarship.⁸ This restrictive system limits competition and the athletes earning capability by not permitting them to shop their talents on an open market. The complaint filed with the court states, “instead of allowing their member institutions to compete for the services of those players while operating their businesses, defendants have entered into what amounts to cartel agreements with the avowed purpose and effect of placing a ceiling on the compensation that may be paid to these athletes for their services.”⁹ It then goes on to add that, “as a result of these illegal restrictions, market forces have been shoved aside and substantial damages have been inflicted upon a host of college athletes.”¹⁰ Overall, the plaintiffs contend that the collegiate players are “exploited”¹¹ and “suffer severe and irreparable harm”¹² and that most

⁵ Complaint and Jury Demand for Plaintiff, *supra* note 1.

⁶ Complaint and Jury Demand for Plaintiff, *supra* note 1.

⁷ Complaint and Jury Demand for Plaintiff, *supra* note 1, at 2.

⁸ Complaint and Jury Demand for Plaintiff, *supra* note 1, at 2.

⁹ Complaint and Jury Demand for Plaintiff, *supra* note 1, at 2.

¹⁰ Complaint and Jury Demand for Plaintiff, *supra* note 1, at 2.

¹¹ Complaint and Jury Demand for Plaintiff, *supra* note 1, at 2. The notion of “exploited” is certainly debatable. The complaint makes no mention of the benefits that the players are receiving, such as high-level coaching, exceptional training facilities and trainers, medical staff, competition that will allow them to

class members “will not receive *any* economic benefit from their roles in generating billions of dollars for FBS football and D-1 men’s college basketball.”¹³ It is important to note that on this point, the universities would counter that it is the revenue generated from football and men’s basketball that funds all of the non-revenue generating sports.

The legal argument is that this restrictive, anti-competitive system is a violation of antitrust laws. The antitrust laws of the United States are designed to protect the economic competitiveness of a marketplace by combating trusts and other arrangements that have the potential to restrain trade.¹⁴ Petty explains that antitrust laws are particularly concerned with a lack of competition by means of collusion, or “competitors agreeing with each other to restrict competition.”¹⁵ The collegiate athletics scholarship system is agreed to by all of the NCAA member universities and reaffirmed in the power conferences own constitution and bylaws.

Through their collegiate athletic scholarship (termed by the NCAA as a full-grant-in-aid) players receive tuition, university fees, room and board, and required course books. All of these scholarships are of equal value, meaning that the starting quarterback receives the same scholarship benefits as the backup quarterback. Ultimately, the lawsuit seeks to recognize the players’ athletic talent in determining compensation. This talent factor can certainly impact university revenues through ticket sales, merchan-

show their talents that could improve their professional opportunities, and admittance into some of the most prestigious educational institutions in the world.

¹² Complaint and Jury Demand for Plaintiff, *supra* note 1, at 35.

¹³ Complaint and Jury Demand for Plaintiff, *supra* note 1, at 35 (emphasis original).

¹⁴ EARL W. KITNER, AN ANTITRUST PRIMER: A GUIDE TO ANTITRUST AND TRADE REGULATION LAWS FOR BUSINESSMEN 15 (The MacMillan Company 2d ed. 1973); see *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911); see also *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

¹⁵ ROSS D. PETTY, THE IMPACT OF ADVERTISING LAW ON BUSINESS AND PUBLIC POLICY 131 (1992).

dising, and appearances in football bowl games or advancement in the NCAA basketball tournament. Fan interest in a university team would also have appeal to sponsors.

The complaint further contends that despite the universities intensely competing for players in recruiting, the player receives no additional benefits beyond the equal scholarship as a result of this competition. The plaintiffs' argument is that because all universities offer identical compensation, having several universities offer an athlete a scholarship is seemingly irrelevant. As explained in the plaintiffs' complaint, "[f]or decades, NCAA institutions have ferociously competed with each other for the services of football and men's basketball athletes, but only within the constraints of the rules that prohibit any financial compensation to athletes beyond the price-fixed limits set by the NCAA and its conferences."¹⁶ The variables that are driving the decision of a player regarding which university to attend are not monetary, but rather based on the coach, university location, conference affiliation, university academics, potential playing time, or any other variable the player deems relevant.

Three other core arguments are proffered in the complaint filed with the court. First, for football and basketball players there are limited opportunities to compete in their sport during their college-age years. The age that the players can enter the professional leagues is determined through collective bargaining agreements between the leagues and their respective players' associations.¹⁷ The National Football League ("NFL") does not allow players to enter the league until three years following their high school graduation and the National Basketball Association ("NBA") does not allow players to enter the league until they are nineteen.¹⁸

¹⁶ Complaint and Jury Demand for Plaintiff, *supra* note 1, at 25.

¹⁷ Steve E. Cavezza, "Can I See Some ID?": An Antitrust Analysis of NBA and NFL Draft Eligibility Rules, 9 U. DENV. SPORTS & ENT. L.J. 22, 24 (2010) (discussing the NBA's age rule).

¹⁸ *Id.*

Second, the rules limiting what athletes receive are strictly enforced with sanctions imposed on universities found to have been providing improper benefits to players. In a recent example, the University of Southern California (“USC”) had both its football and basketball teams sanctioned after the NCAA concluded that football star Reggie Bush and basketball star O.J. Mayo received extra benefits.¹⁹ The USC football team received a two-year postseason ban and the loss of 30 scholarships over three years.²⁰ The NCAA accepted USC’s self-imposed penalties for basketball, which included the loss of two scholarships and the return of the \$206,000 the university received for participation in the NCAA tournament the year Mayo was a member of the team.²¹ Historically, the most notable incident of sanctions being imposed for improper benefits given to players was Southern Methodist University receiving the “death penalty” causing the university not to field a football team in 1987 and 1988.²²

Third, the plaintiff’s complaint points out that there is competition in other aspects of collegiate athletics. Athletic directors and head coaches routinely leave one university to take the same position at another, customarily at a higher salary. In 2013, the University of Texas hired former Arizona State University athletic director Steve Patterson to be its new athletic director.²³

¹⁹ Gary Klein, *For USC Athletics, NCAA Sanctions Are Ending, But Effects Remain*, L.A. TIMES (June 7, 2014), available at <http://www.latimes.com/sports/usc/la-sp-usc-ncaa-sanctions-20140608-story.html#page=1>. Klein also documents that The Ohio State University’s football program lost nine scholarships when it was found that players received free tattoos in exchange for jerseys and other gifts and that then head coach Jim Tressel lied to NCAA investigators

²⁰ *Id.*

²¹ *Id.*

²² See DAVID BLEWETT, *THE PONY TRAP: ESCAPING THE 1987 SMU FOOTBALL DEATH PENALTY* (2012); see also DAVID WHITFORD, *A PAYROLL TO MEET: A STORY OF GREED, CORRUPTION & FOOTBALL AT SMU* (2013).

²³ Anthony Green, *Steve Patterson Selected as UT’s Athletic Director*, THE DAILY TEXAN (Nov. 6, 2013), <http://www.dailytexanonline.com/news/2013/11/05/steve-patterson-selected-as-ut%E2%80%99s-athletic-director>.

Patterson's five-year contract started at a salary of \$1.4 million with 2.5% annual increases.²⁴ His compensation package also includes a \$100,000 bonus each year if the NCAA or the Big Twelve conference finds no major infractions.²⁵ In 2014, the University of Texas hired Charlie Strong to be its new head football coach, agreeing to a five-year contract worth more than \$25 million.²⁶ Strong was previously the head coach at the University of Louisville.²⁷

The complaint continues to argue that there is no fixed ceiling on the compensation of coaches. The complaint submits as evidence the summary judgment in *Law v. Nat'l Collegiate Athletic Ass'n* that was upheld by the Tenth Circuit Court of Appeals, holding that the previous policy of having a coach as part of the staff with restricted salary of \$16,000 was found to be an antitrust violation.²⁸ Essentially, the argument of the plaintiffs on this point is simply if a restrictive compensation system is not permissible for coaches because of antitrust laws, why should it be legally permissible for players?

The Sponsorship Practice

Upon entering into a sponsorship agreement, the benefits to the sports property (league, team, or university) are obvious, as it adds another major revenue stream to its business. These agreements have offered a series of benefits for the sponsor as well, in the hope of obtaining sales, such as obtaining brand exposure, achieving brand recall, enhancing brand image, achieving a

²⁴ *Id.*

²⁵ Richard Tijerina, *Details on Steve Patterson's Contract*, STATESMAN (Nov. 11, 2013), <http://www.statesman.com/weblogs/bevo-beat/2013/nov/11/details-steve-pattersons-contract/>.

²⁶ Associated Press, *UT Regents Approve Charlie Strong*, ESPN (Jan. 13, 2014), http://espn.go.com/college-football/story/_/id/10287503/charlie-strong-contract-approved-university-texas-regents.

²⁷ Associated Press, *Strong in place as new Louisville coach*, ESPN (Dec. 10, 2009), <http://sports.espn.go.com/nfl/news/story?id=4728620>.

²⁸ Complaint and Jury Decision for Plaintiff, *supra* note 1, at 31; *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F. 3d 1010 (10th Cir. 1998).

brand association with the property and its consumers, and communicating a brand theme.²⁹ Sponsorship has thus been defined by Meenaghan as "an investment, in cash or in kind, in an activity, in return for access to the exploitable commercial potential associated with that activity."³⁰ Sandler and Shani offer a broader definition of sponsorship, emphasizing that brand association can be created between the sponsor and the property. They describe a sponsorship agreement as "the provision of resources (e.g., money, people, equipment) by an organization directly to an event or activity in exchange for a direct association to the event or activity. The providing organization can then use this direct association to achieve either their corporate, market, or media objectives."³¹

One of the primary advantages of sponsorship as a form of promotional communication is that all of the parameters of the agreement between a sponsor and a property are meticulously negotiated. Through the negotiation of a sponsorship agreement anything is possible—it is merely a matter of what the sponsor and the property decide. Cornwell explains that "sponsorship decision making is thick with negotiation, barter, and deal making."³² No two sponsorship agreements are alike and it is these negotiated details that can help make the sponsorship flexible and customizable so as to satisfy the specific brand goals of the sponsor. For example, stadium naming rights or signage might be the ideal sponsorship strategy if the goal is brand exposure.

²⁹ See generally JOHN A. FORTUNATO, *SPORTS SPONSORSHIP: PRINCIPLES & PRACTICES* (2013); see generally Kevin Gwinner, *A Model of Image Creation and Image Transfer in Event Sponsorship*, 14 INT. MARK. REV. 145 (1997); Norm O'Reilly & Judith Madill, *The Development of a Process for Evaluating Marketing Sponsorships*, 29 CAN. J. ADMIN. SCI. 50 (2012).

³⁰ Tony Meenaghan, *The Role of Sponsorship in the Marketing Communications Mix*, 10 INT. J. ADVERT. 35 (1991).

³¹ Dennis Sandler & David Shani, *Olympic Sponsorship vs. "Ambush" Marketing: Who Gets the Gold?*, 29 J. ADVERT. RES. 9, 10 (1989).

³² T. Bettina Cornwell, *State of the Art and Science in Sponsorship-Linked Marketing*, 37 J. ADVERT. 41, 46 (2008).

Brand exposure is often the most vital element to the success of the entire sponsorship agreement and has to be the initial achieved objective. Other sponsorship objectives might not be achieved if the brand is not noticed in that particular location. Without the brand being noticed, any audience reaction or behavior toward the brand is due to some other reason than that specific sponsorship. Sponsorship of sports properties is desirable for companies because they can receive brand exposure to the relatively hard-to-reach, male audience between the ages of 18 and 49.³³ Another benefit of sports sponsorships is the opportunity to receive brand exposure during the actual game or event when the audience is apt to be watching and not only during commercials. Sports programming is also considered DVR-proof with one estimate that only two or three percent of live sports events in the United States are viewed using a DVR.³⁴ Watching sports live is extremely attractive to advertisers because their promotional communication messages will be seen at their desired time.

Brand exposure can help achieve the important objective of brand recall. It is not enough that consumers are aware of the product category (insurance), they need to be aware of and have the ability to recall the specific brand name (State Farm) at the time when the purchase decision is being made. Recall is especially important in product categories where there are several competing brands or when making a purchase for the first time in a product category.

To assist with brand recall, sponsors negotiate for exclusivity within a product category. Exclusivity is valuable because it eliminates any competition that one company might receive from a rival within that product category at the sponsored event or location or with the sponsored league, team, or university.³⁵ The result

³³ Susan Tyler Eastman & Timothy P. Meyer, *Sports Programming: Scheduling, Costs and Competition*, MEDIA, SPORTS & SOCIETY, 97, 103 (Lawrence A. Wenner ed., 1989).

³⁴ See, e.g., John Ourand, *World Cup 2018: Fox Sports and Gus Johnson Get Their Turn*, STREET & SMITH'S BUSINESS JOURNAL, 12 (Jul. 21-27, 2014).

³⁵ FORTUNATO, *supra* note 29.

of product category exclusivity could be a distinct competitive advantage for the sponsor. Miyazaki and Morgan note that "the ability to be an exclusive sponsor in one's product category presumably aids in avoiding the competitive interference that typically is experienced in other media contexts."³⁶ Papadimitriou and Apostolopoulou explain that exclusivity acts as a barrier to competitors who might have tried to acquire that same sponsorship or at least diffuses the promotional attempts of competitors during the time that the company is sponsoring the property.³⁷ The issue of product category exclusivity limiting competition has been debated in an antitrust context with sponsors being able to create environments where only their brand products are sold, such as pouring rights at a stadium or arena for a soft-drink sponsor.³⁸

Another enhancement of brand recall through sponsorship is the ability to develop and communicate a brand association between the sponsoring brand and the sponsored property.³⁹ Dean explains that "for the payment of a fee (or other value) to the sponsee, the sponsor receives the right to associate itself with the sponsee or event."⁴⁰ He adds that "by associating itself with the sponsee, the sponsoring firm/brand shares in the image of the sponsee."⁴¹ Grohs and Reisinger point out that, "the aim is to evoke positive feelings and attitudes toward the sponsor, by closely

³⁶ Anthony D. Miyazaki & Angela G. Morgan, *Assessing Market Value of Event Sponsoring: Corporate Olympic Sponsorships*, 41 J. ADVER. RES. 9, 10 (2001).

³⁷ Demitra Papadimitriou & Artembia Apostolopoulou, *Olympic Sponsorship Activation and the Creation of Competitive Advantage*, 15 J. PROMO. MGMT. 90, 108-09 (2009).

³⁸ John A. Fortunato & Jef Richards, *Reconciling Sports Sponsorship Exclusivity with Antitrust Law*, 8 TEX. REV. ENT. & SPORTS L. 33, 38 (2007).

³⁹ Dwane H. Dean, *Associating the Corporation with a Charitable Event Through Sponsorship: Measuring the Effects on Corporate Community Relations*, 31 J. ADVER. 77, 79 (2002); Kevin P. Gwinner & John Eaton, *Building Brand Image Through Event Sponsorship: The Role of Image Transfer*, 28 J. ADVER. 47, 47 (1999); Erik L. Olson & Hans M. Thjomoe, *Explaining and Articulating the Fit Construct in Sponsorship*, 40 J. ADVER. 57, 60 (2011).

⁴⁰ Dean, *supra* note 39, at 78.

⁴¹ Dean, *supra* note 39, at 78.

linking the sponsor to an event the recipient values highly.”⁴² Additionally, Stipp and Schiavone claim the sponsorship goals assume that the target audience for the sponsorship will transfer their loyalty from the sponsored property or event to the sponsor itself.⁴³

To help achieve this brand association transfer, the sponsor is allowed to communicate its association to a league, team, or university by placing a logo on product packaging and in advertisements. For example, a Coca-Cola case or even an individual can or bottle can feature the logo of a university that it sponsors. The ideal outcome for the sponsor is that the popularity and the positive image and reputation of the university can precipitate a similar favorable feeling by fans and consumers toward their brand. Fans, students, and alumni might think favorably about Coca-Cola because that company supports their university.

Brand association is especially relevant in the context of sports sponsorships because of the characteristics of sports fans. Experiencing sports has been shown to satisfy many emotional needs. Because of this emotional satisfaction, the sports audience has been described as very loyal in its behavior.⁴⁴ Funk and James indicate that the emotional and loyalty characteristics of the sports fan can result in consistent and enduring behaviors, such as attend-

⁴² Reinhard Grohs & Heribert Reisinger, *Image Transfer in Sports Sponsorships: An Assessment of Moderating Effects*, 7 INT’L J. SPORTS MKTG. & SPONS. 42, 44 (2005).

⁴³ See, e.g., Horst Stipp & Nicholas P. Schiavone, *Modeling the Impact of Olympic Sponsorship on Corporate Image*, 36 J. ADVER. RES. 22, 23 (1996).

⁴⁴ Walter Gantz, *Reflections on Communication and Sport: On Fanship and Social Relationships*, 1 COMM. & SPORT 176, 182 (2013); Robert Madrigal, *The Influence of Social Alliances with Sports Teams on Intentions to Purchase Corporate Sponsors’ Products*, 29 J. ADVER. 13, 13 (2000); BERNIE J. MULLIN, STEPHEN HARDY & WILLIAM A. SUTTON, *SPORTS MARKETING* (3rd ed. 2007); Daniel L. Wann, Joel Royalty & Angie Roberts, *The Self-Presentation of Sport Fans: Investigating the Importance of Team Identification and Self-Esteem*, 23 J. SPORT BEHAV. 198, 200 (2000).

ance and watching games on television.⁴⁵ The hope for sponsors is that this fan characteristic of loyalty transfers to the behavior of purchasing the brand.

Through negotiation, sponsors can enhance the emotional connection between the sports fans and the teams that they love. Something as simple as a sponsored rally towel that fans wave at the game, for example, helps perpetuate a group association and emotional connection. Researchers point out that as individuals perceive a relevant connection between a sponsor and a property, they are more likely to view the sponsor in a positive manner and their ability to identify and recall the correct sponsors of the property increases.⁴⁶ Maxwell and Lough did in fact find that the higher the fans identification with the team, the more they correctly identified team sponsors.⁴⁷ Dalakas, Madrigal, and Anderson even contend that sponsors should seek to further their brand association by capitalizing on the fans propensity for celebrating their teams' success. They suggest, for example, that sponsors try to have their name on merchandise commemorating a team victory.⁴⁸

The sponsorship progression is that brand exposure and increased recall through strategies such as product category exclusivity and brand association can help achieve the desired consumer behavior. Several researchers have indicated that achieving sales through sponsorship is an attainable objective.⁴⁹ Harvey found

⁴⁵ Daniel C. Funk & Jeff James, *The Psychological Continuum Model: A Conceptual Framework for Understanding an Individual's Psychological Connection to Sport*, 4 SPORT MGMT. REV. 119, 140 (2001).

⁴⁶ See Gwinner & Eaton, *supra* note 39, at 48; see Madrigal, *supra* note 44.

⁴⁷ Heather Maxwell & Nancy Lough, *Signage vs. No Signage: An Analysis of Sponsorship Recognition in Women's College Basketball*, 18 SPORT MKTG. Q. 188, 195 (2009).

⁴⁸ Vassilis R. Dalakas, Robert Madrigal, & Keri L. Anderson, "We Are Number One!" *The Phenomenon of Basking-in-Reflected-Glory and its Implications for Sports Marketing*, SPORTS MARKETING AND THE PSYCHOLOGY OF MARKETING COMMUNICATION 67, 76 (Lynn R. Kahle & Chris Riley, eds., 2004).

⁴⁹ Dean, *supra* note 39; Larry Degaris, Corrie West, & Mark Dodds, *Leveraging and Activating NASCAR Sponsorships with NASCAR-Linked Sales Promotions*,

“sponsorship changes the consumer’s perception of a specific sponsor—which can rub off positively on brands that sponsor in terms of willingness to purchase those brands.”⁵⁰ In specifically examining college football fans, Madrigal found that fan behavior did extend from support of a team to support of companies that sponsor and are associated with that team. He states, “loyalty toward a preferred team may have beneficial consequences for corporate sponsors. Consistent with the idea of in-group favoritism, higher levels of team identification among attendees of a sporting event appear to be positively related to intentions to purchase a sponsor's products.”⁵¹

It should be noted that the role of sponsorship in the economic model of sports has received criticism.⁵² Schiller wrote extensively about the role of the corporation in influencing the types of content and events that remain or what becomes extinct within the culture.⁵³ He claims that there are two choices for control of ideas or images, either “big government” or “big business.”⁵⁴ He contends that corporations have emerged as the proliferators of culture and ideas, largely through their advertising or sponsorship support.⁵⁵ According to Schiller, through their economic support, corporations take on the role of validating agents for certain images, expressions, ideas, and entire entities to have an

3 J. SPONSORSHIP 88 (2009); Bill Harvey, *Measuring the Effects of Sponsorship*, 41 J. ADV. RES. 59 (2001); Madrigal, *supra* note 44; Miyazaki et al., *supra* note 36.

⁵⁰ Harvey, *supra* note 49.

⁵¹ Madrigal, *supra* note 44.

⁵² See generally Sut Jhally, *Cultural Studies and the Sports/Media Complex*, MEDIA, SPORTS, AND SOCIETY 70 (Lawrence A. Wenner, ed., 1989); see generally Michael Real, *Super Bowl: Mythic Spectacle*, 27 J. COMM. 128 (1975); see generally DAVID ROWE, *SPORT, CULTURE AND THE MEDIA: THE UNRULY TRINITY* (2nd ed. 2004).

⁵³ See generally HARVEY I. SCHILLER, *CULTURE INC.: THE CORPORATE TAKEOVER OF PUBLIC EXPRESSION* (1989).

⁵⁴ *Id.*

⁵⁵ *Id.*

existence within the culture. He simply claims that corporate speech is “the loudest in the land.”⁵⁶

The work of Schiller can be applied to the revenue-generating role that sponsors have in sports property economics. Because it is a negotiation, the need for revenue by a sports property could be a determinant as to whether the property or the sponsor is in a more powerful position in creating the sponsorship agreement. Properties that are desperate for revenue might be more willing to capitulate to the demands of a sponsor, putting the sponsor in a more powerful position in the negotiation. More popular properties that do not have difficulty in recruiting sponsors might not give into any of their demands knowing that there is another sponsor in that product category probably very willing to take that spot. If a popular league or university is not pleased with its current sponsor when the contract expires, it could simply offer that sponsorship to a rival company.

The criticism of corporate influence has specifically been raised in the context of collegiate athletics.⁵⁷ One example to illustrate the debate regarding increased commercialization is the sponsorship of college football bowl games. McAllister claims that sponsorship of bowl games “may serve to taint and devalue the essence of the event itself.”⁵⁸ This perspective is countered by the enhanced revenue generation possibilities of these events due to sponsorship support. For example, some sponsors have made their brand the only part of the title of the bowl game. In 1996, Outback Steakhouse became the sole name of the Outback Bowl, a change from the previous name, the Hall of Fame Bowl. Jim McVay, Outback Bowl CEO, explained, “[t]his is a business. The

⁵⁶ *Id.* at 4.

⁵⁷ Matthew P. McAllister, *College Bowl Sponsorship and the Increased Commercialization of Amateur Sports*, 15 CRITICAL STUD. IN MASS COMM. 15 (1998); Matthew P. McAllister, *Hypercommercialism, Televisuality, and the Changing Nature of College Sports Sponsorship*, 53 AMERICAN BEHAVIOR SCIENTIST 53, (2010); MURRAY A. SPERBER, *BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION* (2000).

⁵⁸ McAllister, *supra* note 57, at 366.

College Football Hall of Fame didn't want to lose its name on the game, but schools want more money and you have to find it somewhere."⁵⁹ Farhi summarizes the debate by claiming "while traditionalists may decry the commercial exploitation of what is supposed to be a sport played by amateur student-athletes, proponents argue that sponsor fees provide something for everyone. Companies get to tout their products. Broadcasters wind up paying less for air rights. And the colleges take home fatter purses."⁶⁰

Finally, in the context of the criticism of sponsorship influence, the characteristics of the sports fans and their response to sponsorship is worth noting. Kinney and McDaniel pose the question is sponsorship "welcomed by fans" and if consumers "appreciate sponsors contributions" to sports events? They found that forty percent of their sample agree or strongly agree that sponsorships help keep ticket prices down, with another twenty percent of respondents neither agreeing nor disagreeing.⁶¹ If not a direct reduction in ticket costs, sponsorship support can provide added value to the experience of attending a game, such as sponsoring a promotional giveaway.⁶² Sports fans also could believe that sponsorship revenue can give a team a greater ability to acquire more talented players. Zhang, Won, and Pastore found that die-hard fans had a positive attitude toward commercialization because they felt sponsors were helping their team.⁶³ They found that positive attitude toward commercialization along with high team identifica-

⁵⁹ Eric Matuszewski, *Even Traditional Rose Needs Corporate Help*, HOUS. CHRON., January 4, 2002, at 1.

⁶⁰ Paul Farhi, *Big Business Creating Bowls Full of Money: Sponsors Pouring Dollars into College Football Finals, Other Events*, WASH. POST, A1 (Dec. 31, 1988),.

⁶¹ Lance Kinney & Stephen R. McDaniel, *American Consumer Attitudes Toward Corporate Sponsorship of Sporting Events*, SPORTS MARKETING AND THE PSYCHOLOGY OF MARKETING COMMUNICATION 211 (Lynn R. Kahle & Chris Riley, eds., 2004).

⁶² *Id.*

⁶³ Zhu Zhang, Doyeon Won, & Donna L. Pastore, *The Effects of Attitudes Toward Commercialization on College Students' Purchasing Intentions of Sponsors' Products*, 14 SPORT MKT. Q. 177 (2005).

tion did contribute to purchase intention of sponsors' brands.⁶⁴ Woisetschlager, Eiting, Hasselhoff, and Michaelis even argue that, ideally, the sponsor should be publicly credited with helping a team sign a key free agent player.⁶⁵

Collegiate Athletic Funding

University athletic programs receive money from revenue generated by the NCAA, their affiliated conference, and their own revenue streams. The top forty university athletic departments in terms of total revenue all earn more than \$70 million.⁶⁶ However, of these forty universities, only seven receive no subsidy in the form of student fees, university support or state government support.⁶⁷ Another four universities receive less than a one percent of their total revenue through a subsidy.⁶⁸ Of the top forty universities, only eighteen athletic departments have higher total revenue than total expenses prior to factoring in their subsidized contributions.⁶⁹ The University of Texas has the highest total revenue with over \$165 million and total expenses at \$146,807.⁷⁰ The Texas athletic department receives no subsidy.⁷¹

The athletic program budgets are already beginning to face additional pressure. In August 2014, the NCAA Board of Directors voted to grant autonomy to the power conferences to pass legislation without the support of the other Division I conferences, thus allowing them to develop the rules that may provide

⁶⁴ *Id.*

⁶⁵ David Woisetschlager, Alexander Eiting, Vanessa J. Hasselhoff, & Manuel Michaelis, *Determinants and Consequences of Sponsorship Fit: A Study of Fan Perceptions*, 3 J. SPONSORSHIP 169 (2010).

⁶⁶ Steve Berkowitz et al., *NCAA Finances*, USA TODAY SPORTS (Oct. 6, 2014, 1:46 PM), <http://sports.usatoday.com/ncaa/finances/>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

greater player benefits.⁷² In October 2014, the power conferences offered their suggestions of player benefits, including funding the full cost-of-attendance (estimated at a range of between \$2000 and \$5000 per player⁷³), four-year scholarship guarantees, lifetime scholarship guarantees to allow athletes to return to school to complete their degrees, and long-term health insurance benefits.⁷⁴ University athletic budgets are also confronted with the result of the *O'Bannon v. Nat'l Collegiate Athletic Ass'n*⁷⁵ lawsuit, which held that universities must set aside a minimum of \$5000 for each football and men's basketball player per year, for payments for the use of their name and likeness, with athletes receiving access to that money after they are no longer eligible to play in college.⁷⁶ It has been estimated that the total of these new expenses could mean an additional \$3 million to \$5 million for university athletic program budgets.⁷⁷ A more detailed examination into the university revenue streams is thus important to understand the possibilities of where additional revenue can be generated.

Registered as an unincorporated not-for-profit educational organization that is exempt from federal taxes, the NCAA's

⁷² Brian Bennett, *NCAA Board Votes to Allow Autonomy*, ESPN COLLEGE SPORTS (Aug. 8, 2014), http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences; Marc Tracy, *Big 12 Big Ten ACC SEC PAC-12*, N.Y. TIMES, B9 (Aug. 8, 2014).

⁷³ Bennett, *supra* note 72.

⁷⁴ Associated Press, *Power 5 Endorse Benefit Changes*, ESPN COLLEGE FOOTBALL (Oct. 1, 2014), http://espn.go.com/college-football/story/_/id/11624238/power-five-conferences-endorse-more-benefits-athletes.

⁷⁵ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F.Supp.3d 955 (N.D. Cal. 2014).

⁷⁶ Michael Smith, *Price of Autonomy: Ads Unsure What Their New Freedom Will Cost*, STREET & SMITH'S SPORTS BUS. J. (Sept. 22, 2014), <http://www.sportsbusinessdaily.com/Journal/Issues/2014/09/22/Colleges/Autonomy.aspx>.

⁷⁷ *Id.*

revenues in 2013 were more than \$905 million.⁷⁸ The primary revenue source for the NCAA is through its television broadcast rights contract for the Men's Basketball Tournament. In 2011, CBS partnered with Turner in a fourteen-year agreement that will pay the NCAA a total of \$10.8 billion for the rights to televise the NCAA Men's Basketball Tournament.⁷⁹ The NCAA also has a broadcast contract with ESPN for an average of approximately \$35 million annually for the international distribution of the NCAA Tournament, televising other NCAA championships, and televising the National Invitation Tournament preseason and postseason tournaments.⁸⁰

In terms of sponsorship, in 1984 the NCAA began its Corporate Champion and Corporate Partner Program ("Corporate Champions"). The NCAA explains that these sponsors are "dedicated to excellence and committed to developing marketing and promotional activities surrounding NCAA championships."⁸¹ Sponsors at the Corporate Champions level pay an estimated \$35 million to \$50 million for sponsorship rights fees and advertising.⁸² The three NCAA Corporate Champions are AT&T, Capital One, and Coca-Cola.⁸³ Sponsors at the Corporate Partner level pay an

⁷⁸ *National Collegiate Athletic Association and Subsidiaries*, NCAA, http://www.ncaa.org/sites/default/files/NCAA_FS_2012-13_V1%20DOC1006715.pdf (last visited May 13, 2015).

⁷⁹ John Ourand & Michael Smith, *NCAA's Money-Making Matchup: How CBS, Turner Made the Numbers Work in \$10.8 Billion Deal*, STREET & SMITH'S SPORTS BUS. J. (Apr. 26, 2010), <http://www.sportsbusinessdaily.com/Journal/Issues/2010/04/20100426/This-Weeks-News/Ncaas-Money-Making-Matchup.aspx>.

⁸⁰ *National Collegiate Athletic Association and Subsidiaries*, *supra* note 78, at 18.

⁸¹ *Corporate Champions and Partners*, NCAA (Mar. 18, 2015), <http://www.ncaa.com/news/ncaa/article/2011-02-25/corporate-champions-and-partners>.

⁸² Michael Smith, *NCAA Adding Burger King as Sponsor*, STREET & SMITH'S BUS. J. (Oct. 7, 2013), <http://www.sportsbusinessdaily.com/Journal/Issues/2013/10/07/Colleges/Burger-King-NCAA.aspx>.

⁸³ *Corporate Champions and Partners*, *supra* note 81.

estimate of mid-seven figures for rights fees and can have additional advertising buys of \$20 million annually.⁸⁴ The NCAA Corporate Partners are: Allstate, Buffalo Wild Wings, Buick, Burger King, Enterprise, Infiniti, Kindle Fire, LG, Lowe's, Nabisco, Northwestern Mutual, Reese's, Unilever, and UPS.⁸⁵ The NCAA explains that the money generated from sponsors helps fund the championship tournaments of all college sports, stating "these companies provide a direct, positive impact on the academic and developmental opportunities afforded to over 400,000 NCAA student-athletes each year."⁸⁶

The revenue generated from NCAA broadcast rights contracts and sponsorship agreements, as well as other revenue streams such as NCAA ticket sales are distributed to the conferences and the universities through a series of intricate policies.⁸⁷ Revenues are distributed to conferences and universities in five methods: (1) an annual payment of approximately \$72,000 to each Division I university; (2) through Basketball Fund accounts, based on performance in the NCAA tournament, which account for the largest distribution from the NCAA at thirty-nine percent,⁸⁸ (3) through broad-based distributions given based on the number of the varsity sports offered by the university,⁸⁹ (4) through broad-based distributions also given based on the number of athletic

⁸⁴ Smith, *supra* note 82.

⁸⁵ Corporate Champions and Partners, *supra* note 81.

⁸⁶ Corporate Champions and Partners, *supra* note 81.

⁸⁷ *NCAA 2013-14 Division I Revenue Distribution Plan*, NCAA, <http://www.ncaa.org/sites/default/files/2013-14%20Revenue%20Distribution%20Plan.pdf> (last visited May 13, 2015).

⁸⁸ Payments are given in the form of units that cover a six-year rolling period. Units are paid to the conference for each school's participation in the six-year period and a full unit share is given to each school for each game it plays, except the Championship Game. In 2014, each basketball unit was approximately \$250,100. [citation]

⁸⁹ *Services*, IMG COLLEGE (2014), <http://www.imgcollege.com/services> (last visited May 13, 2015). Each university receives approximately \$33,200 for each sport it offers, starting with the 14th sport.

scholarships offered by the university;⁹⁰ and (5) through Conference Grants, of which approximately \$272,000 are given to each Division I men's and women's basketball conference to assist with officiating programs, compliance and enforcement, enhancement of minority opportunities, and awareness programs such as drug use or gambling.

The collegiate conferences generate additional revenue through television broadcast contracts and sponsorships. The collegiate conferences negotiated an agreement with ESPN for an average of \$715 million over twelve years for the rights to the college football playoff and the other major bowl games.⁹¹ For regular season games, the NCAA lost control over singularly negotiating television contracts in 1984 when a lawsuit led by the University of Oklahoma resulted in a 7-2 United States Supreme Court decision that gave collegiate conferences the ability to negotiate their own television deals with the networks.⁹² Conference broadcast rights contracts are very lucrative with universities in the power conferences, earning payments of approximately \$17 to \$21 million per year in television revenue.⁹³

⁹⁰ Approximately \$294 is given to the university for the first fifty scholarships it offers with additional scholarships receiving a higher per-scholarship payment. [citation]

⁹¹ See John Ourand & Michael Smith, *ESPN Homes in on 12-Year BCS Package*, STREET & SMITH'S BUS. J. (Nov. 9, 2012), <http://www.sportsbusinessdaily.com/Special-Content/News/2012/BCS-ESPN.aspx> (explaining the Sugar, Rose, Orange, Cotton, Peach, and Fiesta Bowls rotate hosting semi-final playoff games with the Championship Game held at a separate site. In the years that the bowl games are not part of the playoff they will host games featuring other top teams as determined by a 13-member selection committee. ESPN has the rights to all six games annually as part of this broadcast rights deal).

⁹² *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984).

⁹³ Michael Hiestand, *\$3.6 Billion in TV Money for ACC a Good Sign for SEC, Big 12*, USA TODAY, 1C (May 10, 2012), available at <http://usatoday30.usatoday.com/sports/story/2012-05-09/36-billion-in-TV-money-for-ACC-a-good-sign-for-SEC-Big-12/54866774/1>; Michael Smith & John Ourand, *ACC Expansion Will Pay Off in New TV Deal: \$1M to \$2M Increase Annually Per School*, STREET & SMITH'S BUS. J. (Feb. 6, 2012),

Collegiate conferences have also launched their own television networks. In these arrangements, the conference obtains all of its universities' television rights.⁹⁴ For example, the Big Ten owns all of its universities' broadcast rights. All Big Ten home football games are either televised on one of the Big Ten's broadcast partners, ABC, ESPN, or the Big Ten Network.⁹⁵ The Big Twelve, however, does not have a conference network and allows the universities to retain the rights to their games not picked up by its conference television partners, ESPN and Fox. Through this arrangement, the University of Texas launched its own network, receiving \$15 million annually from ESPN for the Longhorn Network.⁹⁶ The University of Oklahoma has sold blocks of programming to Fox Sports regional cable channels, receiving \$58 million over ten years.⁹⁷

In addition to the revenue received through the NCAA and their conference, universities themselves generate revenue through sponsorship, tickets, donations, and subsidies. Many university sponsorships are sold through an arrangement between the university and a multi-media rights holder. IMG College and Learfield Sports are the multi-media rights holders for most of the largest sports-oriented universities.⁹⁸ In a contractual agreement,

<http://www.sportsbusinessdaily.com/Journal/Issues/2012/02/06/Colleges/ACC-TV.aspx>; Smith, *supra* note 4.

⁹⁴ Ourand, *supra* note 91.

⁹⁵ See generally John Ourand, *Conference TV Roundup*, STREET & SMITH'S SPORTS BUS. J. (Aug. 11, 2014),

<http://www.sportsbusinessdaily.com/Journal/Issues/2014/08/11/In-Depth/Conference-breakouts.aspx>.

⁹⁶ Michael Smith, *Alabama's Success Delivers Big Payday*, STREET & SMITH'S SPORTS BUS. J. (Apr. 21, 2014),

<http://www.sportsbusinessdaily.com/Journal/Issues/2014/04/21/Colleges/Alabama.aspx>.

⁹⁷ Ourand, *supra* note 91.

⁹⁸ *Our Properties*, IMG COLLEGE (2014), <http://www.imgcollege.com/our-properties/colleges-universities> (last visited May 13, 2015) (listing the universities that IMG College represents); *University Partners*, LEARFIELD SPORTS, <http://learfieldsports.com/university-partners/> (last visited May 13, 2015) (listing the universities that Learfield Sports represents).

IMG College or Learfield Sports pay the universities a guaranteed dollar amount for their multi-media rights, with some contracts including additional money going to the university once the multi-media rights holder attains a certain revenue level. One estimate has the universities in the Big Ten earning guaranteed fees ranging between \$4 and \$7 million per year, with The Ohio State University receiving a guaranteed fee of nearly \$11 million for its multi-media rights.⁹⁹ Multi-media rights include selling sponsorship and advertising for local television and radio broadcasts of games, ancillary programming such as coach's shows, digital, print, stadium and arena signage, and hospitality.¹⁰⁰ The perspective of IMG College is that it "has the expertise and experience to help both our collegiate properties and our corporate sponsors maximize their opportunities, enhance the fan experience, and generate revenue."¹⁰¹

Multi-media rights holders are able to grow their business by expanding the roster of universities that they represent and acquiring more media and event rights from their current roster of universities. The extent of rights provided by the university is negotiated with its multi-media rights holder. For example, the University of Alabama receives between \$15 million and \$16 million annually from Learfield Sports in a contract signed in 2014.¹⁰² The increased fee is double what Alabama had been receiving for its multi-media rights.¹⁰³ In this agreement, Learfield Sports acquired from the University of Alabama ("Alabama") concessions and pouring rights for both soda and isotonic beverage-

⁹⁹ Michael Smith, *Learfield, IMG in Race for Illinois' Rights*, STREET & SMITH'S SPORTS BUS. J. (Feb. 27, 2012), <http://www.sportsbusinessdaily.com/Journal/Issues/2014/04/21/Colleges/Alabama.aspx>.

¹⁰⁰ Smith, *supra* note 79.

¹⁰¹ IMG COLLEGE, *supra* note 89.

¹⁰² Smith, *supra* note 79.

¹⁰³ Smith, *supra* note 79.

es.¹⁰⁴ To date, Alabama has agreements with Coca-Cola and Pepsi-owned Gatorade.¹⁰⁵

Many universities retain the pouring rights to their stadiums and arenas (it should be noted that some pouring rights agreements cover the entire campus), as well as the lucrative uniform and equipment sponsorships. Being the official uniform and equipment sponsor for a university is a major desire because of the considerable brand exposure through logos on the team uniforms, the strong brand image association created with the university (that these companies' products are being used in an actual game), and the fact that collegiate team uniforms are a major seller. Glenn summarizes, "brands on jerseys are the focus of fans throughout the event, whether viewed live or televised. Given the active focus of fans on the players—and the jersey—one might expect more effective brand recall and association from the jersey sponsor."¹⁰⁶

University sponsorship for uniforms and equipment are a very competitive product category for brands such as Nike, Under Armour, and Adidas. For example, beginning in 2014, Under Armour replaced Adidas by agreeing to a ten-year, \$90 million contract to provide all uniforms, footwear, and apparel with Notre Dame.¹⁰⁷ In 2014, for the first time, Under Armour overtook Adidas as the number two athletic apparel and footwear brand, still trailing Nike.¹⁰⁸ Mark King, Adidas North America President, stated, "[w]e have to be just a lot more aggressive to get

¹⁰⁴ Smith, *supra* note 79.

¹⁰⁵ Smith, *supra* note 79.

¹⁰⁶ Bill Glenn, *How to Validate Jersey Sponsorship Value*, STREET & SMITH'S SPORTS BUS. J. (May 30, 2011), <http://www.sportsbusinessdaily.com/Journal/Issues/2011/05/30/Opinion/Glenn-column.aspx>.

¹⁰⁷ Marc Tracy, *Tradition, Redesigned: Notre Dame and Under Armour Seek a Win-Win*, N.Y. TIMES, B10 (Sept. 12, 2014), available at http://www.nytimes.com/2014/09/12/sports/football/notre-dame-and-under-armour-seek-win-win-with-apparel-deal.html?_r=0.

¹⁰⁸ *Id.*

colleges, high schools and clubs in our gear—that’s a major emphasis.”¹⁰⁹

Discussion

If the court rules in favor of the NCAA and holds that the current system is not an antitrust violation, the compensation system of academic scholarships will change slightly with players receiving additional benefits as determined by the power conferences. Through the power of autonomy granted by the NCAA to the power conferences in August, 2014, some of these increased player benefits are beginning to emerge, such as funding the full cost-of-attendance, four-year scholarship guarantees, lifetime scholarship guarantees to allow athletes to return to school to complete their degrees, and long-term health insurance benefits. However, if the court rules in favor of the plaintiffs, the economic system of collegiate athletic scholarships as well as the university and collegiate athlete relationship will forever be altered. Mark Emmert, President of the NCAA, has stated that players being paid would mean “the end of college sports as we know it.”¹¹⁰

A ruling in favor of the plaintiffs that eliminates the fixed limits and equality of all scholarship offers will create an unprecedented competitive environment in the recruitment and compensation of players. If universities are going to attract the most talented players, they will need more money for scholarship offers. Sponsors would appear to be willing to provide those resources because of the advantages of this promotional communication strategy. Sponsors already have a substantial role in fund-

¹⁰⁹ Terry Lefton, *King Out to Make Adidas Swift of Foot in U.S.*, STREET & SMITH’S SPORTS BUS. J. (Oct. 20, 2014), <http://www.sportsbusinessdaily.com/Journal/Issues/2014/10/20/Marketing-and-Sponsorship/Adidas.aspx>.

¹¹⁰ Sharon Terlep, *Inside the Doors of the NCAA: Pressure is Building for College Sports’ Governing Body to Modernize its Rules*, WALL ST. J., A14 (Oct. 25, 2014), available at <http://www.wsj.com/articles/inside-the-doors-of-the-ncaa-1414187475>.

ing collegiate athletics and they could certainly be interested in further opportunities to connect their brands with this audience.

Interestingly enough, the reliance on sponsorship revenue in collegiate athletics was mentioned by the plaintiffs in the *Jenkins* complaint. The complaint states the NCAA and the universities “have lost their way far down the road of commercialism, signing multi-billion dollar contracts wholly disconnected from the interests of ‘student athletes,’ who are barred from receiving the benefits of competitive markets for their services[,] even though their services generate massive revenues.”¹¹¹ The plaintiffs are arguing that the problem with all of the commercialism is that the players are not receiving their deserved share of these revenues. Yet, the amount of commercialization would probably not be viewed as problematic if it were the sponsors that provided the additional financial resources that universities will need to fund the players’ scholarship offers.

An expanded role for sponsors could shift the balance of power in the relationship between the university to the sponsor, amplifying the concerns about corporate influence held by researchers such as Schiller and McAllister. The quest for additional money could cause the university to provide sponsorship opportunities in locations not yet used, such as additional stadium or arena signage or even corporate signage on other parts of the campus. Furthermore, this quest for more money could also open up product categories that universities have yet to offer to sponsors. For example, few universities offer beer sponsorships. Even professional sports leagues have recently expanded their sponsorship offerings to increase revenue by allowing teams to sell sponsorships in the casino and gaming product category, a category once deemed too controversial to have sponsors form a brand association with their teams. Additional opportunities for an increased role in collegiate athletics economics would certainly exist for university multi-media rights holders, such as IMG and Learfield Sports.

¹¹¹ Complaint and Jury Demand for Plaintiff, *supra* note 1, at 2.

It has also been documented that sponsorship of collegiate athletics is particularly appealing because sponsors are reaching an age group that has not established brand preference in a variety of product categories. The college sports fans have been shown to be passionate and loyal toward their university, with researchers demonstrating that these emotional characteristics can result in consistent behaviors, including the purchase of sponsors' products.¹¹² Researchers, thus, point out that sponsors should provide opportunities to enhance the emotional connection of sports fans and their teams. Woisetschlager, Eiting, Hasselhoff, and Michaelis, for example, even stressed that sponsors should actively promote their economic support of a team as a reason why the team was able to pay to acquire top players and be successful.¹¹³

Seeking opportunities to connect with fans, along with the important beneficial characteristic that all of the parameters of a sponsorship agreement are negotiated, become of particular interest in a competitive environment for players. The sponsors could become heavily involved in negotiating the agreement between a university and potential recruit—with the sponsor later promoting the fact that it is the reason that the player is attending the university and accruing all of the benefits of such promotion. Because negotiation is a part of the sponsorship agreement process and the university will now be negotiating the parameters of the agreement with an athlete, the possibilities are endless. Might a player commitment to the university include some aspect of a commercial opportunity, similar to player appearances in advertising or appearances at a store location? Moreover, could a head coach who is close to getting a star player to commit to the university simply call upon a sponsor to increase the offer? For example, might a coach at a Nike-affiliated university call Nike and ask for extra funding to sign a recruit, especially if that player is strongly considering an Under Armour or Adidas-affiliated university? In

¹¹² See Gantz, *supra* note 44.

¹¹³ Woisetschlager et al., *supra* note 65.

exchange for the additional money, could Nike or Under Armour request that this scholarship offer also include a clause that the player already has an endorsement offer once he enters the professional league? Could universities, with the help of sponsors, put together a compensation package where a basketball player who might have left for the NBA after one year makes a commitment to remain at the university for multiple years? There would appear to be nothing to prevent such sponsor-involved negotiated transactions.

In an unfettered marketplace where there are many universities competing for players, it will only take one university, with the assistance of a sponsor, to make a ridiculous financial offer to a player to ignite wide-scale sponsor involvement. In fact, if all universities are only still offering the traditional scholarship plus whatever additional benefits that the power conferences agree to provide through their autonomy, one could imagine lawsuits claiming collusion being initiated.

Finally, universities might simply not have other options to fund these scholarship offers beside sponsors, highlighting Schiller's "big government" or "big business" argument.¹¹⁴ Athletic programs being subsidized through the state government or placing further burdens on student tuition will continue to be problematic. Universities could cut expenses largely through the elimination of non-revenue generating sports, but those decisions too come with criticism. Issues of equity in collegiate athletics would be exacerbated. Questions would emerge involving Title IX application and whether equal compensation opportunities will continue to apply if collegiate athletics are deemed a free market. No longer offering certain sports because the university needs money to provide competitive compensation packages to athletes in football and men's basketball would create an environment where those sports are positioned against all others, as well as further distancing big-time athletics from the university's academic mission.

¹¹⁴ See SCHILLER, *supra* note 53.

In ruling that the current system is an antitrust violation, the court could think that any of these consequences that result from altering what was an unlawful antitrust practice would simply need to be sorted out by the universities and the athletes. However, in the lawsuit, all of the concerns about an unfettered, competitive marketplace for players can certainly be presented. If the court will consider these consequences in rendering its decision, the *Jenkins* lawsuit will be of interest to legal scholars. In that light, it is important to understand the many ramifications. This article demonstrates the profound role that sponsors will undoubtedly play in a new economic system of collegiate athletics.

College Coaching: Demarcating Appropriate Behavior and the Means of Enforcement

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Abstract

Determining the appropriate behavior of college coaches has increasingly surfaced as an mass media topic in the world of college sports. Ideally college coaches should be teachers and mentors that instill character development, motivation, teamwork, loyalty, and tenacity in student-athletes. The popularity of college sports and the large revenue streams coming to the colleges from sport teams based upon success has altered the player-coach dynamic. The win or lose your coaching job atmosphere has resulted in a change in the coach-player relationship and student-athletes are being mandated to year round training, and some are even being subjected to inappropriate physical and verbal abuse. This article explores how to more efficiently address coaching behavior to better protect student-athletes and coaches.

Introduction

Educational institutions recognize the unique and fundamental role sports play in the development of well-rounded students. Schools have long argued that sports provide an ideal forum for the development of character, motivation, endurance, loyalty,

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teamwork, and tenacity.¹ Additionally, through participation in sports, student-athletes learn how to overcome adversity, cope with disappointment and work to attain one's personal best. These are all qualities that society admires and values. Likewise, educational institutions recognize the unique role of the coach in teaching and guiding young student-athletes toward the attainment of such skills. In order to obtain these positive externalities, coaches must push athletes beyond their physical and mental comfort zone. This often requires the use of tactics viewed as unacceptable in other educational teaching settings. A certain amount of verbal heckling or physical contact is considered common practice on the playing field or in the locker room and is recognized as an acceptable and effective mode of coaching.

However, the popularity of major college athletics has changed the dynamics of NCAA coaching. Athletics have become an important means for drawing attention to a college or university. In addition to increasing the overall public awareness of the institution, college administrators recognize that athletic success attracts money from the state, alumni and other donors. For instance, in 2006 and 2007 the University of Florida won a football national championship and two men's basketball national championships. The next year the University saw an increase in licensing revenue of \$2.8 million and a 10% increase in its application rate.² Similarly, Florida Gulf Coast University (FGCU), a relatively unknown school, became the darling of the 2013 NCAA Men's Basketball Tournament (March Madness) making it all the way to the Sweet 16. From March 21 to March 25, visits on the admissions page of the FGCU website jumped from 2,280 to 42,793; visits to the school website jumped from 47,067 to 230,985; and

¹ Ryan Miller. *The Role of Athletics in Higher Education*, MAJOR THEMES IN ECON.31, 32 available at <http://www.cba.uni.edu/economics/Themes/miller.pdf> [hereinafter *The Role of Athletics*].

² Kristi Dosh, *Can we Measure the Effect of National Championships?*, THE BUSINESS OF COLLEGE SPORTS (July 11, 2011), <http://businessofcollegesports.com/2011/07/11/can-we-measure-the-effect-of-national-championships/>.

the athletics website visits jumped from 8,177 to 117,113.³ The benefits attained through athletic success have created a huge incentive to win at all costs.⁴ As a result, the coach is no longer a mere educator. Coaching has become an ultra-competitive and in some cases highly compensated career. College coaches fiercely compete for higher paying and higher-status jobs and work with next to no job security. Pundits argue that the resulting high-stress environment has manifested an incentive to overwork student-athletes, and has led to a pervasiveness of coaches inappropriately lashing out, verbally and physically.

It remains difficult to determine if and when a coach has crossed the line and acted inappropriately. Yet, it has become all the more important to not only recognize but prevent such inappropriate behavior. Currently, coaching behavior is monitored by what can be described nicely as an utterly imperfect system. Players who are mistreated can seek redress only through self-reporting to the university or traditional legal channels. However, as described above, universities are often interested parties who benefit the most from the coach and team's success and consequently are inefficient monitors of such behavior. Likewise, courts are inefficient mitigators of such behavior. In this paper, I attempt to demarcate the line of appropriate coaching behavior, discuss why courts are inadequate at assessing and curbing unacceptable behavior, and suggest a model under which we can more efficiently address coaching behavior concerns.

Behavior Standards

Claims of inappropriate behavior by coaches can be divided into two central groups: physical contact and verbal abuse. These categories are not always isolated and inappropriate coaching behavior is often a combination of the two, but for the purposes of this analysis I will speak to each separately.

³ Manuel Navarro, *FGCU Admissions Spike After March Madness Run*, EAGLE NEWS (Nov. 6, 2013), <http://eaglenews.org/news/fgcu/fgcu-admissions-spikes-march-madness-run/>.

⁴ Miller, *THE ROLE OF COLLEGE ATHLETICS*, *supra* note 1, at 32.

Sporting events are high intensity, high stress environments. Some sports involve a raucous crowd, exacerbating these conditions. Given such, coaches, caught in the excitement of the moment, often tug players by the jersey or uniform in order to grab their attention or quickly substitute them into the game. This is generally considered appropriate behavior in competitive sports. Likewise, in practice, coaches may promote a certain level of physicality between players in an attempt to improve toughness or simulate the intensity of a game atmosphere. As an extreme example, Michigan State men's basketball coach Tom Izzo is known to implement football pads and encourage excessive physical contact during practice.⁵ Such conduct, when aimed at a permissible end, such as improving team toughness, is currently a generally accepted practice in sports. But when does this contact overstep the bounds of teaching and become dangerous and inappropriate? Famous Indiana men's basketball coach Bob Knight was involved in an incident in which he physically choked a student-athlete during practice;⁶ this is conduct clearly outside the bounds of acceptable behavior, but is representative of the types of abuse that have gone overlooked in the past, as player's assume such conduct to be common practice and a matter to be handled inside the locker-room. Similarly, former Rutgers men's basketball coach Mike Rice was caught on video hurling basketballs at and shoving student-athletes from behind during practice.⁷ This behavior persisted for over two-years before action was taken against the coach.

The above-mentioned incidents are all exemplary of acts in which the contact is primarily taken to punish or harm student-

⁵ Kevin Armstrong, *Details Help Michigan State's Izzo Channel Inner Football Coach*, N.Y. TIMES (Apr. 2, 2010),

http://www.nytimes.com/2010/04/03/sports/ncaabasketball/03izzo.html?_r=0

⁶ *Knight's Out: Coach's Tirades Overshadowed Titles Until the End*, CNNFYI (Sept. 11, 2000 5:41 PM), <http://www-cgi.cnn.com/2000/fyi/news/09/11/bob.knight/index.html>.

⁷ Mike Vorkunov, *Ex-Rutgers Basketball Player Derrick Randall Sues School For Mike Rice Incident*, NJ.COM,

<http://www.nj.com/rutgersbasketball/index.ssf/2013/12/ex-rut->

[gers_basketball_player_derrick_randall_sues_school_for_mike_rice_incident.html](http://www.nj.com/rutgersbasketball/index.ssf/2013/12/ex-rut-gers_basketball_player_derrick_randall_sues_school_for_mike_rice_incident.html) (last updated Dec. 9, 2013, 7:57 PM).

athletes, and not to instill the positive educational qualities associated with participation in sports. Physical contact of student-athletes by coaches, or physical contact encouraged by coaches, should only be considered acceptable if: 1) a reasonable person knowledgeable in the sport would construe the conduct to be primarily aimed at improving the requisite skill set of the student-athlete(s) and 2) the risk of injury from the conduct is negligible or no greater than the risk intrinsic from participation in the sport. Under this test, contact like Mike Rice's hurling of balls at and shoving of student-athletes would fail, even if he argued that it was aimed to improve his team's toughness, because the risk of injury would not be commensurate with that intrinsic in playing basketball. Similarly, conduct like Tom Izzo's use of football pads, which to present day has been construed as acceptable, could only continue if the use of pads mitigates the increased risk of injury from the promotion of extra-physical contact by the players. This standard provides coaches with flexibility to employ unique training tactics, while protecting the overall safety of student-athletes.

Collegiate coaches often use verbal jeering as a developmental tool, as United States military does in its training of cadets. Proponents believe this tactic is necessary to push student-athletes outside of their comfort zone, improve toughness, teach student-athletes how to deal with adversity and can serve as a means of commonality, bringing the team together through the shared experience. However, verbal jeering can easily cross the line into unacceptable taunting or unproductive personal attacks. South Carolina men's basketball coach Frank Martin was recently suspended for aggressively shouting in the face of a player and using excessive incendiary language during a game.⁸ Similarly Rutgers' coach Mike Rice was caught on tape continuously screaming offensive epithets at players when they did not perform to his

⁸ Jeff Goodman, *Frank Martin Must Sit One Game*, ESPN.COM (Mar. 6, 2014), http://espn.go.com/mens-college-basketball/story/_/id/10564036/south-carolina-gamecocks-suspend-coach-frank-martin-one-game.

expectations⁹ and Boston University women's basketball coach Kelly Greenberg has been accused by eight former players of bullying and emotional abuse¹⁰. Some coaches and commentators argue that this behavior is common practice across the industry and that there is a level of consent by the student-athletes who voluntarily chose to play for the coach. However, just because verbal assaults have become common practice does not mean that it is morally or legally defensible conduct. Also, do players really consent to this? What is the alternative? A student-athlete can choose to attend a school based on the coach's reputation, but there is no guarantee that coach will remain for the student-athlete's entire collegiate experience, and some student-athlete's skill sets do not afford them such optionality in school selection. Likewise, if it has become such a common practice, is there really any choice involved at all? Given the educational aim of sports, coaches' verbal interactions with student-athletes should be rationally related to performance and development, and not attacks aimed solely to degrade the student-athlete. Coaches and administrators should ask for continuous feedback from players, gauge the effect of such tactics, and constantly adjust the magnitude of use based upon such results.

Clearly defining proper coaching behavior and curbing reprehensible action by coaches is necessary to protect the educational component of sports. Establishment of behavioral standards and their communication to coaches, with constant communication and feedback from student-athletes help guarantee that the coach-athlete relationship supports the educational aspects of sports and protects student-athletes.

⁹ Tyler Conway, *Updates on Derrick Randall's Lawsuit*, BLEACHER REPORT (Dec. 9, 2013), <http://bleacherreport.com/articles/1881941-updates-on-derrick-randalls-lawsuit-against-rutgers-for-mike-rice-scandal>.

¹⁰ Bob Hohler, *BU Women's Basketball Coach Fighting Allegations*, BOS. GLOBE (Mar. 15, 2014), <http://www.bostonglobe.com/sports/2014/03/14/women-basketball-coach-fighting-allegations-two-more-former-players-speak-out/JcB4LoRBF0h4zETRPexfSI/story.html>.

The Legal System is an Inappropriate Check on Coaching Behavior

Trends demonstrate an increased utilization of the legal system as a dispute resolution mechanism. This increased willingness by individuals to try cases in law has contemporaneously led to an increase in lawsuits by student-athletes against coaches and collegiate institutions. While these lawsuits have garnered inordinate amounts of media attention, it remains difficult to determine whether they are a successful means for curbing or punishing inappropriate coaching conduct. Some critics argue that these suits mask the true problems, as they serve more as a means of personal-retaliatory attacks against coaches for non-conduct related grievances (i.e. lack of playing time) instead of by student-athletes whom are actually aggrieved. I argue that lawsuits are an improper means by which to curb coaching conduct and instead serve to muddy the water surrounding acceptable coaching norms.

First, lawsuits are innately public. A student-athlete can only seek this avenue of redress by publicly speaking out against his own collegiate institution. Student-athletes are reluctant to do so, given the likely backlash by peers and the threat such action poses to the student-athlete's continued participation in the sport. Thus, the only time such suits tend to appear is after a student-athlete has decided to transfer or leave the particular institution. This in itself creates skepticism as to the truth of the alleged claims. Bystanders often jump to the conclusion that the allegations are retaliation for other issues, such as the student-athletes lack of playing time or inability to bond with the team. Additionally, the media tends to draw attention away from the issue of the conduct and instead to an analysis of the character makeup of the coach or student-athlete.

Additionally, lawsuits may have extensive time horizons. Under the guidelines of the NCAA, student-athletes have a six-year time period in which to complete up to four years of eligibility. Thus, a student-athlete bringing such a suit will either have to forgo his or her opportunity to play, as continuing at the institution

and playing for the coach becomes impracticable, or transfer to another institution. This means that successful players are unlikely to bring such suits as they have, in essence, more to lose. This once again fuels skeptics; argument that student-athletes who bring these suits are seeking to “get even” with a coach for personal grievances, such as lack of playing time, and not on actual mistreatment grounds.

These skeptics’ beliefs are not without some foundation. Collegiate athletics, particularly at the Division One level, are innately competitive. Each student-athlete was likely the star performer at his or her high school, but is now only one of many such stars on a team or competing for a position. Thus, some student-athletes transition from star to “benchwarmer.” This transition, especially for college-aged students, can be challenging, depressing and even lead to transference, in which the student-athlete and oftentimes his or her parents blame the coach for the lack of playing time and overall negative experience. Such personal grievances can yield frivolous lawsuits, and since these cases become very fact specific disputes, end up wasting valuable court resources.

Lastly, while the legal system may be able to identify egregious conduct on behalf of a coach, such as the choking of a player, it is ill suited to determine when borderline conduct crosses the line of acceptable behavior. Jurors that are uninformed in the sport at issue, or competitive sports in general, are ill equipped to judge the appropriateness of such teaching techniques and thus rely heavily on expert testimony, increasing the cost and time of such trials. Even with the aid of experts, jurors without sports knowledge may be unable to grasp or distinguish the developmental purpose of conduct uniquely acceptable in sports. Thus, there is an increased risk of decisions that dissuade positive teaching technique and inappropriately punish coaches.

The Holy Cross Case Study

A recent lawsuit filed in New York Federal Court serves as an exemplary case study for the limitations of the legal system in regards to coaching conduct cases. Sophomore Ashley Cooper left

the College of the Holy Cross and its women's basketball team and filed suit against women's basketball coach Bill Gibbons and Holy Cross.¹¹ Ms. Cooper alleges in her suit that Coach Gibbons shook her by the shoulders, yanked her by her shirt collar, and squeezed the back of her neck during practices and games.¹² She also alleges that Coach Gibbons was verbally abusive off the court. Coach Gibbons was placed on paid leave during a school investigation and then reinstated after the school's investigation yielded no wrongful action.

Ms. Cooper, a star high-school player in New Jersey, was a rarely used reserve during her two years at Holy Cross.¹³ In response to the lawsuit more than 60 former players and assistants under Coach Gibbons signed a letter of support and attended the first game of the season holding signs stating, "We Stand United for Coach Gibbons."¹⁴ Teammates and others in attendance have challenged Ms. Cooper's account of events. Additionally, there has been severe backlash and public attacks through Internet blogs in regard to Ms. Cooper. For example, one blog stated that Ashley Cooper came from one of the richest towns in the U.S. where everyone owns a horse ranch, and if you've ever met a girl with a pony growing up, then you know what type of person a girl with a pony turns out to be.¹⁵

If we assume Ms. Cooper's allegations are true, what are the repercussions of the negative publicity for other mistreated athletes? The public nature of the suit not only resulted in backlash from teammates and former-friends, but national attention

¹¹ Scott J. Croteau & Jennifer Toland, *Holy Cross Coach Bill Gibbons Sidelined for Abuse Allegations*, TELEGRAM.COM (Oct. 17, 2013), <http://www.telegram.com/article/20131017/NEWS/310179879/0>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Holy Cross Women's Basketball Coach Back To Work After Hurting Ashley Cooper's Feelings*, TURTLEBOYSports (Jan. 15, 2014), <http://turtleboysports.com/2014/01/15/holy-cross-womens-basketball-coach-bill-gibbons-back-to-work-after-hurting-ashley-coopers-feelings>.

¹⁵ *Id.*

challenging her character and motives. The next mistreated athlete will have to ask himself or herself whether he or she is willing to be subjected to such scrutiny?

Also plausible is that Coach Gibbons' conduct was appropriate and Ms. Cooper's pain is at least somewhat related to her struggle to adapt to the rigor and competition of collegiate athletics. Is a court able to or the proper body to determine this? A slap on the back or a tug on the shirt would clearly be inappropriate in the classroom, but is it on the playing field? Those knowledgeable in sports would most likely argue this conduct is far from excessive, yet can a jury lacking the same specific knowledge come to the same conclusion? If the jury is to find liability in regard to Coach Gibbons and the College of the Holy Cross, it could have chilling effects on coaches and threaten the effectiveness of transferring positive educational externalities from participation in sports.

Identifying an Alternative Model

Adjudication and curtailing of coaching behavior would be more efficient and effective if the NCAA created an independent, coaching ethics advisory board. Under such a scheme, student-athletes could anonymously report coaches' conduct issues,¹⁶ the advisory board could perform independent investigations, and work closely with member schools to address such issues. Additionally, the advisory board could be made up of experts who are able to properly weigh the costs and benefits of coaching-specific teaching techniques, thus protecting both student-athlete and coach interests. Under this system, courts could apply the principle of judicial non-interference and allow the advisory board to self-investigate and penalize.

Such a system would provide student-athletes with an independent investigation¹⁷ without the public scrutiny and back-

¹⁶ The person reporting the behavior does not have to be the party of interest in the incident

¹⁷ As discussed previously, it has been argued that schools are unable to self-investigate due to its interest in the success of its sporting programs, in particular money-making sports.

lash of a court proceeding. It would encourage reporting and empower student-athletes to stand up against egregious coaching behavior. Additionally, an NCAA advisory board would be able to act more swiftly and act with flexibility. For instance, the board could anonymously attend practices and take its own evidence and would not be restrained by the court's docket.

Collective bargaining is another mechanism by which student-athletes could curtail coaching practices. Currently, unlike in professional sports, student-athletes lack a common voice under which they can curb expectations and acceptable practices. Recently the University of Northwestern football team was recognized as employees and granted the ability to certify as a union.¹⁸ The players heading the movement have cited the need for an increased say in practice scheduling so as to not interfere with their ability to take classes and pick the majors of their choosing.¹⁹ Likewise, collective bargaining, whether through unionization or another mechanism, would allow student-athletes and coaches to clearly communicate conduct expectations and standards.

Conclusion

Demarcating the line of appropriate conduct of coaches has become an increasingly important task. Sports have become an integral part of education in our colleges and universities. Society has recognized the flexibility that needs to be afforded to coaches in order to push student-athletes and help them achieve their best. However, financial and publicity interests associated with successful teams has, in some instances, led to extreme conduct by coaches and in-turn to allegations of student-athlete abuse. Under this context, coaches' actions should be analyzed under the particular circumstances and judged based on their intent and safety. It has become apparent that courts are not the most efficient means by which to judge and curb coaching conduct. The public nature,

¹⁸ Sara Ganim, *Labor Board: Northwestern University Football Players can Unionize*, CNN.COM, <http://www.cnn.com/2014/03/26/us/northwestern-football-union/> (last updated Mar. 27, 2014, 3:55 PM).

¹⁹ *Id.*

time investment and knowledge limitations of the legal system make it an ineffective resolution methodology. By creating and empowering an independent NCAA advisory board, or empowering student-athletes through collective bargaining, we could more efficiently address coaching conduct concerns, better protecting student-athletes and coaches.

**NO LONGER PERRY MASON: HOW MODERN
AMERICAN TELEVISION'S PORTRAYAL OF
ATTORNEYS SHIFTS PUBLIC OPINION**

Christopher Ryan*

INTRODUCTION

“A lawyer is basically a mouth, like a shark is a mouth attached to a long gut. The business of lawyers is to talk, to interrupt one another and to devour each other if possible.”¹

“Doctors are the same as lawyers, the sole difference being that lawyers only rob you, but doctors rob you and kill you too. . . .”²

“Woe unto you, lawyers! For ye have taken away the key of knowledge: ye entered not in yourselves, and them that were entering in ye hindered.”³

These quotations, while similarly scathing rebukes of the legal profession, are separated by hundreds (in cases, thousands) of years. While many suggest rather emphatically that it was in fact the Watergate scandal that “resulted in the end of the high regard of the law and the beginning of the continuing decline of the lawyer-statesman and the lawyer-social engineer,”⁴ it is much more

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¹ Joyce Carol Oates, *Joyce Carol Oates*, GOODREADS.COM, <http://www.goodreads.com/quotes/306905-a-lawyer-is-basically-a-mouth-like-a-shark-is> (last visited Mar. 20, 2015).

² ANTON CHEKHOV, *IVANOV*, act 1, sc. 3.

³ *Luke* 11:52 (King James).

⁴ Charles J. Ogletree, Jr., *Personal and Professional Integrity in the Legal Profession: Lessons from President Clinton and Kenneth Starr*, 56 WASH. & LEE L. REV. 851, 853 (1999). See also Dominic Salvatore, *The Rise of Cynicism*, RANT LIFESTYLE, <http://www.rantlifestyle.com/2014/04/24/rise-cynicism/> (April 24, 2014).

difficult to find any evidence of popular opinion showing anything other than contempt for attorneys in general. As Robert Clifford stated in his opening statement in *The Impact of Popular Culture on the Perception of Lawyers*,

The public perception of lawyers has always been out of our hands. Since Shakespeare, indeed as early as the 14th century medieval literary work *Piers Ploughman* about a poor man's quest for spiritual truth, those who shape public opinion have portrayed lawyers as shady characters at best. Even a tombstone in the western part of England reads, "God works wonders now and then—here lies a lawyer, an honest man."⁵

That isn't to say that it was impossible to find a positive voice for the profession somewhere in the annals of history. Abraham Lincoln, known not only for his presidency but also his defense of the legal profession in general, would famously champion the legal practice all the while admonishing those that might do harm to its reputation:

There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief. Resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, ra-

⁵ Robert A. Clifford, *The Impact of Popular Culture on the Perception of Lawyers*, 28 LITIG. 1, 1 (2001), available at <http://cliffordlaw.com/news/firm-news/the-impact-of-popular-culture-on-the-perception-of-lawyers>.

ther than one in the choosing of which you do, in advance, consent to be a knave.⁶

Granted Alexis De Tocqueville, in *Democracy in America*,⁷ his famous outsider's peer through the veil of American culture, saw lawyers benevolently as "belong[ing] to the people by birth and interest, and to the aristocracy by habit and taste . . . [thus] they may be looked upon as the connecting link of the two great classes of society,"⁸ yet he also famously lamented that "nothing, on the other hand, can be more impenetrable to the uninitiated than a legislation founded upon precedents."⁹ De Tocqueville went on to opine that "the English or American lawyer resembles the hierophants of Egypt, for, like them, he is the sole interpreter of an occult science."¹⁰ Regardless whether his distaste for the obfuscation of legalese to the population in general remained at the end of his case study on the American democracy, De Tocqueville viewed lawyers as a necessary (and primary) countervailing force against the Tyranny of the Majority.¹¹

While we may have not much more to explain the public opinion of attorneys in centuries long since past than the written words of scholars and statesmen long since deceased, one convenience of the modern world is the public opinion poll. Particularly for the last forty years, multiple agencies like Gallup and Harris have conducted polls of public opinion on a battery of different careers. The data gathered ranges from opinions on the compara-

⁶ Abraham Lincoln, *Notes for a Lecture on Law*, 72 TEX. B.J. 112, 112 -13 (2009) ("Abraham Lincoln prepared the [above] remarks, presumably as part of a lecture to young lawyers just starting to practice. The date of the draft is uncertain. Historians and archivists speculate it was composed during the 1850s.").

⁷ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Philips Bradley ed., Harry Reeve trans., 1990) (1835).

⁸ *Id.* at 276.

⁹ *Id.* at 267.

¹⁰ *Id.*

¹¹ See Phil C. Neal, *De Tocqueville and the Role of the Lawyer in Society*, 50 MARQ. L. REV. 607, 607-08 (1967), available at http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2670&context=journal_articles.

tive prestige across several disciplines,¹² to the perceived honesty and ethics in assorted jobs.¹³ In every poll, public perception of attorneys has tumbled dramatically since 1976.¹⁴ While we may not be able to understand why people once felt the way they did about attorneys, we can at least ask pertinent questions about the recent measurable trends. Why would numbers fall from a high of 36% viewing lawyers being jobs with “very great” prestige in 1977 to 22% in 2007?¹⁵ Why would 25% of people view lawyers as having “very high/high” degrees of honesty and ethics in 1976, only to plummet to a record low of 13% in 2009?¹⁶

This paper looks to examine the possible deleterious effects that scripted television has had on the American legal practice. Part I will discuss current trends in opinion; Part II will move into Cultivation Theory and explain how it relates to current opinion of lawyers; Part III will examine the six archetypal attorneys portrayed in television; and Part IV will conclude with a prognosis for the near future of the profession.

I. WHERE ARE WE, AND HOW DID WE GET HERE?

It will come as no surprise to anyone aware of trends of public opinion that lawyers are not thought of in the esteem that they once were. In fact, if one were to go on Amazon.com and

¹² Harris Interactive has maintained decades of varying polls to this tune. *Doctors, Military Officers, Firefighters, and Scientists Seen as Among America's Most Prestigious Occupations*, THE HARRIS POLL, http://www.harrisinteractive.com/vault/Harris%20Poll%2085%20-%20Prestigious%20Occupations_9.10.2014.pdf (last visited Sept. 14, 2014).

¹³ Gallup has data going back to 1976 across numerous professions. *Honesty/Ethics in Professions*, GALLUP, <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx#3> (last visited Sept. 14, 2014).

¹⁴ *Id.* See also *Doctors*, *supra* note 12.

¹⁵ *Firefighters, Scientists, and Teachers Top List as “Most Prestigious Occupations,” According to Latest Harris Poll*, HARRIS INTERACTIVE, <http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Pres-Occupations-2007-08.pdf> (Aug. 1, 2007).

¹⁶ *Honesty/Ethics*, *supra* note 13. It should be noted that the popular opinion has started to improve, finding 20% of people viewing lawyers as having “very high/high” ethics in 2013.

input “lawyer jokes” in the books section, over 1500 results will be displayed.¹⁷ To get a more direct response, inputting “why do people hate lawyers?” on Answers.com will yield the colorful response “[p]eople hate lawyers because they’re jealous of how awesome they are.”¹⁸ While this might be endearingly reassuring to anyone in the legal profession, it should be noted that the category in which this explanation was found included the search terms “behavior,” “lawyers,” and “Justin Bieber.”¹⁹ As such, it may be wise to take the compliment with a grain of salt. Perhaps a more cogent and well-articulated response can be found on Yahoo’s Answers page, when queried why people don’t like lawyers:

Well there are several reasons. First, in ever [sic] case, someone loses [sic]. That someone will often blame their lawyer. The people who win usually just feel that justice was done. Second, people's views of lawyers are distorted by popular fiction. They think trials are actually like CSI, that judges and lawyers behave in a fairly arbitrary manner and that decisions are either the result of the fundamental justice of the cause (which is good) or ridiculous technicalities (which is [sic] bad). Generally, if people like lawyers at all, they like the archetype [sic] of the crusading, maverick lawyer, also perpetuated by popular fiction and equally inaccurate—if a lawyer behaved as some popular mavericks on TV do they would be disbarred and be unable to help their clients at all. In truth, lawyers are just people. There are good ones and bad ones, and most are a mixture.²⁰

¹⁷ Book Search for lawyer jokes, AMAZON.COM, <http://www.amazon.com> (enter “lawyer jokes” in search bar; then click “lawyer jokes in Books.”).

¹⁸ Web search for why people hate lawyers, ANSWERS.COM, <http://www.answers.com/> (type “Why do people hate lawyers?” into search bar).

¹⁹ *Id.*

²⁰ Web search for why people don’t like lawyers, YAHOO.COM, <https://www.yahoo.com/> (search “How come people don’t like lawyers?”; pick the first question, read the “best answer.”).

While it might be simple to dismiss the argument as shallow or facile, it is worth note that webpages like Answers.com or Yahoo's Answers are the essence of the modern *vox populi*—where else could one find a better barometer of how the average person feels? *Forbes* magazine sought to answer the same question, hypothesizing “[p]eople hate lawyers because they represent the interests of people and corporations without really caring who they are, what they did, what harm they caused, or, how culpable they are.”²¹

Another likely reason is the fact that most lawyers often work behind the scenes, or deal in topics to which the general public is rarely exposed. When the average person does interact with a lawyer, it is usually for a more traumatic reason:

One reason the general public dislikes lawyers is that the most prominent public role of lawyers involves criminal defense, even though only a tiny fraction of all lawyers do that type of work. The public will always blame defense lawyers for helping criminals whom the public fears [sic] and detests [sic]. A second reason is that people most often deal with lawyers during stressful times such as when they are going through bankruptcy, a divorce, or a lawsuit. People naturally tend to blame the lawyers for the miserable and expensive experience (particularly the lawyer on the other side but often their own lawyer as well).²²

Disregarding, for the time being, *why* public opinion has fallen so drastically, it is important to also elucidate *when* it fell. In citing Chris Klein's poll in the *National Law Journal*, Professor Robert F. Blomquist states:

Sadly, the public's trust of American lawyers, in general, and of the civil and criminal justice sys-

²¹ Victoria Pynchon, *It's OK to Hate Lawyers*, FORBES (Jan. 18, 2013, 2:30PM), <http://www.forbes.com/sites/shenegotiates/2013/01/18/its-ok-to-hate-lawyers/>.

²² MICHAEL ASIMOW & SHANNON MADER, LAW AND POPULAR CULTURE 62 (2013).

tems, in particular, are at an all-time low. According to an August 1997 National Law Journal article, referencing a 1997 Harris Poll, “lawyers’ prestige has plummeted at a pace unmatched by that of other professions during the past 20 years.” This poll suggests that merely “19 percent of the public views the law as a ‘very prestigious’ occupation.” In 1977, the year I graduated from law school, that figure was at thirty-six percent. This seventeen-point drop is “the biggest among occupations in the survey,” which included scientists, physicians, teachers, clergy, engineers, athletes, and business persons, among others.²³

Taking the data another ten years into Professor Blomquist’s future shows a slightly improved landscape for attorneys. In 2007, the percentage of people who viewed lawyers as having a profession of “very great” prestige rose from 19% to 22%.²⁴ Interestingly, lawyers can no longer be said to have had the biggest point drop among occupations in the survey.²⁵ Though lawyers still had roughly a 39% drop in perception from 1977 until 2007, professional athletes still tie them in percent decrease dropping from 26% in 1977 to 16% in 2007.²⁶ Perhaps surprising to no one, bankers now take the biggest drubbing of all. They saw a decrease from the already low 17% in 1977 to a mere 10% in 2007—coming in as the largest disparity in the three decades, with a 41.2% drop.²⁷

Harris Interactive’s 2014 poll provided a more detailed look into the current year’s public perception of occupational prestige, sacrificing a comparative timeline for the ability to see

²³ Robert F. Blomquist, *The Phoenix Project: (Seriously) Renewing Public Trust in the American Justice System*, 44 S.D. L. REV. 41, 43 (1999) (citations omitted).

²⁴ *Firefighters*, *supra* note 15.

²⁵ *Id.*

²⁶ Corso, *supra* note 15.

²⁷ Corso, *supra* note 15. Interestingly enough, this data wouldn’t account for a reflection of public attitude towards such public meltdowns as the Lehman Brothers or AIG.

multiple degrees of perception.²⁸ As of this year, 60% of respondents say that being a lawyer has “more prestige,” compared to 40% that believe it has “less prestige.”²⁹ Of that 60%, 16% believe the legal profession to have a “great deal of prestige,” compared to 44% who responded that it simply “has prestige.”³⁰ In comparison, lawyers are the exact median of the spectrum coming in at eleven places below doctors, with a prestige percentage of 88, and eleven places above real estate broker or agent, with a prestige percentage of 27.³¹

Adding another new feature to the 2014 poll, Harris now includes a separate distribution by age demographic. Millennials (ages 18-37) make up the group that sees attorneys most favorably with a prestige report of 69%; Generation X (38-49) follow with 60%; Matures (69+) with 54%; and Baby Boomers (50-68) bring up the rear with only 52% viewing lawyers as being prestigious.³²

Why would there be such a big disparity between Millennials and Boomers? Some might argue that Millennials are generally more socially progressive, and witness lawyers fighting the injustices they themselves see every day in society. Unfortunately, that view would fail to take into account the idea that other lawyers must then inherently be fighting *against* the change the Millennials seek to foster. Others still may argue, as previously mentioned, that Watergate sparked a breach of faith in the profession that never recovered in Boomers and Matures. The problem with that argument is that Millennials and Generation X-ers have had front row seats to any number of scandals and miscarriages of justice including Whitewater, O.J. Simpson, former Attorney General Alberto Gonzales’s controversial midterm dismissal of U.S. Attorneys, and Casey Anthony.

Maybe there is a simpler explanation. While it would be beyond naïve to suggest that it is the *only* factor, perhaps part of

²⁸ Pollack, *supra* note 12.

²⁹ Pollack, *supra* note 12. Athletes, coincidentally, have the same percentages in prestige.

³⁰ Pollack, *supra* note 12.

³¹ Pollack, *supra* note 12.

³² *Id.*

the slow downward spiral of public opinion of the legal profession is the fact that we are living in a society with more Saul Goodmans and less Perry Masons. We have an abundance of Barry Zuckercorns and a dearth of Ben Matlocks. In short, Cultivation Theory may be able to explain this phenomenon.

II. CULTIVATION THEORY: HOW PERCEPTION IS A REFLECTION OF WHAT WE WATCH

Lawyers often are being portrayed in movies, novels, advertising, campaigns, and television shows as greedy, vicious, or just plain foolish. The American public is wrestling with deciphering the difference between fact and this fiction. It is popular to hate lawyers, even to despise them, and certainly to poke fun at them. Sometimes this is achieved under the guise of entertainment, but as the public's perception of what is news and what constitutes entertainment becomes even fuzzier, fiction and fact also become more blurred. What is the difference between the U.S. Attorney General and Joe Pesci in *My Cousin Vinny*? Does the U.S. Supreme Court really operate much differently from Judge Judy? To a great many of the American viewing public, not really.³³

The main premise of Cultivation Theory is that “[t]elevision viewers who say they are exposed to greater amounts of television are predicted to be more likely (compared to viewers who say they are exposed to lesser amounts) to exhibit perceptions and beliefs that reflect the television world messages.”³⁴ Developed by Professor George Gerbner³⁵ in the mid-1960s, Cultivation Theory is an effects-driven hypothesis that seems to never fully be

³³ Clifford, *supra* note 5.

³⁴ W. James Potter, *Cultivation Theory and Research: A Methodological Critique*, in 174 JOURNALISM MONOGRAPHS 1, 1 (James W. Tankard Jr. ed., 1994).

³⁵ Former Dean of the Annenberg School of Communications at the University of Pennsylvania.

able to overcome its own limitations. Mainly, Cultivation Theory is subject to “the usual criticisms of both content analysis and surveys,”³⁶ ambiguity in measurements,³⁷ the arbitrary nature of “cut points” in analyzing viewer samples,³⁸ justification of television world-views,³⁹ questionable or no scaling in its analysis,⁴⁰ and generally inconclusive results.⁴¹ In spite of all of these criticisms, the theory is still widely discussed and, to an extent, accepted.⁴² In regards to this article, the culmination of this study on television viewing came in the early 1990s when a series of tests were done on hundreds of willing participants regarding views on attorneys.⁴³ The tests centered around Gerbner’s views of the creation of a “symbolic environment,” which “equate[s] television with religion, in that both function socially through the continual repetition of patterns [sic], which define the world and legitimize the social order.”⁴⁴ Pfau et al. (“Pfau”) characterize such internalization as a form of secondary socialization, which helps adults reinforce their often pre-existing worldviews and understand others’ roles in society.⁴⁵ Pfau explains such behavior, stating:

It is through direct experience, or if unavailable, through television, or a combination of direct experience and television, that people come to under-

³⁶ Daniel Chandler, *Cultivation Theory*, ABERYSTWYTH U., <http://visual-memory.co.uk/daniel/Documents/short/cultiv.html> (last visited Sept. 21, 2014).

³⁷ Potter, *supra* note 33, at 4.

³⁸ Potter, *supra* note 33, at 7.

³⁹ Potter, *supra* note 33, at 11.

⁴⁰ Potter, *supra* note 33, at 12 -16.

⁴¹ Gavin Davie, *Cultivation Theory: How Violence Might Affect Us*, MASS COMM. THEORY (March 12, 2010), <http://masscommtheory.com/2010/03/12/cultivation-theory-how-violence-might-affect-us/>.

⁴² Anecdotally, it seems that most applications of Cultivation Theory are centered around debates on violence and sexuality in television. This author believes that, while an attractive lens through which to view sociological reaction to a stimulus, Cultivation Theory has about the same *practical* utility when used in a predictive function as a farmer’s almanac would be in preparing the reader for droughts or hurricanes.

⁴³ Michael Pfau et al., *Television Viewing and Public Perception of Attorneys*, 21 HUM. COMM. RES. 307, 307 (1995).

⁴⁴ *Id.* at 308 (internal citations omitted).

⁴⁵ *See id.* at 309.

stand the nature of attorneys and their work, producing beliefs, feelings, and attitudes about attorneys. People's direct experiences, if available, are the main source of influence, and in those instances when experiences and television images are consonant, people's experiences "resonate and amplify" cultivation patterns. This involves the cultivation process termed "resonance," and explains the way that direct experience and television play off each other, thus reinforcing the social order and power structure.⁴⁶

Unfortunately for the public image of attorneys, a good portion of the cognitively malleable television viewers have little or no first-hand experience with members of the Bar:

Cultivation is an appropriate paradigm to explain the impact of prime-time television depictions of attorneys on the public's perception of attorneys because of an axiom of the theory (which is often ignored in Cultural Indicators studies) that television is the most influential "in cultivating assumptions about which there is little opportunity to learn first-hand and which are not strongly anchored in established beliefs and ideologies." In other words, television programming's depictions are influential mainly in those circumstance in which people have limited opportunity to confirm or deny television's symbolic images firsthand.

Available evidence indicates that most people have limited direct contact with attorneys, at least in comparison to other professionals For example, Bennack indicates that the mass media overshadows direct contact as the dominant source of information about attorneys for most people. His survey of 983 respondents found that "television drama . . . is considered a frequent source of judicial

⁴⁶ *Id.* at 310 (internal citations omitted).

information for no less than 19% of the public.” Macaulay observes that “more people learn about their legal system [and attorney’s work] from television and film than from first-hand experience.”⁴⁷

Pfau goes on to note that the 1980s saw a sharp increase in the depiction of attorneys; further highlighting that one show portrayed them as “rational and smart, [having] perceptions consistent with their success in defending clients and, perhaps more important, as supportive, fair, sociable, and warm images consistent with their efforts to assist and defend the innocent.”⁴⁸ With the increase in legal-themed television came a chance for a new case study in Cultivation Theory. To briefly summarize the test, data was gathered from voluntary responses to a series of telephone and mail surveys reflecting content analysis of prime-time television shows featuring attorneys.⁴⁹ A number of factors were weighed from respondents, such as education level, age, gender, etc., in creating the test and the results were measured against responses from some almost 300 practicing attorneys as well.⁵⁰ Overall, ten dimensions were employed to assess the “attorney persona,” with scale items including:

Propriety, consisting of immoral/moral, wrong/right, and improper/proper; power, comprising poor/wealthy, low/high status, and weak/strong; relational skills, featuring cold/warm, uncaring/caring, and unfriendly/friendly; physical features, including unattractive/attractive, plain/stylish, and unsexy/sexy; presentational skills, consisting of

⁴⁷ *Id.* (internal citations omitted).

⁴⁸ *Id.* at 311. Pfau also states, “[d]uring this period, the concern among the legal community was that television programming was cultivating a misperception of attorneys and the legal process, overemphasizing the defense aspects of a case and vastly oversimplifying attorney tactics.” *Id.* Just how much of that legal community might wish for a return to *those* halcyon days would make for the topic of an entirely different paper. The way attorneys are currently represented on television (as depicted *infra* part IV) is often much more negative for the profession in general. To paraphrase George Bernard Shaw, the two greatest tragedies in life are not getting what you want, and getting it.

⁴⁹ Pfau et al., *supra* note 42, at 316.

⁵⁰ Pfau et al., *supra* note 42, at 316.

rough/smooth, inarticulate, articulate, and unpersuasive/persuasive; character, consisting of selfish/unselfish, bad/good, and dishonest/honest; sociability, comprising gloomy/cheerful, unpleasant/pleasant, and irritable/good-natured; extroversion, featuring tired/energetic, withdrawn/outgoing, and meek/assertive; competence, consisting of unintelligent/intelligent, unqualified/qualified, and incompetent/competent; and composure, including nervous/poised, tense/relaxed, and anxious/calm.⁵¹

At the outset of the study, two hypotheses were posited. The first of which suggested that “network television programming’s depiction of attorneys and the legal profession influence [sic] public perceptions of attorney power, sociability, composure, physical attractiveness, character, and presence, and public perceptions of the proportion of attorneys who are female, young, upper class, and who specialize in criminal law.”⁵² The second hypothesis was that such a depiction would result in a positively skewed perception for traits such as composure, physical appearance, and presence, while producing a negatively skewed perception of character, sociability, and power.⁵³ Perhaps not surprisingly for followers of Gerbner’s school of thought, the patterns of results supported the former hypothesis, including MANOVA and univariate tests, planned comparisons, and correlation matrices.⁵⁴ On the other hand, the data somewhat shockingly did not support the latter hypothesis.⁵⁵ It should be taken into account that television was well past *Perry Mason*’s run, and well before the *Friends*-esque *Ally McBeal*. Glenn Close had yet to show the corrupting nature of power in *Damages*, and *Law and Order* would not entertain us for another several years with its mix of cops and lawyers. Instead, this was a time of *Matlock*, *L.A. Law*, *The Paper Chase*, and *Night Court*. At this time, *Better Call Saul* wouldn’t enter the collective zeitgeist for another quarter of a century.

⁵¹ Pfau et al., *supra* note 42, at 318.

⁵² Pfau et al., *supra* note 42, at 319.

⁵³ Pfau et al., *supra* note 42, at 319.

⁵⁴ Pfau et al., *supra* note 42, at 320-22.

⁵⁵ Pfau et al., *supra* note 42, at 320-22.

The presentation and public opinion of lawyers on television was still roughly high by the time this study was conducted.⁵⁶ Unfortunately, the 1990s and early 2000s were host to a plethora of new television shows that portrayed the legal profession in a manner more worthy of opprobrium than ever before. As the shows premiered with excellent ratings, public polling of attorneys fell. The year 1990 saw 22% of the public as having a high to very high degree of belief that attorneys are honest or ethical.⁵⁷ That number would fall at an average of 1% per year, dropping to 13% in 1999 (half of the high as seen in 1977).⁵⁸ Ever since it reached that particular trough, public belief that attorneys are honest or ethical has made a timid recovery to the tune 20% by 2013.⁵⁹ Though it may seem easy to discount Cultivation Theory's explanation, particularly in light of the expected results versus actual results of Pfau's study, the trend does seem to follow a similar pattern of reputation highs and lows reflecting the legal counterpoints on television. The year 1997 saw such shows as *Ally McBeal* and *The Practice*, juggling the lighter toned comedy about the relationship qualms of the eponymous Ally McBeal with David Kelley's *The Practice*, a "rebuttal to *L.A. Law*. . . and its romanticized treatment of the American legal system and legal proceedings."⁶⁰ Was *Ally McBeal*'s situational comedy enough to compensate for the gritty, ethically gray drama of *The Practice*? Perhaps not, as the public opinion poll for that year had attorneys around 15%—a 2% drop from the previous year.⁶¹ Later, in 2009, *The Good Wife*'s Alicia Florrick was humiliated by her State's Attorney husband's sex and corruption scandal. That same year showcased Jeff Winger in *Community*. As corrupt an attorney as they come, Winger was forced to return to community college after it was discovered that his bachelor's degree wasn't from Columbia the university, but

⁵⁶ *Honesty/Ethics in Professions*, *supra* note 13.

⁵⁷ *Honesty/Ethics in Professions*, *supra* note 13.

⁵⁸ *Honesty/Ethics in Professions*, *supra* note 13.

⁵⁹ *Honesty/Ethics in Professions*, *supra* note 13.

⁶⁰ *The Practice*, WIKIPEDIA, http://en.wikipedia.org/wiki/The_Practice (last visited Oct. 8, 2014).

⁶¹ *Honesty/Ethics in Professions*, *supra* note 13.

Colombia the country.⁶² Also debuting in 2009, *The League* introduced a number of attorneys and their friends involved in a debaucherous fantasy football league, showcasing some of the funniest, yet crudest and least professional, attorneys in television history.⁶³ That year saw the public opinion drop to a low of 13%, down 5% from the previous year.⁶⁴

While it is always important to remember the fact that correlation does not always imply causation, it is likewise necessary to monitor trends and predict responses where applicable. Does Cultivation Theory provide an accurate predictor of public opinion? Probably not, but relying on a rigid set of statistical charts is rarely definitive when dealing with something as fickle as public opinion. It does, on the other hand, make for an argument worthy of further observation. If time proves that Cultivation Theory is more accurate than Pfau's tests would suggest, why is the public's perception as low as it is? Are attorneys really being depicted as such unethical, immoral brutes that an average of more than a quarter of all people in the United States report that they have low honesty and ethical standards?⁶⁵ If so, the roles attorneys play on television shows may shed some light on the matter.

III. ARCHETYPES OF LAWYERS ON TELEVISION

Whenever attorneys appear on television, it seems that they are seldom given the three-dimensional treatment reserved for the main protagonist or protagonists. Usually, attorneys represent a facet of the public's fears and perceptions, provide a shallow vehicle for plot movement, or provide a foil against which the viewer might compare the protagonist(s). It is due to this superficial treatment of television attorneys that Carl Jung's concept of the

⁶² *Community (TV series)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Community_%28TV_series%29 (last visited Oct. 5, 2014).

⁶³ *The League (TV Series)*, WIKIPEDIA, http://en.wikipedia.org/wiki/The_League (last visited Oct. 6, 2014).

⁶⁴ *Honesty/Ethics in Professions*, *supra* note 13.

⁶⁵ *Id.*

archetype becomes an important tool in scrutinizing public opinion within the confines of Cultivation Theory. The word archetype is a Greek compound word, taken by combining the word *archein*, meaning original or old, with *typos*, which means pattern or model.⁶⁶ Jung believed that cultural roles and ideas are part of our shared and inherited communal ancestry. In laymen's terms, the same general roles and stories have been happening over and over since the beginning of history.⁶⁷ Because of this, we feel justified in our own reinforcements of stereotypes in our personal compartmentalizations. Jung delineated twelve different archetypes that represent the basic human motivations for most purposes.⁶⁸ The same sort of concept can easily be applied to the context of lawyers on television. Although there can realistically be dozens of subdivisions within this section, for purposes of organization and avoidance of overlapping categories, the number of archetypes will be distilled down to six general and inclusive ideas.⁶⁹

A. The Hero

The archetype of the lawyer as the Hero is one that seems almost dated in the modern conversation. In the realm of television lawyers, the Hero is one unblemished by vice. He or she doesn't succumb to temptations, always acts ethically and in a professional manner, and is usually the defender of the weak and disenfranchised. The mantle of the Hero has been best worn by two fictional men: Perry Mason and Ben Matlock. As representatives of the Hero archetype, Mason and Matlock are the subjects of the most attention and reverence among their fictitious legal peers. For example, "[Perry Mason] is mentioned much more often than any

⁶⁶ Carl Golden, *The 12 Common Archetypes*, SOULCRAFT.CO, http://www.soulcraft.co/essays/the_12_common_archetypes.html (last visited Oct. 2, 2014).

⁶⁷ *See Id.*

⁶⁸ *Id.*

⁶⁹ These seven are not intended to be culled from Jung's archetypes. Instead, they are one viewer's explanation for why the public views attorneys the way that they do. If we had an abundance of Heroes (*see discussion infra* Part III.A) on recent television, we may have had a more favorable result in recent opinion polls. However, if we produce more shows with Villains (*see discussion infra* Part III.F), we may see the public opinion fall to new lows.

other TV lawyer by judges (in their opinions), by practitioners (in briefs), and by academics (in law review articles). After Mason there is his ‘modern-day clone [Ben] Matlock’ . . .”⁷⁰ For much of the early twentieth century, the Perry Mason books and television show provided the general public with a window to the esoteric world of criminal law.⁷¹ In fact, Mason stoically summarized the adversarial system in a way that resonates with the public:

Remember that I’m a lawyer. I’m not a judge, and I’m not a jury. I only see that people are represented in court. It’s the function of the lawyer for the defense to see that the facts in favor of the defendant are presented to the jury in the strongest possible light. *That’s all he’s supposed to do.* It’s the function of the district attorney to see that the facts in favor of the prosecution are presented to the jury in the most favorable light. It’s the function of the judge to see that the rights of the parties are properly safeguarded, that the evidence is introduced in a proper and orderly manner; and it’s the function of the jury to determine who is entitled to a verdict. I’m a lawyer, that’s all.⁷²

Closing with the phrase “I’m a lawyer, that’s all,” is emblematic of why Mason was, and still is, such a powerhouse of legal popular culture. Mason has accomplished this by demystifying the profession and humbly shrugging off any prestige that might normally be attributed to it. In zealously representing his clients, Mason would often unmask the real perpetrator—typically in open court. Though he may have been too modest to refer to himself as such, Perry Mason was very well the hero and champion his clients needed.

Matlock, on the other hand, was at the same time more and less relatable to the viewing public. “Ben Matlock is a very expen-

⁷⁰ Ross E. Davies, *The Popular Prosecutor*, 16 GREEN BAG 2d 61, 63-64 (2012) (internal citation omitted).

⁷¹ See Kenneth Lenoir, *The Case of the Esteemed Lawyer*, 76 TEX. B.J. 523, 523-24 (2013).

⁷² *Id.* at 526 (emphasis added) (internal citation omitted).

sive criminal defense attorney who charges \$100,000 to take a case. Fortunately, he's worth every penny as he and his associates defend his clients by finding the real killer."⁷³ On the other hand, "if he or his staff believe strongly enough in the innocence of a client, or if the client is unable to pay immediately (if at all), he will have them pay over time, or will reduce the fee significantly or waive it entirely, albeit reluctantly in some cases."⁷⁴ This tough, but fair, stance on his remuneration helped to cement respect for Matlock in the minds of many who prize self-reliance and strong work ethic in their television role models. Further helping to connect him to the average person, Matlock was known for his penchant for hot dogs, driving American cars, and having a cantankerous attitude.⁷⁵ Similar to Perry Mason, Matlock would often identify the true perpetrator in a dramatic courtroom exchange ultimately securing an acquittal at trial for his client and an arrest for the guilty party.

It is no wonder that Ben Matlock is presented as more of a flawed human. Essentially, the idea of Perry Mason was born in the advent of the modern super hero. The world saw the first of many Perry Mason novels in 1933, to be followed by a fifteen-minute radio show ten years later.⁷⁶ Though he may not have directly influenced Seigel and Shuster's creation of Superman (who appeared five years after the first Perry Mason novel), both Mason and Superman represent the same ideals and virtues. Both were created in a time when the country was reeling from one World War and careening into another, and both were undoubtedly influenced by a need for hope in a country facing the Great Depression. Matlock, a product of the 1980's, was allowed to be more realistic, reflecting a public with a greater scrutiny of the legal realm.

In the end, both Mason and Matlock are remembered as being heroic gladiators of the courtroom. Both are ethically above

⁷³ *Matlock*, IMDB, www.imdb.com/title/tt0090481/ (last visited Oct. 5, 2014).

⁷⁴ *Matlock (TV Series)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Matlock_\(TV_series\)](http://en.wikipedia.org/wiki/Matlock_(TV_series)) (last visited Oct. 5, 2014).

⁷⁵ *Id.*

⁷⁶ *Perry Mason (radio)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Perry_Mason_\(radio\)](http://en.wikipedia.org/wiki/Perry_Mason_(radio)) (last visited Oct. 5, 2014).

reproach, and demonstrate the ideals of the Model Rules of Professional Conduct of the American Bar Association. This is the essence of the Hero archetype.

B. The Fool

The second archetype that often arises in television portrayals of attorneys is that of the Fool. The Fool is presented as a bumbling, unprofessional attorney, usually for comic relief. The Fool, by nature, is never the antagonist of the television show and is rarely presented in a show where law is the focal point of the comedy or drama. The best example of the lawyer as the Fool is the character of Ted Buckland in *Scrubs*. The *Scrubs* Wiki page describes Ted as having “clammy hands, a sweaty brow, and a bald head; which are all targets of insults tossed in his direction. Because his life was so depressing, he often thought about killing himself but never mustered the guts. Eventually he became a member of the Brain Trust, but his ineptitude as a lawyer never changed.”⁷⁷ Ted is characterized as having stress-induced dyslexia, is sterile, divorced, and nicknamed the Hospital Sad Sack.⁷⁸ Ted is even a member of an a capella band with the name “The Worthless Peons.” Perhaps the most damning of all is Ted’s own self-castigation. In the episode “My Lucky Day,” Ted is called upon to represent Dr. Elliot Reid after an altercation with a patient.⁷⁹ After Dr. Reid admitted to antagonizing the patient and admitting fault, Ted laments, “Oh, come on! A good lawyer couldn’t win this case!”⁸⁰ In all fairness, Ted should not be representative of attorneys in general. He once admitted, “I’m not what you call a winner... sure I’m a lawyer but that’s only [sic] because I took the bar

⁷⁷ *Ted Buckland*, SCRUBS WIKI, http://scrubs.wikia.com/wiki/Ted_Buckland (last visited Oct. 5, 2014).

⁷⁸ *Id.*

⁷⁹ *My Lucky Day Transcript*, SCRUBS WIKI, http://scrubs.wikia.com/wiki/My_Lucky_Day_transcript (last visited Oct. 5, 2014).

⁸⁰ *Id.*

exam in Alaska and they only have like four laws and most of them are when you can and cannot kill... seals.”⁸¹

Another prime example of the lawyer as the Fool is *The Simpsons*'s Lionel Hutz. Hutz's character lives in an animated world where everyone around him is already a caricature, so it should come as no surprise that lawyers would be equally lampooned. Hutz's incompetence rivals and exceeds Ted's—at least Ted knows what the words “mistrial” and “lawyer” mean.⁸² Comically, Hutz's law firm is named “I Can't Believe It's A Law Firm!” and is known to solicit business by offering “expert shoe repair[s]” and offering free gifts such as a “‘smoking monkey’ doll, a pen that looks like a cigar, an exotic faux-pearl necklace, a business card that ‘turns into a sponge when you put it in water,’ and even an almost-full Orange Julius he once had handy.”⁸³ Hutz is only occasionally shown as the victor in the courtroom, and more often than not solely due to the work of others. The one time he did manage to get a \$100,000 settlement for Bart Simpson in a case, he only gave Bart \$500, keeping the rest for himself and his associates.⁸⁴

As seen with Ted Buckland, the Fool is often presented with an unflattering physique, though this need not always be the case. *Arrested Development*'s Barry Zuckerkorn, played by Henry Winkler, looks to be a textbook example of how an attorney might physically appear. He's well dressed, in above average physical shape, and has no obvious humorous physical abnormalities. Instead of physical humor or sight gags, *Arrested Development*'s creators derive Zuckerkorn's humor from implied sexual pervers-

⁸¹ *Favorite Ted Buckland Quotes*, TVFANATIC, <http://www.tvfanatic.com/quotes/characters/ted-buckland/by-rating/> (last visited Oct. 7, 2014).

⁸² *Lionel Hutz*, WIKIPEDIA, http://en.wikipedia.org/wiki/Lionel_Hutz (last visited Oct. 5, 2014). Other demonstrations of his incompetence include representing clients in a lawsuit against a producer for not giving them parts in a play when he himself is cast in that play, failing to notice the fact that his client is French despite the obvious accent, and his slogan: “Cases won in 30 minutes or your pizza is free.” *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

sions,⁸⁵ his high level of incompetence,⁸⁶ and his inappropriately sexual demeanor around his clients.⁸⁷ Though he may appear very statesman-like, once Zuckerkorn speaks it becomes strikingly obvious that he is anything but.

As previously mentioned, the Fool rarely, if ever, shows up in a show about law, and is never the main protagonist. Their role is simply to make us laugh with a mixture of pity and disdain. These Fools are where lawyer jokes originate, and it may be naively optimistic to hope that the general population doesn't believe that their real-world counterparts would actually exist or, at very least, not pass the MPRE.

C. The Everyman

Like the play bearing the same name, the Everyman represents all mankind.⁸⁸ The Everyman is, to a degree, a composite of all the other archetypes and the closest thing to being a complete, three-dimensional character. The Everyman, unlike the Hero, is not without his professional flaws by often failing early on in life before solidifying his role as attorney. Coming with the territory of being most true to life, the Everyman is clearly also the most relatable of the archetypes. The Everyman will never be tragically flawed to the point of no redemption, but will certainly have struggles with which the viewer can empathize. The strength of this

⁸⁵ *Barry Zuckerkorn*, ARRESTED DEVELOPMENT WIKI, http://arresteddevelopment.wikia.com/wiki/Barry_Zuckerkorn (last visited Oct. 6, 2014). Numerous scenes throughout the multiple seasons of *Arrested Development* have Zuckerkorn mentioning everything from frequenting drag clubs, to being arrested for soliciting prostitution, to allegedly breaking into a high school locker room to witness students in states of undress. *Id.*

⁸⁶ *See id.* Zuckerkorn was late to the Bluth family's trial because his own arraignment ran late. Further, when the judge was then reading George Bluth's charges, Zuckerkorn exclaimed that he must have missed that page. He once says that he wants to settle a case because he isn't "super prepared." *See id.*

⁸⁷ *See generally id.* (for example, Zuckerkorn comments on the shape of Lucille's breasts, tells Michael he could kiss him on the balls when their case catches a break, and makes repeated sexual innuendos towards the juvenile characters on the show).

⁸⁸ *See Medieval Sourcebook: Everyman, 15th Century*, FORDHAM UNIVERSITY, <http://www.fordham.edu/halsall/basis/everyman.asp> (last visited Oct. 5, 2014).

character is his ability to change and endure change. As this character is designed to resonate with the average viewer, the actual legal matter presented in these television shows will likely never escape a barebones, rudimentary façade. Part of the charm of the Everyman is in seeing his metamorphosis throughout a longer story arc. As such, you will rarely ever find such a character as a bit part, as it can take many episodes to flesh out such a complicated persona.

Perhaps the character that best encapsulates the Everyman is Marshall Eriksen from the comedy *How I Met Your Mother*. Marshall is portrayed as charming, emotional, charismatic, superstitious, and innately kind.⁸⁹ At the same time, he is also commonly shown to be flighty, have occasional substance abuse problems, cry easily, be emotionally vulnerable, and occasionally cross the line from boyishly charming to childish.⁹⁰ Fortunately, these characteristics are what endear him to audiences. Again, Everyman characters will have numerous failures in their personal and professional life, and Marshall is no exception. He has an awkward childhood, is dumped by his fiancé, is initially unable to get a job working for an environmental law firm, struggles with student loan debt, buys a house with a crooked foundation, has a series of soul-deadening corporate jobs with cruel bosses, and is ultimately disappointed with the environmental firm for whom he finally ended up employed.⁹¹ *How I Met Your Mother* finally ends with a projection into the future, where a hard-fought campaign finally sees Marshall as a Supreme Court Justice for the Supreme Court of New York.⁹² More so than his skill for lawyering, Marshall is renowned for his character as a friend. At its heart, *How I Met Your Mother* never attempts to be a show about the law. It doesn't shy away from the fact that it is a show about relationships—both good and bad. The fact that such a widely loved character is an

⁸⁹ See *Marshall Eriksen*, HOW I MET YOUR MOTHER WIKI, http://how-i-met-your-mother.wikia.com/wiki/Marshall_Eriksen (last visited Oct. 5, 2014).

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² *Id.*

attorney bodes well for the future of public perception, should other television shows follow suit.⁹³

D. The Tragically Flawed

The fourth archetype explored in this paper is the Tragically Flawed attorney. While this person may be virtuous, almost to the point of the Hero, some major flaw, either one of character or of specific previous misdeeds, becomes their defining trait. The curse of the Tragically Flawed is that their flaw is inescapable. Though progress may be made, they will always be marked with a stigma that they bear, either quietly internalized or public and obvious to all. The tragedy of their flaw can be of any nature such as a dangerous habit, romantic indiscretion, important lie or sin of omission, or even an inability to deal with the pressures of the job. The Tragically Flawed are often larger than life, presented with problems and opportunities not often experienced by the average viewer. Due to this, they are one of the least relatable of the archetypes, even if they are one of the most likeable. These characters are usually present more in dramas than comedy shows, and the subject matter more often than not is actually directly related to the law.

Of the many subcategories within the Tragically Flawed, *Suits*'s Mike Ross is most true to form since his flaw is compound in nature. Early in his life, Ross's parents were killed in an accident.⁹⁴ Eleven-year-old Ross then witnessed an attorney pressure his grandmother into taking a settlement for a paltry sum considering the loss of life, and develops what may be considered an unhealthy attitude towards the law that will greatly impact his adult life.⁹⁵ Mike possesses an eidetic memory which he later uses to take the LSATs for other people as a living, only to get caught

⁹³ There are any number of online quizzes and memes about Marshall that demonstrate his popularity as a character. One of the best is the *18 Reasons Why You Want Marshall Eriksen From "How I Met Your Mother" To Be Your Best Friend*, found at <http://www.buzzfeed.com/mwiggins/18-reason-why-you-want-marshall-eriksen-to-be-your-iau3>.

⁹⁴ *Mike Ross*, SUITS WIKI, http://suits.wikia.com/wiki/Mike_Ross (last visited Oct. 6, 2014).

⁹⁵ See generally *Id.*

doing so and expelled from college and denied access to Harvard.⁹⁶ Through a serendipitous meeting with Harvey Specter, a partner in one of the biggest firms in New York, Ross secures a job as a legal associate with the secret that not only did he never pass the bar but he also never attended law school in the first place.⁹⁷ This secret becomes much of the impetus behind Mike Ross's struggle; it affects his love life, personal life, and certainly professional life.⁹⁸ As un-relatable as Mike's situation might be to the common viewer, *Suits* is widely popular show, consistently pulling in an average of over 2 million viewers an episode.⁹⁹

Olivia Pope, the main protagonist of *Scandal*, is perhaps even more divorced from the viewing public—yet is even more popular.¹⁰⁰ Pope maintains a small, boutique crisis management firm with an extremely competent staff of attorneys, detectives, and other operatives that handle her clients' cases, though not always within the confines of the law. Pope's tragic flaw (so prominent as to inspire the title of the show) is her secret affair with the President of the United States of America. Though there are no shortages of other scandals present in the show, this emotional vulnerability of Pope's oftentimes overshadows the career of an otherwise powerful and reasonable woman. Though she may be in a situation far removed from the average person, a Google search of "do people identify with Olivia Pope" reveals almost 400,000 results, including such results as "Channeling your inner Olivia Pope," "White women tell me they want to BE Olivia Pope," and "5 Ways to Be More Like Olivia Pope." All proof that though viewers may be worlds apart from television characters, they can still see themselves in those characters' struggles.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *See Id.*

⁹⁹ *USA Network TV Show Ratings*, TV SERIES FINALE, <http://tvseriesfinale.com/tv-show/usa-network-tv-show-ratings-33445/> (last updated Mar. 20, 2015). *Suits* remains the #1 show on the USA network, taking the lion's share of the key 18-34 demographic. *Id.*

¹⁰⁰ *Scandal*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Scandal_\(TV_series\)#Ratings](http://en.wikipedia.org/wiki/Scandal_(TV_series)#Ratings) (last visited Oct. 6, 2014). *Scandal* maintains an increasing viewership, going from an average of 8.7 million viewers in the first season to 11.99 million in the third. *Id.*

E. The Shyster

The Shyster is all that is negative about the legal profession. If the Hero was the superego of law and the Everyman was the ego, then the Shyster would certainly be the id.¹⁰¹ This archetype is marked by a complete lack of ethics and general disregard for the lives and condition of those around them. To refer to the Shyster as a textbook sociopath would be accurate but also an incomplete diagnosis. The Shyster is often presented as being very successful, particularly in their professional life, and usually has a very lucrative practice (often a solo one, as they don't work well with others). While the Fool may be fodder for the typical lawyer joke, the Shyster is the reason they exist. Shysters are the go-to negative image of the corrupt, dishonest, money-grubbing attorney, providing little to no benefit to society while profiting immensely for themselves. They are not necessarily evil or cruel, though they are strictly immoral and selfish. Such a character is usually not the protagonist, though *Better Call Saul* will shortly change this dynamic.¹⁰²

Speaking of *Better Call Saul*, no one could better represent the Shyster than Mr. Goodman himself. Saul plays fast and loose with the law, often extorting money from his clients and employing hired goons to do his dirty work as needed. Perhaps the best anecdotal evidence that Saul Goodman is the ideal Shyster is that he wasn't even born Saul Goodman. He changed his name from James McGill to Saul Goodman so as to attract Jewish clients who "want a member of the tribe."¹⁰³ There are even questions as to whether Goodman even went to law school. Although the locations in *Breaking Bad* are actual places, Goodman's office is

¹⁰¹ Hey—you got your Freud in my Jungian analysis!

¹⁰² *Better Call Saul* is a spin-off show of the wildly popular drama *Breaking Bad*. *Better Call Saul* will premiere fall of 2014 and has already been picked up for a sophomore season. "Better Call Saul" Spoilers, *Renewal News: What Can Fans Expect?*, INQUISITR (Apr. 6, 2015), <http://www.inquisitr.com/1986725/better-call-saul-spoilers-renewal-news-what-can-fans-expect/>.

¹⁰³ *Saul Goodman*, BREAKING BAD WIKI, http://breakingbad.wikia.com/wiki/Saul_Goodman (last visited Oct. 6, 2014).

adorned with a law diploma from the University of American Samoa, a university that doesn't exist in the real world.¹⁰⁴

Though Goodman barely maintains a thin veneer of respectability, *Arrested Development's* Maggie Lizer flaunts her dishonesty. When she first meets Michael Bluth, she introduces herself saying, "I'm Maggie Lizer. As in 'Maggie lies her ass off.'"¹⁰⁵ The comic irony in Lizer is that she pretends to be blind in order to overcome the evidentiary shortcomings in her cases, her ability as a student and later as a lawyer,¹⁰⁶ and also to elicit sympathy from the judge and jury.¹⁰⁷ Lizer, in an unbelievably brash and flippant act, even names her blind dog Justice, and perpetuates the notion that *he* is *her* seeing-eye dog.¹⁰⁸

Perhaps the most frustrating aspect of the Shyster is that they never seem to get their comeuppance. Saul Goodman is left alive after the finale of *Breaking Bad* and has made millions off of his work with Walter White.¹⁰⁹ Maggie Lizer, through a series of flukes, is temporarily blind in court and hit in the head with a thrown bible when Michael Bluth attempts to prove that she can in fact see.¹¹⁰ When her vision recovers, she proclaims it was a miracle, thanks to the power of the bible.¹¹¹ It is this view of lawyers that does the most pervasive damage to the reputation of the legal profession particularly because it is so entertaining.

¹⁰⁴ *Id.*

¹⁰⁵ *Maggie Lizer*, ARRESTED DEVELOPMENT WIKI, http://arresteddevelopment.wikia.com/wiki/Maggie_Lizer (last visited Oct. 6, 2014).

¹⁰⁶ *Id.* (showing that Lizer cheated on the LSAT and the Bar by pretending to be blind and secretly reading from the proctor's answer sheet).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Saul Goodman*, *supra* note 101.

¹¹⁰ *Maggie Lizer*, *supra* note 103.

¹¹¹ *Transcript of "Justice Is Blind"*, ARRESTED DEVELOPMENT WIKI, http://arresteddevelopment.wikia.com/wiki/Transcript_of_Justice_Is_Blind (last visited May 17, 2015).

F. The Villain

In the world of modern television, the lawyer as the Villain is even more of a retired trope than the Hero. As real world people are seldom defined by black-and-white or good-versus-evil, so also are our modern analogs on television. Though the lawyer as the Villain will occasionally come up in television series, those series are often fantastic in nature, exhibiting some element of the supernatural. The best examples are the firm of Wolfram & Hart from the show *Angel*, or Mr. Gold from *Once Upon a Time*. Wolfram & Hart brag to have been part of the inquisition, the Khmer Rouge, and other historical atrocities, and whose “Senior Partners are unspecified demons from a hell dimension, [and the] firm keeps a team of ninja assassins on retainer, has an in-house blood sacrifice division, and makes their associates sign employment contracts that keep their souls billing hours from the afterlife.”¹¹² Mr. Gold, literally the alter ego for storybook villain Rumpelstiltskin, constantly uses his dark magic to kill and generally make everyone’s lives miserable in Storybrook.¹¹³

Perhaps the closest modern television comes to an actual antagonistic Villain is The Lawyer from *It’s Always Sunny in Philadelphia*. Though The Lawyer, who remains nameless in the show as a plot device due to the crass and bullish attitudes of the Paddy’s Pub Gang, may initially be seen as just another attorney, through provocation The Lawyer eventually embraces any chance he can get to thwart the Gang’s plans.¹¹⁴ While it could be seen that the Gang themselves are the real villains of the show, The Lawyer does everything he can to harass them ranging from tricking the gang into signing a contract which gives him all the profits

¹¹² Sean McGilvray, *6 Most Evil Attorneys Ever*, LEGAL GEEKERY (June 10, 2009) <http://legalgeekery.com/2009/06/10/6-most-evil-attorneys-ever/>.

¹¹³ *See generally Rumpelstiltskin*, ONCE UPON A TIME, <http://abc.go.com/shows/once-upon-a-time/cast/rumpelstiltskin> (last visited Mar. 23, 2015). It should be noted that, even though labeled a villain within the show itself, Gold does seem to be able to be redeemed (and quite often is on the brink of redemption). *See id.* However, Gold never fully embraces redemption, always keeping some vile secret or plotting another murder. *See id.*

¹¹⁴ *The Lawyer*, IT’S ALWAYS SUNNY WIKIA, http://itsalwayssunny.wikia.com/wiki/The_Lawyer (last visited Oct. 6, 2014).

from their patents (even including a restraining order in the same contract!), to representing a family that Frank Reynolds is trying to force out of a home he bought in a short sale, and even representing Maureen Ponderosa in her divorce from Dennis pro bono “because he hates Dennis and the Gang.”¹¹⁵

Outside of genre-specific fantasy pieces and eccentric sitcoms, true Villains are vastly outnumbered by Shysters and other morally questionable attorneys. Real life attorneys are rarely ever really evil and neither are their depictions on television. So then, what’s the prognosis for the legal reputation as we enter the fall lineup of 2014?

IV. CONCLUSION

As fall 2014 television kicks off, we are treated to a plethora of new shows about law and lawyers. One thing is painfully obvious about the new legal lineup—we are treated almost exclusively to new shows that feature lawyers and the law in a much less than favorable light. *A to Z* presents us with the character of Zelda, described as a “no-nonsense¹¹⁶ lawyer who was raised by a hippie mother and carries a rebellious streak.”¹¹⁷ While the over-used trope of the career-oriented, no-nonsense attorney may have been done successfully in the past, IGN’s review states that the show is a comedy “*abysmally* without laughs.”¹¹⁸ Zelda is shown as a character who has no interest in love, though the premise of the show suggests that she will indeed eventually grow as a person. Unfortunately, IGN posits that the show will likely be cancelled before any real character growth might be observed.¹¹⁹ The likelihood that she will develop into another Marshall Eriksen Every-

¹¹⁵ *Id.*

¹¹⁶ Fun challenge—find a review of this show that excludes this term. The first five pages visited that mention the show use the exact wording.

¹¹⁷ *A to Z (TV series)*, WIKIPEDIA, http://en.wikipedia.org/wiki/A_to_Z_%28TV_series%29 (last visited Oct 7, 2014).

¹¹⁸ Max Nicholson, *A to Z Pilot Review*, IGN.COM (Aug. 18, 2014) <http://www.ign.com/articles/2014/08/18/a-to-z-pilot-review>.

¹¹⁹ *Id.*

man, therefore, is slim and she will likely be left the one-dimensional workaholic.¹²⁰

The next new show, *Bad Judge*, takes the Fool paradigm and applies it to a disheveled, albeit good intentioned, member of the bench. *TV Guide*'s review refers to *Bad Judge* as "a toxic concoction of smarm and schmaltz that urges Kate Walsh . . . to mug and vamp shamelessly as a carefree municipal-court jurist who's a mess, a drunk and pretty much a bad girl under the robe."¹²¹ The review concludes: "*Bad Judge* is the sort of bad TV show that makes you despair the future of comedy."¹²² Though Walsh's character may be good at heart, her antics can only serve to damage the viewer's opinion of legal practitioners.

Better Call Saul will not premiere until February of 2015, but will likely present a very similar character to Saul Goodman's role in *Breaking Bad*. While this spinoff takes place six years prior to the events of *Breaking Bad*, it is unlikely that the viewer will see any change in Goodman's character other than a possible front row seat to his descent to the repugnant lows to which the viewer was already accustomed.

Perhaps the best attempt at creating a three-dimensional character this television season is ABC's *Cristela*. *Cristela* is a sitcom about a young Hispanic girl in her sixth year of law school, facing harsh reality of taking an unpaid internship and living with three generations of her extended family.¹²³ Though the show does feature a legal atmosphere, the central premise is really based more on multiculturalism and its implications in society than on law.¹²⁴

¹²⁰ Hardly a giant blemish on the face of the legal profession, but having one more character that seems like a less emotionally functioning lawyer won't help the legal community's reception.

¹²¹ Matt Roush, *New Season Reviews: Gracepoint, A to Z, Bad Judge; Also, a Bitter-Sweets Bones*, TVGUIDE.COM (Oct. 2, 2014 at 9:51 AM) <http://www.tvguide.com/News/New-Season-Reviews-1087761.aspx>.

¹²² *Id.*

¹²³ See Hank Steuver, *Fall TV 2014*, THE WASHINGTON POST (Sept. 19, 2014), <http://www.washingtonpost.com/wp-srv/special/entertainment/2014-fall-tv-shows/#cristela>.

¹²⁴ *See id.*

Still, any positive depictions will help the aggregate image, so *Cristela* is a welcomed addition.

Finally, this September also saw the premiere of *How to Get Away with Murder*, a dark look into life at a highly unrealistic law school.¹²⁵ The irony of *Entertainment Weekly*'s review of its introductory episode is that it claims "*Murder* wants us to re-evaluate our assumptions about people, and because it's a show about a brilliant, complicated woman of color, that's especially important."¹²⁶ Unfortunately, the only assumption that the show may lead people to believe is that attorneys, and law students, are more morally vacant than previously observed.¹²⁷ Not only are all of the students particularly cutthroat and ethically dubious, but the faculty is that special blend of aloof and immoral that translates to excellent drama but poor professional image.

In summation, though the reputation of the legal profession has been on an admittedly anemic course correction, the ill will garnered by the new season of television might be enough to see another decline in public opinion. Of the five new shows to prominently display legal professionals, only one, or at most two, present them in what can be considered a positive light. If, as the tired old joke states, 100 lawyers at the bottom of the ocean is "a good start," this season's television lineup can be considered the polar opposite and as potential inspiration for further tasteless jokes at the expense of an otherwise noble profession.

ADDENDUM

The 2014-2015 television season was incredibly volatile for legal-related television shows. Partially due to the success of *How to Get away with Murder*, ABC can claim the lion's share of the

¹²⁵ See Melissa Maerz, *How to Get Away with Murder*, ENTERTAINMENT WEEKLY (Jan. 17, 2015, 5:04 PM), <http://www.ew.com/ew/article/0,,20855916,00.html> .

¹²⁶ *Id.*

¹²⁷ *See id.*

coveted upscale young adult market.¹²⁸ Of the top fifteen shows for the season, ABC's programming made up seven of them, with *How to Get away with Murder* ranked at number seven.¹²⁹ It was ranked the number one new drama, with over four million viewers average per episode.¹³⁰ Not one to neglect capitalizing on its success, ABC quickly renewed its freshman legal drama for another season, confidently displaying a promotional video for season two before even making the announcement that it had been renewed.¹³¹

Not every show has fared as well—*A to Z* was quickly and quietly cancelled after a lackluster freshman outing.¹³² Adding to that, not only was *Bad Judge* cancelled, it was done so amidst bad ratings and under protest.¹³³ The Miami-Dade chapter of the Florida Association of Women Lawyers claimed the protagonist was depicted as “unethical, lazy, crude, hypersexualized and unfit to hold such an esteemed position of power [as judge].” The portrayal ruffled more than a few feathers, particularly with the FAWL:

The group provided several examples of the unethical depiction, including the judge having sex with an expert witness in her chambers just minutes after he testified in her courtroom, and the judge commenting on a male lawyer's tight pants.

¹²⁸ Amanda Kondology, *Season to Date: ABC Leads with Upscale Adults 18-49*, TV BY THE NUMBERS (Apr. 8, 2015), <http://tvbythenumbers.zap2it.com/2015/04/08/season-to-date-abc-series-lead-with-upscale-adults-18-49/386570/>.

¹²⁹ *Id.*

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¹³¹ Kimberly Roots, *How to Get away with Murder Renewed for Season 2 “of Insanity,” Promo Touts*, TV LINE.COM (Feb. 7, 2015, 7:33 a.m.), <http://tvline.com/2015/02/27/how-to-get-away-with-murder-season-2-renewal-htgawm/>.

¹³² See Emma Jones, *Bad Judge and A to Z Just Got Cancelled*, CINEMA BLEND, <http://www.cinemablend.com/television/Bad-Judge-Z-Just-Got-Cancelled-68152.html> (last visited May 16, 2015).

¹³³ Debra Cassens Weiss, “*Bad Judge*” Show Is Cancelled After Lawyer Group Protests, ABA JOURNAL (Nov. 4, 2014, 12:08 p.m.), http://www.abajournal.com/news/article/bad_judge_tv_show_is_canceled_after_lawyer_group_protests/.

“A misogynist who believes that women in power cannot control their sexuality, their bodies and their professional or personal conduct would have their views endorsed by this show,” the letter read.¹³⁴

Sadly, the excellent *Cristela’s* fate is still uncertain.¹³⁵ In spite of increasingly well-received sitcom’s success, ABC has yet to confirm a second season. Fortunes are much better for standout *Better Call Saul*, which has outperformed expectations and quickly earned renewal.¹³⁶ *Better Call Saul* was not just a quick cash-in on the fame of *Breaking Bad*—in many ways it eclipsed the quality of its predecessor by telling a compelling story without much of the slow-paced episodes that plagued early episodes of its sister-series. The fact of the matter is, *Better Call Saul* wove a story dealing with the implications of ethics in the legal profession and in life in general and did so in a way that most viewers will be unaccustomed to seeing. Though followers of *Breaking Bad* are familiar with Saul Goodman as the perpetrator of legal shenanigans, it was refreshing to see how what can conceivably be seen as a legitimately good—if flawed—man explore a three-dimensional growth encompassing a dark and thought-provoking back story. Saul Goodman originally went by the name of Jimmy McGill, and lived in the shadow of his older brother, Chuck.¹³⁷ Jimmy was far from perfect, completing his school online and not passing the bar on his first try.¹³⁸ His story, however comes closer to a tragically flawed version of the everyman. Jimmy McGill, though beginning as a petty conman, eventually tried to bring his career around—and was

¹³⁴ *Id.*

¹³⁵ Kayla Hawkins, *Will There Be “Cristela” Season 2? ABC Has Remained Quiet, but This Series Has More Than Earned Another 22 Episodes*, <http://www.bustle.com/articles/76942-will-there-be-cristela-season-2-abc-has-remained-quiet-but-this-series-has-more-than> (last visited May 16, 2015).

¹³⁶ “*Better Call Saul*” Spoilers, *Renewal News: What Can Fans Expect?*, INQUISITR (Apr. 6, 2015), <http://www.inquisitr.com/1986725/better-call-saul-spoilers-renewal-news-what-can-fans-expect/>.

¹³⁷ See Rick Morris, *Better Call Saul: Jimmy McGill—Making Elder Law Interesting Since 2002!*, Not Just Another TV Site (Mar. 24, 2015), <http://notjustanotherTVsite.com/2015/03/24/better-call-saul-jimmy-mcgill-making-elder-law-interesting-since-2002/>.

¹³⁸ *See id.*

thwarted by his very own brother in the end.¹³⁹ Though after only one, albeit great, season, there still remains much to transition this character from lovable sob-story Jimmy McGill to slick talking Saul Goodman, audiences are presented with a much more rounded look at the legal profession in creator Vince Gilligan's world.

The past year has been mostly a triumph for the law in terms of television. The atrocious *Bad Judge* has been relegated to the far corners of the public psyche, while *Better Call Saul* allowed audiences to finally see the ins and outs of what was ultimately a modern day character piece not terribly far removed from Miller's *Death of a Salesman*. The consequences of bad behavior were readily visible—Jimmy McGill wasn't able to con his way into the big firm. Even with hard work, McGill's success wasn't a guarantee.

It is unreasonable to believe that the viewing public will judge the legal profession in terms of what they see in shows like *How To Get away with Murder*, as even within that particular world, the story arc is both harrowing and uncommon for the respective characters. Instead, those shows are more an idle curiosity that simply happens to have a legal backdrop to heighten the drama and remove the plot from what could have been a more mundane environment. In conclusion, when the public declines to watch poorly created and written shows, they thankfully go away. With a little luck, the remaining dramas will be remembered not as depictions of what can be expected in dealing with the legal profession, but rather excellent character pieces that take place under extraordinary circumstances.

¹³⁹ *See id.*

