# SPECTATOR HARASSMENT

*Dallan F. Flake*

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*Instances of spectators harassing professional athletes because of their race, color, religion, sex, or national origin are well documented. This is not a new problem, but it is becoming worse in this age of emboldened bigotry. Fans are sometimes punished for such behavior, as are players who retaliate in response. Meanwhile, the teams and leagues that allow it to occur face no repercussions. This must change for there to be any hope of eradicating this egregious form of discrimination. The logical starting point is Title VII of the Civil Rights Act of 1964, under which an employer can be held liable for harassment perpetuated against an employee on the basis of certain protected traits. This statute is rarely utilized in the context of spectator harassment, in no small part because the standard for holding a team or league liable for the conduct of fans may seem impossibly high. This Article argues there is room within the extant case law for a professional athlete to prevail on such a claim and provides a blueprint for how to do so. Specifically, it asserts that: (1) an athlete is entitled to a presumption that spectator harassment is unwelcome; (2) spectator harassment is sufficiently severe to be actionable because it is publicly humiliating, causes far-reaching harm, and is intended to undermine job performance; and (3) spectator harassment is imputable to teams and leagues because they have the resources to implement more effective measures to protect athletes but choose not to. Holding sports organizations accountable through litigation is necessary to bring about changes that will better safeguard athletes from this demeaning and degrading type of abuse.*

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## INTRODUCTION

During a professional basketball game in 2019, a spectator yelled at nine-time All-Star Russell Westbrook, who is Black, "get down on your knees like you're used to."[1] The Utah Jazz, who hosted the game, predictably responded with a sternly-worded statement denouncing the racial slur and emphasizing "there is no place in our game for personal attacks or disrespect."[2] This sounds nice, but the reality is that personal attacks and disrespect tied to a player's race, color, religion, sex, or national origin—what this Article terms "spectator

1. Tim MacMahon, *Westbrook Threatens Courtside Fan, Fan's Wife*, ESPN (Mar. 12, 2019, 2:53 PM), https://www.espn.com/nba/story/_/id/26234619/. This was not the first time a fan in Salt Lake City racially taunted Westbrook. During a playoff game the previous season, a fan screamed at Westbrook, "[h]ere we go, boy." *See* Jeff Zillgitt, *Jazz Permanently Ban Second Fan for Separate Russell Westbrook Incident*, USA TODAY (Mar. 15, 2019, 6:35 PM), https://www.usatoday.com/story/sports/nba/2019/03/15/utah-jazz-ban-second-fan-separate-russell-westbrook-incident/3173929002/.

2. Tim MacMahon, *Jazz Ban Fan Permanently; Westbrook Fined $25K*, ESPN (Mar. 12, 2019), https://www.espn.com/nba/story/_/id/26241791/.

harassment"—abound. This problem is not confined to Salt Lake City or the National Basketball Association ("NBA") but pervades all professional sports in cities throughout the United States, from Boston, where fans at a Major League Baseball ("MLB") game repeatedly called Baltimore Orioles outfielder Adam Jones the N-word and threw a bag of peanuts at him,[3] to Detroit, where players at a National Football League ("NFL") game, and fans in the weeks that followed, taunted Denver Broncos quarterback Tim Tebow, a devout Christian, by mimicking his on-field prayers.[4]

Spectator harassment in professional sports is not a new phenomenon.[5] The good news is that some progress has been made: fan conduct policies have become ubiquitous, and violators are often ejected and issued lengthy bans.[6] But despite these efforts, spectator harassment persists and, in this age of emboldened bigotry,[7] is becoming worse. Veteran NBA forward Thad Young recently observed, "[i]t's beginning to get to an all-time high and it's definitely something that has to be addressed."[8] One long-time NBA usher agreed that fan behavior has grown much worse in the past few years, reaching a level of disrespect that goes beyond mere playfulness.[9] Michele Roberts, Executive Director of the National Basketball

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3. *See* Bob Nightengale, *Orioles' Adam Jones Berated by Racist Taunts at Fenway Park*, USA TODAY (May 2, 2017, 8:39 AM), https://www.usatoday.com/story/sports/mlb/2017/05/01/orioles-adam-jones-berated-racist-taunts-fenway-park-peanuts/101187172/.

4. *See* Matt Faulconer, *Tim Tebow Sparks Awesome 'Tebowing' Craze You Must Include in Your Daily Routine*, BLEACHER REP. (Oct. 27, 2011), https://bleacherreport.com/articles/913212; Jemele Hill, *Lions Disrespected Tim Tebow's Faith*, ESPN (Nov. 1, 2011), https://www.espn.com/espn/commentary/story/_/id/7177658/.

5. *See infra* Part I.

6. *See infra* Part II.

7. *See* Ursula Perano, *Hate Crimes Reach 16-Year High According to FBI Report*, AXIOS (Nov. 12, 2019), https://www.axios.com/6f9b013a-e448-4bd5-a18d-4b4643710362.html (noting that hate crimes surged to a sixteen-year high in 2018); JULIANA MENASCE HOROWITZ ET AL., RACE IN AMERICA 2019 4 (2019), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2019/04/Race-report_updated-4.29.19.pdf (reporting that two-thirds of respondents believed it became more common for people to express racist views after former President Donald Trump was elected).

8. Scott Agness, *Liquid Courage, Smartphones and Social Media: Why NBA Players Say Personal Attacks from Fans are Soaring*, ATHLETIC (Apr. 8, 2019), https://theathletic.com/904204/2019/04/08/liquid-courage-smartphones-and-social-media-why-nba-players-say-personal-attacks-from-fans-are-soaring/. Young's observation comports with reports that the NBA banned five times as many fans from games in 2019 as it had the previous season. *See* Sam Amick, *Mark Stevens Should've Known Better: On the NBA's Spike in Fan Bans and How the League is Prioritizing Player Protection*, ATHLETIC (June 7, 2019), https://theathletic.com/1016834.

9. Agness, *supra* note 8.

Players Association, echoed this sentiment, noting in 2019, "[l]ast season, . . . there was a certain, I'll call it absence of civility, that permeated the games . . . . I was seeing more bad-mouthing opposing teams that were [sic] not simply 'you suck,' which every one of us will tolerate, but really nasty, nasty comments being directed at players."[10] Professor Amira Davis remarked that professional sports have reached a point where "fans feel more emboldened now to say whatever they like, without fear of repercussions."[11] One need only look to Europe, where spectator harassment at soccer matches has spiraled so out of control that teams have been forced to play in empty stadiums,[12] to see where this could lead unless more stringent measures are implemented.

The law has not proven particularly effective in curbing spectator harassment. A player could theoretically sue a fan, but the fan's behavior would have to be physically threatening (in the case of assault),[13] false and malicious (in the case of defamation),[14] so outrageous that it causes severe emotional distress (in the case of intentional infliction of emotional distress), or involving harmful or offensive contact (in the case of battery)[15] to be actionable. Most

10. Associated Press, *NBA Enacting Zero-Tolerance Rules for Abusive, Hateful Fan Behavior*, ESPN (Oct. 21, 2019), https://www.espn.com/nba/story/_/id/27893069/ [hereinafter *Zero-Tolerance*].

11. *Id.*; *see also* Agness, *supra* note 8 (quoting NBA All-Star Draymond Green, who commented, "I think it's bad because people just come in and say whatever the hell they want"); Marc. J. Spears, *It's Time the NBA Takes More Action to Protect Players from Hate Speech*, UNDEFEATED (Mar. 13, 2019), https://theundefeated.com/features/its-time-the-nba-takes-more-action-to-protect-players-from-hate-speech/ (quoting former NBA All-Star Kenyon Martin, who remarked, "[f]ans think they're entitled to do whatever because they bought tickets. I've been booed. Told, '[y]ou suck.' Told, '[y]ou can't shoot.' But you can get called 'c[**]n' and asked if you want a banana and look into the stands and not know who said it.").

12. *See, e.g.*, Associated Press, *Bulgaria Forced to Play Euro Qualifier in Empty Stadium for Fan Racism, Nazi Salutes*, SPORTS ILLUSTRATED (Oct. 29, 2019), https://www.si.com/soccer/2019/10/29/bulgaria-discipline-empty-stadium-fan-racism-nazi-salute-england (reporting that Bulgaria was fined $94,000 and ordered to play a Euro qualifier game in an empty stadium after its fans "made Nazi salutes and targeted monkey noises at England's Black players").

13. RESTATEMENT (SECOND) OF TORTS § 21(1)(a) (AM. L. INST. 1965) (defining "assault" as an act intended "to cause a harmful or offensive contact . . . or an imminent apprehension of such a contact").

14. RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977) (liability for defamation requires a "false and defamatory statement concerning another" that is published to a third party). As public figures, professional athletes must additionally prove the defendant acted with actual malice. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

15. RESTATEMENT (SECOND) OF TORTS § 13 (AM. L. INST. 1965) ("An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other . . . or an imminent apprehension

spectator harassment falls short of these requirements;[16] in fact, there is no reported case of a player even attempting to bring such a claim. Criminal liability for assault, battery, or disorderly conduct is likewise possible,[17] but fans are rarely arrested, much less prosecuted.[18] Although it is conceivable that a spectator could be charged with a hate crime if certain biases motivate criminal conduct toward a player,[19] most spectator harassment is not extreme enough to qualify.[20] Indeed, there does not appear to be any instance of a fan being charged with a hate crime based on behavior toward an athlete at a sporting event.

Holding spectators liable is not only difficult but also unlikely to bring about the wholesale changes needed to better protect players. These changes must come from teams and leagues themselves, as they are best positioned to implement broad measures to safeguard players from abuse.[21] Without a serious threat of litigation, some

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of such contact, and (b) a harmful contact with the person of the other directly or indirectly results.").

16. *See* Christopher J. Kaufman, Comment, *Unsportsmanlike Conduct: 15-Yard Penalty and Loss of Free Speech in Public University Sports Stadiums*, 57 U. KAN. L. REV. 1235, 1244 (2009) ("It may be possible for fan expression to be characterized as defamation if a specific player . . . is the target of such expression. However, most of the cheering speech at issue relates to offensive and indecent language rather than harming the reputation of a specific individual.").

17. *See, e.g.*, *Celtics Fan Banned for Life After Hard Seltzer Throwing Incident at Garden*, WCVB (Jan. 9, 2020, 4:51 PM), https://www.wcvb.com/article/celtics-fan-arrested-for-throwing-beer-can-toward-spurs-bench-team-official-confirms/30449419# (reporting that a fan was arrested and charged with disturbing a public assembly after throwing a beverage on the floor during a game).

18. *See* Lindsay M. Korey Lefteroff, *Excessive Heckling and Violent Behavior at Sporting Events: A Legal Solution?*, 14 U. MIAMI BUS. L. REV. 119, 119–20 (2005) ("Despite exhibiting behaviors that violate criminal statutes (i.e., battery, disorderly conduct, etc.), the obstreperous fans are rarely arrested. In the unlikely event that police officers do arrest fans, prosecution is not likely to follow.").

19. *See* 18 U.S.C. § 249 (defining a hate crime as an "attempt[] to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person").

20. Most spectator harassment does not include an attempt to cause bodily injury, a required element of a hate crime. *See* Lefteroff, *supra* note 18, at 136–37 (noting that stadium layouts in the four major American sports create separation between spectators and athletes, making violent interactions less prevalent than verbal abuse).

21. *See* Chamber of Com. of the U.S. v. Whiting, 563 U.S. 582, 606 (2011) (observing that anti-discrimination laws protect against employment discrimination and provide employers with a strong incentive not to discriminate); Yaba v. Cadwalader, Wickersham & Taft, 896 F. Supp. 352, 353 (S.D.N.Y. 1995) ("Congress has determined that the respondeat superior liability created by the statute gives employers an adequate incentive to deter the

sports organizations have taken only minor steps to reduce the risk of spectator harassment. These actions not only help them avoid bad press but also enable them to market their products as family-friendly.[22] But as important as fan conduct policies and in-game reporting hotlines are to regulating spectator behavior, these measures have proven inadequate. Teams and leagues can and should do more. A more serious threat of litigation—and the negative publicity that would inevitably follow—could provide the incentive needed for these organizations to take stronger action.[23]

How can professional sports organizations be held liable for spectator harassment when the law struggles to reach the individual perpetrators themselves? The logical starting point is Title VII of the Civil Rights Act of 1964 ("Title VII"). Under this statute, an employer can be held liable when its employee is harassed on account of her race, color, religion, sex, or national origin.[24] Employer liability is not limited to harassment from other employees but extends to harassment perpetrated by third parties, including customers.[25]

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discriminatory actions of their employees and that individual liability is not necessary to further the purposes of the statute."); Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2384 (2012) ("Gatekeeper and vicarious liability regimes incentivize parties facing liability for wrongdoing engaged in by others to institute proactively policies that prevent violations. Under Title VII, potential liability for sexual harassment claims incentivizes employers to take proactive steps so that harassment will not occur.").

22. *See* MATTHEW D. SHANK & MARK R. LYBERGER, SPORTS MARKETING: A STRATEGIC PERSPECTIVE 231 (5th ed. 2015) (describing how sports organizations are attempting to make sporting events more family friendly by limiting alcohol sales in certain sections and by setting up text-messaging systems to report unruly fans).

23. Even the threat of litigation has proven a powerful motivator for professional sports organizations to take aggressive measures to root out other forms of discrimination. When attorneys Johnny Cochran and Cyrus Mehri released a report detailing the discrimination that Black NFL coaches faced and threatened to sue the NFL, unless it took "concrete steps" to increase the number of Black head coaches, the league responded by adopting its controversial "Rooney Rule," which requires teams hiring a head coach to interview at least one candidate of color before filling the position. *See* MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION 706 (5th ed. 2020).

24. 42 U.S.C. § 2000e-2(a)(1) (prohibiting an employer from "fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

25. *See* Freeman v. Dal-Tile Corp., 750 F.3d 413, 423 (4th Cir. 2014) ("Therefore, an employer is liable under Title VII for third parties creating a hostile work environment if the employer knew or should have known of the harassment and failed 'to take prompt remedial action reasonably calculated to end the harassment.'" (quoting Amirmokri v. Balt. Gas & Elec. Co., 60 F.3d 1126,

Although harassment lawsuits are relatively common in many industries, just one professional football player, Bryan Cox,[26] and a small group of professional cheerleaders[27] have ever sued their employers for spectator harassment. Unfortunately, neither case gave the courts the opportunity to consider Title VII's applicability. Cox and the NFL almost immediately settled after the league agreed to implement certain measures,[28] and the cheerleaders' lawsuit was forced into private arbitration.[29]

There are likely several reasons for the dearth of spectator harassment lawsuits. Athletes may fear retaliation from their team or league, particularly after NFL quarterback Colin Kaepernick lost his job and was allegedly blacklisted from signing with another team because he knelt during the national anthem to protest racial injustice.[30] Additionally, suing for spectator harassment would force athletes to publicly acknowledge that they were harmed by fans' behavior.[31] Athletes are taught from a young age to block out the crowd,[32] so admitting defeat in this regard is a vulnerability few

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1131 (4th Cir. 1995))); Dallan F. Flake, *Employer Liability for Non-Employee Discrimination*, 58 B.C. L. REV. 1169, 1192–1210 (2017) (discussing cases involving third-party discrimination).

26. Cox v. Nat'l Football League, 889 F. Supp. 118, 119 (S.D.N.Y. 1995) (addressing allegations that the plaintiff, who played for the NFL's Miami Dolphins, was subjected to "an intense barrage of verbal abuse [from spectators in Buffalo], much of which was based on race" and which included "[s]houts of 'n[****]r,' 'monkey,' 'we will kill you,' and a string of racially-based obscenities" and noting that "[o]ne fan had rigged up a [B]lack dummy with . . . [the plaintiff's] number and the words 'Wanted Dead' on it, and then hung the dummy on a noose").

27. Plaintiffs' First Amended Complaint at 9, Turnbow v. Hous. Texans, L.P., No. 4:18-CV-01797 (S.D. Tex. June 22, 2018), ECF No. 9 (alleging the plaintiffs were physically assaulted by spectators, but their employer, the NFL's Houston Texans, failed to do anything about it).

28. *Cox*, 889 F. Supp. at 119.

29. *See generally* Order, *Turnbow*, No. 4:18-CV-01797 (S.D. Tex. June 22, 2018), ECF No. 15 (ordering the case into private arbitration).

30. *See generally* Matthew McElvenny, *The Eyes of the World are Watching You Now: Colin Kaepernick's Collusion Suit Against the NFL*, 26 JEFFREY S. MOORAD SPORTS L.J. 115 (2019) (detailing Kaepernick's lawsuit against the NFL based on his claim that owners colluded to keep him out of the league after he started kneeling during the national anthem before games to protest racial injustice).

31. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993) (explaining that, to be actionable under Title VII, harassment must be both objectively and subjectively offensive).

32. *See, e.g.*, Patrick Cohn, *How to Focus in Front of a Hostile Crowd*, PEAK SPORTS, https://www.peaksports.com/sports-psychology-blog/focus-hostile-crowd/ (last visited Aug. 12, 2021) ("All great athletes have developed their ability to focus in adverse conditions . . . . You will definitely be aware of the tone of the

professional athletes may be willing to disclose.[33] Apart from these psychological barriers, the law itself presents challenges. Like any employee, an athlete can only succeed on a harassment claim by proving that the harassing conduct was unwelcome, based on a protected characteristic, and sufficiently severe or pervasive to alter the conditions of employment and create an abusive environment.[34] Even then, the employer is only liable if it failed to reasonably prevent or correct the harassment.[35] Prevailing on a harassment claim is never easy,[36] but it can be especially daunting in the professional sports context, where harassment is often ambiguous, sporadic, and takes place in a setting that is notoriously difficult to control.

These are not insurmountable obstacles. This Article argues there is room within the extant case law for professional athletes to hold their teams, and perhaps even their leagues, accountable for spectator harassment. It also provides a blueprint for how athletes might do so. Specifically, it asserts that: (1) players are entitled to a presumption that spectator harassment is unwelcome because it has no inherent social value; (2) spectator harassment is sufficiently severe to be actionable because it is publicly humiliating, causes far-reaching harm, and is intended to undermine job performance; and (3) spectator harassment is imputable to teams, and in some cases leagues, because they have the resources to implement more reasonable preventive and corrective measures but choose not to. Even with this blueprint, athletes face an uphill battle in proving spectator harassment. And yet, success—or at least a legitimate possibility of success—is precisely what is needed for sports organizations to finally give this issue the attention it deserves.

This Article proceeds in three parts. Part I explores how spectators harass professional athletes on account of Title VII protected characteristics. Part II describes sports organizations' efforts to address spectator harassment and explains why those efforts are inadequate. Part III identifies the unique obstacles athletes face in proving spectator harassment and demonstrates how

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crowd but you don't have to invite them into your mental space. You should never give outside distractions more than a 'Not right now.'").

33. In 2017, Brazilian soccer star Everton Luiz left the pitch in tears after fans subjected him to monkey chants, racist remarks, and a banner bearing an insulting message. *See* Rebecca Shapiro, *Soccer Fans' Racist 'Monkey Chants' Cause Brazilian Star to Leave Game in Tears*, HUFFINGTON POST (Feb. 21, 2017), https://www.huffpost.com/entry/everton-luiz-brazil-soccer-player-racist-chants-serbia_n_58abe9a5e4b0a855d1d9246e.

34. Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 277 (4th Cir. 2015).

35. *See* Smith v. Ill. Dep't of Transp., 936 F.3d 554, 560–62 (7th Cir. 2019).

36. *See* Green v. Adm'rs of The Tulane Educ. Fund, 284 F.3d 642, 663 (5th Cir. 2002) (observing that "sexual harassment suits are extremely difficult to bring and to win"); Charlotte S. Alexander, *#MeToo and the Litigation Funnel*, 23 EMP. RTS. & EMP. POL'Y J. 17, 40–51 (2019) (reporting findings from an empirical study showing it is very difficult to win sexual harassment cases).

they can leverage the existing case law to overcome these impediments.

Before turning to Part I, it is worth considering why an article devoted to harassment of professional athletes is warranted.[37] Although a serious and legally interesting issue, professional athletes are hardly alone in experiencing harassment. There are entire populations of workers who are more susceptible to harassment,[38] have less power,[39] and suffer even more horrific acts of abuse than privileged professional athletes.[40] Is this Article yet another example of athletes receiving more attention than they deserve?[41]

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37. This Article focuses on spectator harassment in professional sports because professional athletes that play for teams generally constitute employees and therefore are entitled to protection from harassment pursuant to Title VII. *See* 42 U.S.C. § 2000e-2(a). By contrast, collegiate and high school athletes are not employees of the educational institutions they represent. Student-athletes are entitled to protection from harassment under Title VI of the Civil Rights Act of 1964 and Title IX of the Higher Education Amendments of 1972, but those provisions impose different (and much higher) standards for proving harassment. *See id.* § 2000d; 20 U.S.C. § 1681(a); *see also* Davis. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 630 (1999) (under Title IX, a school district can be liable for student-on-student sexual harassment only if the district had actual knowledge of the harassment and was "deliberately indifferent"); Williams v. Pennridge Sch. Dist., 782 F. App'x 120, 127 (3d Cir. 2019) (applying deliberate indifference standard to Title VI cases).

38. *See, e.g.*, REST. OPPORTUNITIES CTRS. UNITED & FORWARD TOGETHER, THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY 20 (2014), https://chapters.rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf (finding that trans survey respondents were nearly three times more likely than their cisgender counterparts to report harassing comments about their sexual orientation or gender identity from managers and that they were two and a half times more likely to report harassing comments from customers)

39. *See, e.g.*, HUM. RTS. WATCH, CULTIVATING FEAR 3 (2012), www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf ("Sexual violence and harassment in the agricultural workplace are fostered by a severe imbalance of power between employers and supervisors and their low-wage, immigrant workers.").

40. *See, e.g.*, Chancellor v. Coca-Cola Enters., 675 F. Supp. 2d 771, 774–76 (S.D. Ohio 2009) (addressing Title VII claims where a Black warehouse employee alleged coworkers and supervisors harassed him because of his race by calling him "n[****]r," shrink-wrapping him to a bench, commenting about his "big lips," comparing him to "Aunt Jemima," placing a noose on a forklift, etching "n[****]r" and "KKK" on a bathroom stall, and threatening to shoot all Black politicians and "run over this n[****]r b[***]h").

41. *See* Mike Downey, *Joe Athlete Treated with Kid Gloves . . .*, CHI. TRIB. (July 12, 2007), https://www.chicagotribune.com/news/ct-xpm-2007-07-12-0707120155-story.html (detailing various ways in which athletes are not punished as harshly as others for their misconduct); Megan Twohey et al., *Need a Coronavirus Test? Being Rich and Famous May Help*, N.Y. TIMES (Mar. 18, 2020), https://www.nytimes.com/2020/03/18/us/coronavirus-testing-elite.html

Having mulled over this question, I believe that even if spectator harassment is not the most serious form of harassment, it warrants consideration for at least three reasons. First, the need to address spectator harassment is not because professional athletes are exceptional but rather because of the unique context in which it occurs. Sports are "a microcosm of American society" that not only reflect but also help shape our fundamental values.[42] Unlike most types of workplace harassment, which are ordinarily confined to private spaces and tend not to be widely publicized,[43] spectator harassment is entirely public. Its effects reach beyond the individual player. Not only do other fans witness the harassment in person, but given the mammoth size of the sports industry, it is often reported by news outlets and splashed across social media.[44] Thus, the harm spectator harassment inflicts does not stop with the athlete herself but extends to broader communities and even to society at large. Professor Phoebe Weaver Williams observed, "[w]hile the public nature of sports employment makes prevention of racially abusive behaviors difficult for the sports industry, the very public nature of the harms caused by . . . harassment from sports fans demands even greater degrees of diligence and higher levels of responsibility."[45] Second, spectator harassment—and the inability to police it—serves as a perverse signal that discriminatory behavior is acceptable, is shared by others, and incurs no negative repercussions. This is disconcerting in its own right but is made more troubling by the reality that spectator harassment has also infiltrated the collegiate,[46]

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(questioning why athletes and other celebrities were allowed access to coronavirus testing more quickly than others were).

42. *See* Timothy Davis, *Balancing Freedom of Contract and Competing Values in Sports*, 38 S. TEX. L. REV. 1115, 1115–16 (1997) ("[S]ports represents a microcosm of American society. As such, sports not only reflects values fundamental to American society, but contributes to shaping society's values.").

43. *See* Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791, 815 n.116 (2002) (observing that "harassment often occurs behind closed doors with no witnesses").

44. *See, e.g.*, John Ross Ferrara, *Hometown Heckler Who Called LeBron James a 'P[***]y-A[*]s B[***]h' Feels He Should be More Humble*, LOST COAST OUTPOST (June 16, 2015, 4:59 PM), https://lostcoastoutpost.com/2015/jun/16/lebron/ (reporting that a video of a fan calling LeBron James a "p[***]y-a[*]s b[***]h" amassed more than 3.5 million YouTube views in one week).

45. Phoebe Weaver Williams, *Performing in a Racially Hostile Environment*, 6 MARQ. SPORTS L. J. 287, 313 (1996).

46. *See, e.g.*, Janelle Griffith, *Homophobic Taunting at College Basketball Game Sparks Investigation*, NBC NEWS (Mar. 9, 2020, 12:25 PM), https://www.nbcnews.com/feature/nbc-out/offensive-grindr-taunts-new-jersey-college-basketball-game-sparks-investigation-n1153251 (reporting that, during a men's basketball game at Monmouth University in 2020, students held up images of an opposing player's profile on the dating app Tinder along with a sign that read "Stick to Grindr" (an LGBTQ+ social networking app)).

high school,[47] and even youth league[48] ranks. Eradicating spectator harassment from professional sports is likely to have a positive trickle-down effect on how spectators behave at other sporting events. Finally, unlike many forms of discrimination, spectator harassment has received almost no scholarly attention, a fact Professor Williams lamented in 1996—the last and only time a law review article addressed this issue.[49]

## I. SPECTATOR HARASSMENT IN PROFESSIONAL SPORTS

This Part describes the various ways spectators harass professional athletes because of their race, color, religion, sex, and national origin. Although this phenomenon has persisted for more than a century, its magnitude and manifestations have ebbed and flowed in response to shifting societal norms. For decades, fans primarily harassed Black and Jewish players; today, they target a greater variety of players for a broad assortment of reasons.[50]

### *A. Race and Color*

Race- and color-based spectator harassment is a serious issue that has persisted for as long as athletes of color have participated in professional sports.[51] Early on, Black athletes suffered harassment that may seem unfathomable by today's standards. When Black boxer Jack Johnson faced a White opponent in 1910, event organizers required attendees to check their guns at the gate to prevent racial violence but permitted the band to play "All C**ns Look Alike to Me" as spectators peppered Johnson with racial slurs.[52] Perhaps nobody experienced more vitriol from fans than MLB Hall of Famer Jackie Robinson, the first Black player to break baseball's color barrier in 1947. Robinson endured a "torrent of mass hatred" from a

47. *See, e.g.*, Christopher Lindsay, *Racist Taunts Aimed at Native American High School Athletes Denounced*, CRONKITE NEWS (Oct. 31, 2019), https://cronkitenews.azpbs.org/2019/10/31/racist-taunts/ (reporting that officials halted a high school volleyball match because spectators directed racial gestures and slurs at the Native American players).

48. *See, e.g.*, Derek Hawkins, *Crowd Hurls Slurs at All-Black Youth Football Team as Some Players Kneel During Anthem, Coach Says*, WASH. POST (Oct. 13, 2016, 7:09 AM), https://www.washingtonpost.com/news/morning-mix/wp/2016/10/13/crowd-shouts-racial-slurs-at-all-black-youth-football-team-when-some-players-kneel-during-anthem-coach-says/ (reporting that fans started calling youth football players the N-word because they knelt during the national anthem).

49. Williams, *supra* note 45, at 289.

50. *See* discussion *infra* Subparts I.A and I.B.

51. *See* MITTEN ET AL., *supra* note 23, at 701–04 (providing an overview of the racial segregation and integration of professional athletics).

52. ALLEN GUTTMAN, SPORTS SPECTATORS 119 (1986).

"vicious . . . howling mob" that yelled racial remarks.[53] Throughout his career, he faced slurs, threats, and abuse, as fans mercilessly taunted him, pitchers aimed at his head, and runners tried to spike him with their metal cleats.[54]

While much has changed since 1947—Black players predominate on football and basketball rosters[55] and have made significant inroads in other sports[56]—racial minorities, and Black athletes in particular, continue to suffer horrendous abuse not all that different from what Johnson and Robinson experienced. Most egregiously, Black athletes continue to be subjected to threats and intimidation through the display of nooses. In 2020, a noose was found in Bubba Wallace's garage stall at Talladega Superspeedway, less than two weeks after Wallace, NASCAR's only Black driver, successfully pushed the stock car racing series to ban the Confederate flag at its tracks and facilities.[57] Racial slurs likewise remain commonplace, with Black athletes across a variety of sports reporting that they are called epithets, such as the N-word and "boy."[58] Spectators also try to

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53. JACKIE ROBINSON, I NEVER HAD IT MADE 50 (1995).

54. *See* William Nack, *SI Vault: The Breakthrough: Why May 1947 was Crucial for Jackie Robinson*, SPORTS ILLUSTRATED (Apr. 15, 2015), https://www.si.com/mlb/2015/04/15/jackie-robinson-day-william-nack-si-vault (recounting that, through his first thirty major-league games, "Robinson had also been the target of racial epithets and flying cleats, of hate letters and death threats, of pitchers throwing at his head and legs, and catchers spitting on his shoes").

55. At the start of the 2019 season, 58.9% of NFL players identified as Black, with an additional 9.1% identifying as two or more races. *See* RICHARD LAPCHICK, THE 2019 RACIAL AND GENDER REPORT CARD: NAT'L FOOTBALL LEAGUE 7 (2019), https://43530132-36e9-4f52-811a182c7a91933b.filesusr.com/ugd/3844fb_1478b405e58e42608f1ed2223437d398.pdf. In the NBA, 73.9% of players for the 2017–2018 season identified as Black. *See* RICHARD LAPCHICK, THE 2019 RACIAL AND GENDER REPORT CARD: NAT'L BASKETBALL ASS'N 9 (2018), https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/7d86e5_39a4a7c436fe42f090f142408fb121e6.pdf.

56. Women's professional tennis has seen an influx of Black and biracial players in the past two decades, including Venus and Serena Williams, Sloane Stephens, Madison Keys, Taylor Townsend, and Cori Gauff. *See* Tucker Toole, *Black Girl Magic at Wimbledon: Teen Advances to Third Round*, UNDEFEATED (July 1, 2019, 5:55 PM), https://theundefeated.com/whhw/black-girl-magic-at-wimbledon-teen-upsets-idol-venus-williams/.

57. *See* Azi Paybarah & Aimee Ortiz, *Noose Found in Bubba Wallace's Garage*, N.Y. TIMES (July 6, 2020), https://www.nytimes.com/2020/06/22/sports/bubba-wallace-noose-talladega.html.

58. *See* Andrew Joseph, *Old Footage Surfaces of Russell Westbrook Confronting Jazz Fan over Racist Remark*, USA TODAY (Mar. 13, 2019, 6:43 PM), https://ftw.usatoday.com/2019/03/russell-westbrook-jazz-fan-2018-footage (describing a video that surfaced of a fan yelling, "[h]ere we go, boy," at Westbrook); *CC Sabathia on Racist Fan Behavior: 'When You Go to Boston, Expect It*,*'* SPORTS ILLUSTRATED (May 2, 2017), https://www.si.com/mlb/2017/

humiliate Black players by insinuating they are subhuman. They have thrown bananas and peanuts at Black athletes,[59] compared them to monkeys,[60] and accused them of having low IQs.[61] These ugly incidents are hardly limited to rowdy, inebriated crowds at football or basketball games. Tennis star Serena Williams once had to ask a chair umpire to intervene after a spectator yelled at her to "[h]it the net like any Negro would."[62] Fans have also seized on racial stereotypes to demean and degrade Black athletes. For instance, NFL Hall of Famer Eric Dickerson recalled a game during which fans of his own team held up a poster of "a [B]lack baby [doll] sitting in the Indian style position with chicken on one side, a stack of money on one side, watermelons on another, and [Dickerson] holding fried chicken in [his] hands with big red lips."[63] More recently, when Devonte Smith-Pelly, one of the few Black players in the National Hockey League ("NHL"), was sent to the penalty box, fans serenaded him with repeated chants of "basketball"[64]—an unmistakably racist

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05/02/cc-sabathia-adam-jones-boston-fan-racism (reporting that former New York Yankees pitcher CC Sabathia once remarked that he and other Black players "expected" to be called the N-word whenever they played in Boston).

59. *See, e.g.*, Greg Wilson, *Hockey Fan Throws Banana at Black NHL Player*, NBC BAY AREA, https://www.nbcbayarea.com/news/sports/hockey-fan-throws-banana-at-black-nhl-player/2095810/ (Sept. 23, 2011, 4:00 PM) (reporting that a fan in Detroit threw a banana at Philadelphia Flyers winger Wayne Simmonds); Nightengale, *supra* note 3 (reporting that fans threw peanuts at Adam Jones and called him the N-word).

60. *See* DAVID K. WIGGINS, MORE THAN A GAME: A HISTORY OF THE AFRICAN AMERICAN EXPERIENCE IN SPORT 118 (2018) (recounting that fans taunted Valmore James, the first Black professional hockey player, by hanging monkey dolls from a noose in the penalty box).

61. *See* JEFFREY LANE, UNDER THE BOARDS: THE CULTURAL REVOLUTION IN BASKETBALL 153 (2007) (describing a game in which fans taunted NBA Hall of Famer Patrick Ewing by holding up a bunch of bananas and a sign that read, "Ewing Kan't Read Dis").

62. Jenée Desmond-Harris, *Serena Williams is Constantly the Target of Disgusting Racist and Sexist Attacks*, VOX (Sept. 7, 2016, 8:50 AM), https://www.vox.com/2015/3/11/8189679/.

63. Steve DelVecchio, *Eric Dickerson Recalls Racist Taunts from Colts Fans When He Played in Indy*, YARDBARKER (Aug. 27, 2019), https://www.yardbarker.com/nfl/articles/eric_dickerson_recalls_racist_taunts_from_colts_fans_when_he_played_in_indy/s1_127_29842436.

64. *See* Kevin Skiver, *Blackhawks Ban Four Fans for Racist Taunting of Capitals' Forward Devante Smith-Pelly*, CBS SPORTS (Feb. 20, 2018, 10:36 AM), https://www.cbssports.com/nhl/news/blackhawks-ban-four-fans-for-racist-taunting-of-capitals-devante-smith-pelly/. Smith-Pelly understood the chant for what it was. He told reporters, "[i]t's pretty obvious what that means. . . . It's just one word, and that's all it takes. I got the idea." Andy McDonald, *Black Hockey Player Taunted with Racist Chant in Chicago*, HUFFINGTON POST (Feb. 19, 2018, 1:20 PM), https://www.huffpost.com/entry/black-canadian-hockey-player-taunted-with-racist-chant-in-chicago_n_5a8af0b6e4b05c2bcacdbe93.

insinuation that basketball is a "Black" sport and that hockey is a "White" sport.

Spectators target athletes of other races as well. Latino MLB players have been "spat at, called 's[**]c,' and told to go back" to where they came from.[65] Former NBA player Jeremy Lin, an Asian American, reported that during his playing days at Harvard, fans yelled out "[c]hicken fried rice! Beef lo mein! Beef and broccoli!" and asked him if he could "even see the scoreboard with those eyes."[66] When pitcher Ryan Helsley, a member of the Cherokee Nation, took the mound against the Atlanta Braves, fans in Atlanta serenaded him with their customary tomahawk chop and its accompanying chant, and the fans continued to yell out the team's battle cry throughout the game.[67] Likewise, during a professional lacrosse game in which the visiting team was comprised of several Native Americans, the public address announcer tried to fire up the crowd by yelling, "[l]et's snip the ponytail," in reference to a Native American player's braid, and fans threatened to "scalp" one of the players.[68]

### *B. Religion*

Spectators have long targeted players because of their religious beliefs. Without question, Jewish players have borne the brunt of this abuse. In the early 1900s, Jewish boxers endured abusive taunts from spectators, who called them slurs such as "k[**]e," "dirty Jew," and "Jew boy."[69] Prominent Jewish baseball players such as Hank Greenberg and Al Rosen were frequently ridiculed by fans and opposing dugouts.[70] In fact, several early Jewish major leaguers went

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65. *See* Felix Anthony, *The 'Browning' of Baseball: Latino Players Face Insults and Exclusion*, FINAL CALL, http://www.finalcall.com/artman/publish/Perspectives_1/The_browning_of_baseball_Latino_players_face_insul_1325.shtml (Mar. 2, 2004, 4:33 PM) (internal citation omitted).

66. Cork Gaines, *Jeremy Lin Told Some Disturbing Stories About the Racism He Endured Playing College Basketball*, BUS. INSIDER (May 11, 2017, 9:05 PM), https://www.businessinsider.com/jeremy-lin-received-racist-taunts-playing-for-harvard-2017-5.

67. Kia Morgan-Smith, *Braves Fans Taunt Native American Pitcher with 'Tomahawk Chop' but Karma Struck Back*, GRIO (Oct. 10, 2019), https://thegrio.com/2019/10/10/braves-fans-taunt-native-american-pitcher-with-tomahawk-chop-but-karma-struck-back/.

68. Dave Caldwell, *The Thompson Brothers on Abuse, Glory and Native American Pride in Lacrosse*, GUARDIAN (Apr. 4, 2019, 4:30 AM), https://www.theguardian.com/sport/2019/apr/04/lyle-thompson-lacrosse-georgia-swarm-nll.

69. Frederic Cople Jaher, *Antisemitism in American Athletics*, 20 SHOFAR 61, 66 (2001) ("Jewish boxing champions Abe Attell, Barney Ross, and Benny Leonard noted that fans, and less often, opponents had called them 'k[**]e,' 'dirty Jew,' and 'Jew boy.'").

70. *See* HANK GREENBERG, HANK GREENBERG: THE STORY OF MY LIFE 210 (Ira Berkow ed., 1989) (describing how Al Rosen "used to want to go into the stands

so far as to change their last names to avoid harassment.[71] Though perhaps less common today, Jewish athletes continue to be harassed for their religious beliefs. Atlanta Falcons quarterback Josh Rosen has been subjected to taunts on the field, including "[s]tay the f[**k] down, you Jewish b[*****]d" and "I'm gonna break your f[**king] nose, you Jew."[72]

Muslim athletes are likewise subjected to taunting from fans, though reports of anti-Muslim bias at professional sporting events are surprisingly uncommon, given the widespread animosity against the religion that has persisted since the 9/11 attacks.[73] This may stem more from the relatively small number of professional athletes who identify as Muslim rather than any goodwill fans have toward the religion. The most prominent example of anti-Muslim harassment at the professional ranks occurred during an Ultimate Fighting Championship bout in 2018, when a member of the opposing fighter's staff called Khabib Nurmagomedov a "f[**k]ing Muslim rat," which so enraged Nurmagomedov that he leaped from the cage and began attacking the perpetrator.[74] Likewise, during a moment of silence at an NFL game for victims of a terrorist attack carried out by Islamic extremists in Paris, fans in Green Bay, Wisconsin, yelled out "[d]eath to Muslims" and "Muslims suck."[75] Though not directed at any

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and murder somebody when they'd taunt him about being a Jew, but he learned to control himself pretty well"). Greenberg's teammate, Birdie Tebbetts, remarked that "[t]here was nobody in the history of the game, who took more abuse than Greenberg, unless it was Jackie Robinson . . . . [Y]ou'd hear it out in the stands. To Greenberg you'd hear 'Jew b[*****]d' or 'k[**]e son of a b[***]h.'" Jaher, *supra* note 69, at 68. Tebbetts further related that, "[d]uring the 1935 World Series . . . the Chicago Cubs rode [Greenberg] ruthlessly, 'calling [him] Jew this and Jew that.' The plate umpire . . . went to the Cub's bench and told them to stop the epithets. The Cub players refused and an argument ensued. [The umpire] threatened to clear the bench and the Commissioner of Baseball Judge Landis later fined some of the players." *Id.*

71. *See* Jaher, *supra* note 69, at 68 ("[S]everal early Jewish major-leaguers changed their names to avoid harassment. Of eight Cohens in the big leagues seven took non-Jewish names.").

72. Michael Silver, *Josh Rosen Has Written His Own NFL Draft Story, and He's Sticking to It*, NFL (Apr. 23, 2018), https://www.nfl.com/news/back-2-campus/everyone-hates-me.

73. *See* Khaled A. Beydoun, *"Muslim Bans" and the (Re)making of Political Islamophobia*, 2017 U. ILL. L. REV. 1733, 1751 ("It was widely believed that Islamophobia would decline after 9/11's immediate aftermath; recent events, state policy, and bigoted political rhetoric, however, indicate otherwise.").

74. Des Bieler, *Conor McGregor Teammate Denies Inciting Khabib Nurmagomedov with Anti-Muslim Slur*, WASH. POST (Oct. 11, 2018, 1:33 AM), https://www.washingtonpost.com/sports/2018/10/11/conor-mcgregor-teammate-denies-inciting-khabib-nurmagomedov-with-anti-muslim-slur/.

75. Michael David Smith, *Aaron Rodgers Denounces Green Bay Fan for Prejudiced Comment During Moment of Silence*, NBC SPORTS (Nov. 15, 2015, 6:46

athlete in particular, this incident is indicative of the anti-Muslim sentiment that can simmer just below the surface at sporting events.

Even Christians are susceptible to abuse from fans because of their religious beliefs. After NFL linebacker Stephen Tulloch sacked quarterback Tim Tebow, an outspoken evangelical Christian, Tulloch celebrated by kneeling in a prayer pose to mock Tebow, who often prayed on the field during games.[76] Later in the game, a second player on the opposing team struck this same pose after scoring a touchdown.[77] The players' actions unleashed a craze known as "Tebowing," in which fans would post to social media pictures and videos of themselves posing in mock prayer as a way to taunt and humiliate Tebow.[78] This ridicule followed Tebow to his later stint in minor league baseball. During a game in South Carolina, the home team's mascot wore eye black with "John 3:16" written on it, just as Tebow often did in his quarterbacking days, and was also spotted "Tebowing."[79] The public address announcer added to the taunting by playing the "Hallelujah Chorus" each time Tebow walked up to bat.[80]

### *C. Sex*

At first blush, sex-based spectator harassment may not seem like it would be a major problem in professional sports. After all, men and women generally do not compete against each other at the professional level, so it would not make sense for a fan to taunt a player for being a woman when all of the other players are women

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PM), https://profootballtalk.nbcsports.com/2015/11/15/aaron-rodgers-denounces-green-bay-fan-for-prejudiced-comment-during-moment-of-silence/.

76. Hill, *supra* note 4.

77. *Id.*

78. *See* Faulconer, *supra* note 4. Some columnists called for a stop to "Tebowing," but others claimed the mockery was justified because of Tebow's outspokenness about his religious beliefs. *Compare* Jen Engel, *Why the Heck Do We Hate Tim Tebow?*, FOX SPORTS (Nov. 2, 2011), https://www.foxsports.com/nfl/story/tim-tebow-why-the-heck-do-we-hate-him-110211 (arguing "religion is sacred and should be off limits" and hypothesizing that, if Tebow were a Muslim and Tulloch had mockingly bowed toward Mecca after sacking him, "[a]ll hell would break loose"), *with* Tommy Craggs, *The Stupid Moral Panic over Mocking Tim Tebow; Or, What Would Jesus Do About Tebowing?*, DEADSPIN (Nov. 4, 2011, 12:05 PM), https://deadspin.com/the-stupid-moral-panic-over-mocking-tim-tebow-or-what-5856237 ("Whenever Tim Tebow takes a knee on the field and thanks God, he is engaging in a very conscious act of moral grandstanding . . . . In so doing, Tebow knows full well that he is opening himself up to satire, because that is also a part of the deal evangelicals make when they dedicate themselves to converting a skeptical public.").

79. Ryan Bort, *Making Fun of Faith: Tim Tebow's Christianity Mocked by Minor League Team*, NEWSWEEK (June 21, 2017, 10:24 AM), https://www.newsweek.com/tim-tebow-christianity-mocked-minor-league-team-627940.

80. *Id.*

too. Nevertheless, sex-based spectator harassment is actually quite common: not in the sense that fans taunt athletes of one sex for being inferior to athletes of another sex but more often because of perceived deficiencies in an athlete's conformity with gender stereotypes.[81] Fans often try to humiliate players by questioning their masculinity or femininity. For example, as NBA superstar LeBron James exited the court after a game during the 2015 Finals, a fan yelled out, "LeBron, how does it feel to be a p[***]y-a[*]s b[***]h?"[82] When NHL All-Star Sidney Crosby returned to action after taking time off for a broken jaw, New York Islanders fans chanted "Princess Crosby."[83] Brittney Griner, a top player in the Women's National Basketball Association ("WNBA"), is often ridiculed for her large frame and deep voice. "Brittney Griner is now the first man to play in the WNBA," "Brittney Griner threw down two dunks last night. One for each of her testicles," and "Brittney Griner suspended for first three games next season after testing positive for a penis"[84] are just a sampling of the taunts she has endured from fans.

Related to questioning a player's masculinity or femininity are slurs about an athlete's perceived or actual sexual orientation. Following the Supreme Court's landmark decision in *Bostock v. Clayton County*,[85] holding that sexual orientation and transgender discrimination are forms of sex discrimination,[86] taunting based on a player's perceived or actual sexual orientation or gender identity is unequivocally actionable under Title VII. At a Major League Soccer ("MLS") match in Los Angeles, fans chanted an anti-gay epithet as an

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81. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) (holding that discrimination based on nonconformity with gender stereotypes constitutes unlawful sex discrimination).

82. Ferrara, *supra* note 44. According to the report, "[t]he world-famous athlete stared angrily in [the fan's] direction, before returning to the locker room looking confused." *Id.*

83. Jesse Spector, *NHL Playoffs: John Tavares Leads Islanders to Game 4 Victory, Even Series with Penguins*, SPORTING NEWS (May 8, 2013), https://www.sportingnews.com/us/nhl/news/4497613-penguins-islanders-game-4-score-nhl-playoffs-john-tavares-sidney-crosby.

84. Laurie Abraham, *How Slam-Dunking, Gender-Bending WNBA Rookie Brittney Griner is Changing the World of Sports*, ELLE (Nov. 4, 2013), https://www.elle.com/culture/career-politics/interviews/a12606/brittney-griner-profile/.

85. 140 S. Ct. 1731 (2020).

86. *Id.* at 1743 ("For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that 'should be the end of the analysis.'" (quoting Zarda v. Altitude Express, Inc., 883 F.3d 100, 135 (2d Cir. 2018) (Cabranes, J., concurring))).

opposing player took goal kicks.[87] NFL Pro-Bowl receiver Odell Beckham Jr. has long been targeted by fans and opposing players who speculate he is gay.[88] At a World Wrestling Entertainment event in 2019, a spectator shouted "Canadian f****t" and other homophobic slurs at wrestler Sami Zayn, sparking a heated confrontation.[89]

Sexually suggestive conduct by fans toward players is fairly uncommon at professional sporting events, with one notable exception. Numerous teams employ cheerleaders to interact with fans both at games and other events.[90] The harassment cheerleaders endure from fans largely flew under the radar until 2018, when the New York Times published a report based on interviews with dozens of professional cheerleaders.[91] An NBA cheerleader recalled having her buttocks grabbed by a twelve-year-old boy.[92] An NFL cheerleader disclosed that she was taught how to hold her pompoms in a way that would block fans from touching her bare waist or buttocks when they "got too handsy."[93] A cheerleader for the NFL's Dallas Cowboys recalled an incident where a fan of the rival Philadelphia Eagles looked directly at her and said, "I hope you get raped."[94] She and other Cowboys cheerleaders further revealed that they were required to visit tailgate parties and high-priced luxury suites where "[y]ou knew the alcohol was flowing and that they would be handsy. . . . Arms around the waist, kisses on the cheek. You knew

87. Brooke Sopelsa, *Los Angeles Football Club Condemns Fans After Use of Anti-Gay Slur*, NBC NEWS (Nov. 2, 2018, 8:11 PM), https://www.nbcnews.com/feature/nbc-out/los-angeles-football-club-condemns-fans-after-use-anti-gay-n930701.

88. *See* Christopher Chavez, *Michael Irvin: Odell Beckham Victim of Homophobic Taunts All Year*, SPORTS ILLUSTRATED (Dec. 23, 2015), https://www.si.com/nfl/2015/12/23/michael-irvin-odell-beckham-taunted-gay-slurs-new-york-giants (quoting NFL Hall of Famer Michael Irvin, who commented about Beckham, "[h]e deals with it a lot . . . . For some reason, everybody goes after him with gay slurs. He's a different kind of dude. He has the hairdo out, he's not the big muscular kind of dude. The ladies all love him. He's a star. I wonder why people are going in that direction").

89. Tufayel Ahmed, *WWE's Sami Zayn Confronts Fan Who Allegedly Shouted Homophobic Slurs at Him*, NEWSWEEK (Dec. 9, 2019, 7:09 AM), https://www.newsweek.com/sami-zayn-wwe-homophobic-fan-smackdown-1476167.

90. *See, e.g.*, Scott Jenkins, *The Chilly Reason Why 6 NFL Teams Don't Have Cheerleaders*, SPORTSCASTING (June 22, 2020), https://www.sportscasting.com/the-chilly-reason-why-6-nfl-teams-dont-have-cheerleaders/ ("Over time, the role of the cheerleaders has increased, and they now participate in off-the-field events to heighten a team's public image.").

91. Juliet Macur & John Branch, *Pro Cheerleaders Say Groping and Sexual Harassment Are Part of the Job*, N.Y. TIMES (Apr. 10, 2018), https://www.nytimes.com/2018/04/10/sports/cheerleaders-nfl.html.

92. *Id.*

93. *Id.*

94. *Id.*

they would, and you couldn't say anything . . . [or] [y]ou'd be dismissed from the team."[95]

### *D. National Origin*

As more foreign-born players enter American professional sports leagues,[96] it should come as no surprise that fans target them because of their national origin. During an NBA game in Cleveland, a fan yelled at San Antonio Spurs guard Patty Mills, whose father is a Torres Strait Islander and mother is Aboriginal Australian, "[h]ey Mills[,] Jamaica called; they want their bobsledder back."[97] In 2019, NBA player Enes Kanter, a Swiss-born Turk, was subjected to an especially offensive insult. Shortly after the Turkish government sought an international warrant for Kanter's arrest based on his public criticism of Turkish president Recep Erdogon, a fan in Denver yelled at Kanter, "[g]o back to Turkey, oh wait you can't!"[98] Kanter later tweeted in response, "I wish I could go back to Turkey to see Family" and implored the Denver Nuggets to "take control of your fans."[99]

## II. EFFORTS TO CONTROL SPECTATOR HARASSMENT

This Part examines the measures sports organizations have implemented to protect players from spectator harassment. Because lawmakers have shown zero appetite for enacting legislation to regulate fan behavior toward athletes,[100] this task has fallen to teams

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95. *Id.*

96. *See NBA Rosters Feature 108 International Players in 2019–20*, NAT'L BASKETBALL ASS'N (Oct. 22, 2019, 11:43 AM), https://www.nba.com/article/2019/10/22/nba-rosters-feature-108-international-players-2019-20 (reporting that there were 108 international players from 38 countries and territories on NBA opening-night rosters in 2019); *Record 73 Countries Represented Among Diverse MLS Player Pool*, NYCFC (Sept. 19, 2017, 1:58 PM), https://www.nycfc.com/post/2017/09/19/record-73-countries-represented-among-diverse-mls-player-pool (noting that, in 2017, MLS players hailed from 73 countries); *see also New Program Is Opening Doors for International NFL Hopefuls*, ESPN (Nov. 2, 2017), https://www.espn.com/nfl/story/_/id/21230190/how-international-player-pathway-program-opening-doors-four-nfl-hopefuls (describing the NFL's International Player Pathway Program, a global initiative to attract and develop non-traditional football players).

97. Adam Wells, *Cavaliers Indefinitely Ban Fan Who Directed Racist Taunt at Patty Mills*, BLEACHER REP. (Feb. 27, 2018), https://bleacherreport.com/articles/2761752.

98. Joe Nguyen, *Blazers' Enes Kanter Calls on Nuggets to "Take Control of Your Fans,"* DENVER POST (May 2, 2019, 11:20 PM), https://www.denverpost.com/2019/05/02/enes-kanter/.

99. *Id.*

100. There is no state or federal law that specifically addresses spectators' mistreatment of athletes. The only development of note is a resolution that New York Congressman Adriano Espaillat introduced in the House of Representatives

and leagues. These organizations have taken a number of steps in the right direction, but the continued prevalence of spectator harassment indicates their efforts are inadequate.

In the past two decades, several leagues, including the four major professional sports leagues (the NBA, NFL, NHL, and MLB), have implemented fan codes of conduct.[101] These codes tend to be short and quite general in their description of prohibited conduct and the potential consequences for violations. For example, the NFL's code bans "[b]ehavior that is unruly, disruptive, or illegal in nature," "[i]ntoxication . . . that results in irresponsible behavior," and "[f]oul or abusive language or obscene gestures," and the code warns that violators "will be subject to ejection" and prevention from attending future games.[102] Similarly, the NBA's spectator conduct policy prohibits "disruptive behavior, including foul or abusive language and obscene gestures" and "obscene or indecent messages on signs or clothing," and the policy cautions that violators "will be subject to penalty including, but not limited to, ejection without refund, revocation of their season tickets, and/or prevention from attending future games."[103] In some leagues, teams are allowed to supplement the league code with their own additional rules or clarifications. For

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in 2019 condemning racism in sports. *See* H.R. Res. 283, 116th Cong. (2019) (recounting various instances of racism in sports and proclaiming that "racism in sports must be combatted and unequivocally condemned"). The lack of political will to take on spectator harassment is somewhat surprising, if only because of the flurry of state legislation designed to protect referees, umpires, and other sports officials from fan abuse. As of August 2021, twenty-three states had adopted such measures. *See State Legislation*, NAT'L ASS'N SPORTS OFFS., https://www.naso.org/resources/legislation/state-legislation/ (last visited Aug. 12, 2021) (compiling a list of state legislation aimed at protecting sports officials from assault or harassment). In Louisiana, the most recent state to enact such a law, harassing an athletic contest official carries a fine of up to $500 and the possibility of imprisonment for ninety days, as well as mandatory community service and counseling. LA. STAT. ANN. § 14:38.4 (2019).

101. *See NFL Teams Implement Fan Code of Conduct*, NAT'L FOOTBALL LEAGUE (Aug. 5, 2008, 9:43 AM), http://www.nfl.com/news/story/09000d5d809c28f9/article/nfl-teams-implement-fan-code-of-conduct [hereinafter NFL Code]; Scott Lauber, *MLB to Implement Code of Conduct for Fans at Ballparks in 2018*, ESPN (Aug. 22, 2017), https://www.espn.com/mlb/story/_/id/20419845/mlb-implement-code-conduct-fans-ballparks-2018 (reporting that "[b]y adopting a league-wide policy, MLB is seeking to establish a set of minimum behavioral standards and consequences that are uniform across the league, according to a source"); *NBA Fan Code of Conduct*, NAT'L BASKETBALL ASS'N, https://www.nba.com/nba-fan-code-of-conduct (last visited Aug. 12, 2021) [hereinafter NBA Code]; *Code of Conduct*, N.Y. ISLANDERS, https://www.nhl.com/islanders/fans/code-of-conduct (last visited Aug. 12, 2021) [hereinafter NHL Code].

102. NFL Code, *supra* note 101.

103. NBA Code, *supra* note 101.

example, the Utah Jazz's code builds on the NBA's more general proscriptions by specifically prohibiting "hate speech, racism, sexism [and] homophobia."[104]

Fan codes of conduct are necessary—but far from sufficient—to protect players from spectator harassment. The policy language is often too generic to give fans any real sense of what behaviors are prohibited. Fans can have very different definitions of terms such as "foul," "abusive," and "obscene," and without a specific prohibition against race-, color-, religion-, sex-, and national-origin-based taunting, there is no guarantee that fans will understand that behavior towards players based on these characteristics is off-limits. Furthermore, none of the four major sports leagues' codes specify that the rules apply to fans' interactions with players, which may lead some fans to mistakenly believe the rules only apply to their interactions with each other.[105] Such ambiguities not only fail to give spectators a clear understanding of what they can and cannot do but also can lead to inconsistent enforcement, further undermining the codes' effectiveness.

Of course, the contents of a fan code of conduct only matter if spectators actually take the time to read and understand them. Unfortunately, there is little reason to believe this is happening.[106] Efforts to communicate codes to fans vary from team to team. Virtually every team includes its code on its website, but it seems unlikely many fans would bother to seek it out. Some teams post language about their code on electronic scoreboards before and during their games, have the public address announcer remind fans about the code, or play a video message from a player about the code during a timeout.[107] But with everything else that goes on at a game, it is

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104. *NBA & Utah Jazz Fan Code of Conduct*, UTAH JAZZ, https://www.nba.com/jazz/gamenight/fan-code-of-conduct (last visited Aug. 12, 2021).

105. The NFL's fan code specifically prohibits "[v]erbal or physical harassment of opposing team fans," but makes no mention of harassment of players. NFL Code, *supra* note 101.

106. *See, e.g.*, Ed Reeves, *Fan Behavior Is Getting Worse Every Year, and the NBA Is Sick of It*, SPORTSCASTING (Nov. 19, 2019), https://www.sportscasting.com/fan-behavior-is-getting-worse-every-year-and-the-nba-is-sick-of-it/ (noting that, in the 2018–19 season, five times as many fans were banned as in the prior season, prompting the NBA to promote the fan code of conduct more frequently during games and increase enforcement).

107. *See, e.g.*, Peter Schmuck, *Don't Be a Jerk*, BALT. SUN (Aug. 7, 2008, 2:00 AM), https://www.baltimoresun.com/bs-mtblog-2008-08-dont_be_a_jerk-story.html (discussing "don't be a jerk" announcements used by the Baltimore Ravens); *see also RESPECT Campaign*, NCAA, https://www.ncaa.org/about/what-we-do/fairness-and-integrity/sportsmanship/ncaa-respect-campaign (last visited Aug. 12, 2021) (providing resources for NCAA teams to enhance sportsmanship through game program ads, in-venue signage, and audio/visual public service announcements).

doubtful these communications reach the average fan in a meaningful way.

Even a well-drafted and effectively communicated code of conduct may not have much of an impact on fan behavior given the physiological and psychological conditions spectators often experience at sporting events. Alcohol consumption—a ubiquitous feature of most sporting events—lowers inhibitions, prompting fans to behave in ways they would not dream of when sober.[108] Many fans also experience spikes in testosterone, which can result in more aggressive behavior.[109] In addition, fans often experience psychological conditions that can further diminish a conduct code's deterrent effect. Spectators in large crowds know the likelihood of getting caught for misbehaving is low, and the anonymity they feel may lead them to believe their actions will not result in social or legal repercussions.[110] Furthermore, spectators often experience what social psychologists call "deindividuation," a state characterized by a loss of self-awareness, a sense of diffused responsibility, and decreased concern about how others may valuate their behavior, which results in the abandonment of normal restraints and inhibitions.[111]

Moreover, fan conduct codes are notoriously difficult to enforce. Identifying a violator in a sea of fans can be next to impossible, especially when a single event staffer is responsible for monitoring a section of hundreds or even thousands of fans. Realizing the impossibility of this task, many leagues and teams have set up hotlines that spectators can call or text to report unruly behavior.[112]

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108. *See* Michael K. Ostrowsky, *Sports Fans, Alcohol Use, and Violent Behavior: A Sociological Review*, 19 TRAUMA, VIOLENCE, & ABUSE 406, 406–15 (2018) (reviewing studies that examine the link between sports fans' alcohol consumption and violent behavior).

109. *See* Paul C. Bernhardt et al., *Testosterone Changes During Vicarious Experiences of Winning and Losing Among Fans at Sporting Events*, 65 PHYSIOLOGY & BEHAV. 59, 59–61 (1998) (finding that testosterone levels increased in male fans associated with winning teams in sporting events and decreased in the fans of losing teams).

110. Brian S. Gordon & Jeremy Arney, *Investigating the Negative Fan Behaviors of a Branded Collegiate Basketball Student Section*, 3 J. AMATEUR SPORT 82, 85 (2017) ("In the realm of a sport stadium, a feeling of anonymity can lead an individual to believe that his or her actions will not result in social or legal repercussions.").

111. *See* Leon Mann et al., *A Test Between Deindividuation and Emergent Norm Theories of Crowd Aggression*, 42 J. PERSONALITY & SOC. PSYCH. 260, 260–61 (1982) (explaining deindividuation theory); Yaron Simons & Jim Taylor, *A Psychosocial Model of Fan Violence in Sports*, 23 INT'L J. SPORTS PSYCH. 207, 226 (1992) (concluding that an individual in the presence of a group with a strong connection may be susceptible to abandoning personal responsibility and losing a sense of self and social restraint).

112. JACK BOWEN ET AL., SPORT, ETHICS AND LEADERSHIP 85 (2017) ("Most teams also have phone or text 'hotlines,' and fans are encouraged to report offensive language or behavior.").

But even then, fans may not want to report each other, and when they do, it is difficult to take action unless the event staffer directly witnesses the behavior or secures corroborating evidence. When violators can be identified, they may be warned[113] or ejected.[114] In severe cases, a team may ban a fan from attending future games.[115] The NFL has been particularly aggressive in this regard, implementing a rule in 2015 that fans who receive bans are barred from entry into any NFL stadium, not just the one from which they were ejected.[116] It likewise requires any fan who wishes to have a ban lifted to complete a four-hour online fan conduct course at a cost of approximately $250.[117] Although ejections and bans might seem like stringent measures, in reality they can be easily circumvented.[118] There is little to stop an ejected fan from purchasing another ticket from someone on the street and reentering the stadium. Likewise, banned fans can easily have someone else purchase them a ticket or buy a ticket themselves through secondary market websites like SeatGeek. Sometimes teams will take pictures of fans who are banned and distribute them to event staff, but catching violators is nearly impossible. It is not difficult for fans to disguise themselves, particularly when they are part of a mass of thousands of spectators trying to quickly enter a venue.

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113. *See* Ben Sin, *NBA Fan Issued Warning Card for "Verbal Abuse,"* SPORTS ILLUSTRATED (Dec. 5, 2013), https://www.si.com/extra-mustard/2013/12/05/nba-fan-issued-warning-card-for-verbal-abuse (reporting that an NBA fan was handed a warning card).

114. *See, e.g.*, Michael Shapiro, *Yankees Fan Ejected After Pregame Taunts Toward Zack Greinke*, SPORTS ILLUSTRATED (Oct. 18, 2019), https://www.si.com/mlb/2019/10/18/yankees-fan-ejected-taunting-zack-greinke-alcs-game-4 (reporting that a fan was ejected from a baseball game for insulting an opposing player about his "battles with a social anxiety disorder and depression" and making "crude remarks" about the player's mother).

115. *See, e.g.*, *Reports: Jazz Issue Lifetime Ban to Another Fan*, NBA (Mar. 15, 2019, 2:12 PM), https://www.nba.com/article/2019/03/15/reports-utah-jazz-lifetime-ban-second-fan (reporting that the Utah Jazz imposed lifetime bans on the fans who taunted Russell Westbrook).

116. Daniel Kaplan, *NFL: Fans Ejected from Stadium Will Now be Barred from Others*, SPORTS BUS. J. (Dec. 15, 2014), https://www.sportsbusinessjournal.com/Journal/Issues/2014/12/15/Leagues-and-Governing-Bodies/NFL-security.aspx.

117. *4 Hour Online Fan Code of Conduct Class*, AJ NOVICK GROUP, INC., https://www.fanconductclass.com/nfl/ (last visited Aug. 12, 2021); Darren Rovell, *NFL Gets Serious About Fan Conduct*, ESPN (Aug. 17, 2012), https://www.espn.com/nfl/story/_/id/8278886/.

118. *See* Brandon Griggs, *Stadiums Can Ban a Fan for Life. But They Can't Easily Enforce It*, CNN (May 4, 2017, 8:26 PM), https://www.cnn.com/2017/05/04/sport/ballparks-banning-fans-explainer-trnd/index.html; Dave Sheinin & Mike Hume, *When Fans Get Banned for Life from Sports Stadiums*, WASH. POST (Oct. 7, 2016, 1:46 PM), https://www.washingtonpost.com/news/sports/wp/2016/10/07/when-fans-get-banned-for-life-from-sports-stadiums/.

Recognizing the limitations of fan codes, some teams and leagues have taken additional measures to control spectator behavior. Because alcohol is often a driver of fan misconduct, some organizations have implemented policies to limit alcohol consumption. The NFL's San Francisco 49ers forbid spectators from bringing outside alcoholic beverages into their games, restrict fans from purchasing more than two drinks at a time, and discontinue alcohol sales after the end of the third quarter.[119] Like codes of conduct, restrictions on alcohol sales are an important component of crowd control but are difficult to enforce. It is not especially difficult to smuggle in alcohol, fans who wish to consume more than two alcoholic beverages can simply go to the concession stand multiple times or have someone else buy their drinks, and fans can get plenty drunk well before the fourth quarter—particularly if they have been drinking for hours beforehand, as is often customary.

Another tactic some organizations have deployed is to promote initiatives and events to improve sportsmanship. Boston-area professional sports teams have joined together to form the "Take the Lead" campaign to "[f]oster[] an inclusive and safe in-venue environment."[120] In Utah, professional teams and several universities created the "Lead Together" initiative, which has the goal of "cultivating and promoting a community culture of inclusion and belonging."[121] In addition to model campaigns like these, some teams host smaller events to promote greater tolerance and understanding. The NBA's San Antonio Spurs organized an "Indigenous Night," hosted by Patty Mills (the player who was told by a fan that Jamaica wanted its bobsledder back),[122] and twenty-eight of the thirty MLB teams hosted LGBTQ+ pride events during the 2019 season.[123] Sometimes individual players take it upon themselves to promote better fan behavior. NBA star Draymond Green, who has been outspoken about the racial abuse he endures from fans, once wore custom-designed shoes during a game that read "Sideline Racism" to

119. *Stadium A-Z Guide, Alcohol Policy*, LEVI'S STADIUM, https://www.levisstadium.com/stadium-az-guide/ (last visited Aug. 12, 2021).

120. *Mission*, TAKE THE LEAD, https://taketheleadboston.org/ (last visited Aug. 12, 2021).

121. Ryan McDonald, *Following Numerous Incidents of Fan Misbehavior Toward Athletes, Utah Sports Teams Join 'Lead Together' Initiative*, DESERET NEWS (Oct. 25, 2019, 2:11 PM), https://www.deseret.com/2019/10/25/20932478/fan-misbehavior-toward-athletes-utah-sports-teams-join-lead-together-initiative.

122. Kenny Honaker, *Patty Mills to Host First-Ever Indigenous Night on Jan. 19*, CLUTCHPOINTS (Jan. 14, 2020), https://clutchpoints.com/spurs-news-patty-mills-to-host-first-ever-indigenous-night-on-jan-19/.

123. Dawn Ennis, *Play Ball! All But 2 MLB Teams are Hosting Pride Events this Season*, SB NATION OUTSPORTS (Apr. 10, 2019, 7:30 PM), https://www.outsports.com/2019/3/28/18285393/baseball-mlb-opening-day-hosting-pride-events.

raise awareness that "[e]very person, regardless of their race, deserves respect and dignity."[124]

A final strategy some teams employ is to publicly denounce fans for their bigoted behavior toward players. The day after Boston Red Sox fans called Adam Jones the N-word and threw a bag of peanuts at him, team president Sam Kennedy publicly warned, "[w]e want to make sure that our fans know, and the market knows, that offensive language, racial taunts, [and] slurs are unacceptable . . . . If you do it, you're going to be ejected . . . [and] subject to having your tickets revoked for a year, maybe for life."[125] After the Utah Jazz fan shouted at Russell Westbrook to "get on [his] knees," team owner Gail Miller took the unusual step of directly addressing the crowd in person prior to the next home game.[126] She told the crowd she was "extremely disappointed that one of our quote 'fans' conducted himself in such a way as to offend not only a guest in our arena, but also me personally, my family, our organization, the community, our players, and you . . . ."[127] Miller implored fans to not only refrain from such behavior but to call it out when it happens: "This should never happen. We are not a racist community . . . . We believe in treating people with courtesy and respect as human beings. From time to time, individual fans . . . disrespect players on other teams. When that happens, I want you to jump up and shout 'Stop.'"[128]

Although some sports organizations have taken some steps to curb spectator harassment, their efforts have not produced the intended outcome. If anything, spectator harassment has intensified

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124. Tamryn Spruill et al., *Draymond Green Takes a Stand by Wearing RISE's 'Sideline Racism' Shoes for MLK Day*, SB NATION GOLDEN STATE OF MIND (Jan. 16, 2017, 12:01 PM), https://www.goldenstateofmind.com/2017/1/16/14278590/nba-2017-mlk-day-warriors-draymond-green-shoes-sideline-racism.

125. Joseph Zucker, *Red Sox Considering Lifetime Ban for Fans for Racism After Adam Jones Incident*, BLEACHER REP. (May 3, 2017), https://bleacherreport.com/articles/2707542-red-sox-considering-lifetime-ban-for-fans-for-racism-after-adam-jones-incident. Likewise, the same night that Chicago Blackhawks fans serenaded Devante Smith-Pelly with chants of "[b]asketball," the team issued a statement apologizing to Smith-Pelly and his team and emphasizing its "commit[ment] to providing an inclusive environment for everyone who attends our games and [that] these actions will never be tolerated." Pete Blackburn, *Chicago Fans Ejected Following Racist Taunts at Capitals' Devante Smith-Pelly*, CBS SPORTS (Feb. 18, 2018, 9:51 AM), https://www.cbssports.com/nhl/news/chicago-fans-ejected-following-racist-taunts-at-capitals-devante-smith-pelly/.

126. MacMahon, *supra* note 2; Matt Eppers, *Jazz Owner Gail Miller Addresses Utah Crowd on Russell Westbrook Incident: 'This Should Never Happen,'* USA TODAY (Mar. 15, 2019, 9:03 PM), https://www.usatoday.com/story/sports/nba/jazz/2019/03/14/jazz-owner-gail-miller-addresses-crowd-russell-westbrook-confrontation/3170346002/.

127. Eppers, *supra* note 126.

128. *Id.*

in recent years.[129] Despite the inherent difficulty of controlling thousands of fans all at once, this is not a problem without a solution. Teams and leagues have a number of powerful tools at their disposal that could significantly reduce spectator harassment.[130] As the next Part explains, spectator harassment litigation may provide the necessary spark for sports organizations to implement such measures.

## III. HOLDING SPORTS ORGANIZATIONS ACCOUNTABLE

This Part examines how professional sports organizations can be held accountable through Title VII litigation. Under this statute, an employer is liable when a co-employee or even a non-employee subjects an employee to unwelcome conduct that is based on the employee's protected characteristic and that conduct "is sufficiently severe or pervasive to alter the [employee's] conditions of . . . employment and create an abusive work environment."[131] For the employer to be liable, the employee must further prove that the employer was negligent by failing to take reasonable steps to prevent or correct the harassment.[132] This Part considers the unique challenges athletes face in proving each element of a spectator harassment claim and identifies multiple openings within the case law that athletes can leverage to increase their likelihood of success.

### *A. Unwelcomeness*

Only unwelcome conduct is actionable as harassment under Title VII.[133] "Whether words or conduct were unwelcome presents a difficult question of proof turning largely on credibility determinations committed to the factfinder."[134] In the absence of a bright-line test, courts scrutinize the plaintiff's own behavior in determining whether conduct was welcome or unwelcome, routinely dismissing cases where the plaintiff instigated the harassment.[135]

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129. *See supra* text accompanying notes 7–11.

130. *See infra* Subpart III.D.2.b.

131. Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 277 (4th Cir. 2015) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

132. *Id.* at 278.

133. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) ("The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" (quoting 29 C.F.R. § 1604.11(a) (1985)).

134. Hrobowski v. Worthington Steel Co., 358 F.3d 473, 476 (7th Cir. 2004) (citing Reed v. Shepard, 939 F.2d 484, 491 (7th Cir. 1991), *abrogation on other grounds recognized*, Betts v. Container Corp. of Am., 114 F.3d 1191 (7th Cir. 1997)).

135. *See, e.g.*, Mahler v. First Dakota Title Ltd. P'ship, 931 F.3d 799, 806–07 (8th Cir. 2019) (affirming summary judgment for the employer on the employee's sexual harassment claim where the employee welcomed a coworker's email

More difficult are cases where the plaintiff did not initiate the harassment but nonetheless participated in it. In such cases, courts often look to whether the plaintiff made some sort of complaint.[136] For example, the Seventh Circuit affirmed a directed verdict against the harassment claim of a female jail employee who never complained about the allegedly harassing conduct but preferred instead to deal with coworkers through making her own sexually explicit jokes.[137] By contrast, the Seventh Circuit held in another case that the employee made a sufficient showing that the harassing speech was unwelcome, even though he admitted to making racially oriented jokes and using racial epithets in the workplace.[138] Key to the court's decision was the fact that, unlike the plaintiff in the prior case, this employee complained to his managers, which could lead a reasonable jury to conclude the employee "did not welcome racist speech, at least when he was the victim of that language."[139]

*1. Obstacles*

It may seem axiomatic that spectator harassment is always unwelcome, but the way courts determine unwelcomeness presents three unique challenges for athletes. First, a player might be less likely than workers in other professions to complain about spectator harassment. If a player responds too forcefully, he could be fined or suspended. For instance, the NBA fined Westbrook $25,000 for swearing at the fan who told him to get down on his knees.[140] Even a player who responds less aggressively runs the risk of further inciting fans. Spectators taunt players to get a reaction. When a player objects, it signals to the fans that they were successful in getting inside the player's head, which is likely to lead to even more taunting. Even if a player is not worried about riling up the crowd, he may still refrain from vocalizing his dismay because it would force him to admit

containing an off-color joke by responding to the email, "[n]o offense taken and thank you I did get a good laugh out of it").

136. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N ("EEOC"), POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT, N-915-050 (1990), https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment ("When there is some indication of welcomeness or when the credibility of the parties is at issue, the charging party's claim will be considerably strengthened if she made a contemporaneous complaint or protest.").

137. *Reed*, 939 F.2d at 491.

138. *Hrobowski*, 358 F.3d at 476.

139. *Id.*

140. MacMahon, *supra* note 2. In addition to the fine, the fan involved in the altercation unsuccessfully sued Westbrook and the Jazz for $100 million, alleging defamation and intentional infliction of emotional distress. Madeline Coleman, *Report: Judge Dismisses $100M Heckler Lawsuit Against Russell Westbrook*, SPORTS ILLUSTRATED (May 27, 2021), https://www.si.com/nba/2021/05/28/russell-westbrook-utah-jazz-lawsuit-dropped.

that he allowed a fan to affect him. For hypercompetitive athletes who are taught from a young age to block out the crowd, acknowledging this could prove difficult.

Second, a player may respond to harassment in a way that seems to welcome it. When a fan threw a banana at Brazilian soccer player Dani Alves, he responded by picking up the banana, peeling it, and taking a bite.[141] NHL star Alex Ovechkin responded to chants of "Ovi sucks" by cupping his hand to his ear in an "I can't hear you" gesture.[142] Similarly, Russian tennis player Daniil Medvedev extended his arms toward the booing crowd at the 2019 U.S. Open and motioned for the fans to keep taunting him.[143] Actions like these may appear welcoming, particularly since an athlete may even publicly claim the taunts boosted his performance. Indeed, during his on-court interview after winning the match, Medvedev incited the crowd further: "I want all of you to know when you sleep tonight, I won because of you."[144] As the crowd booed even louder, he added, "[t]he more you do this, the more I will win for you guys."[145]

Third, another obstacle in proving unwelcomeness is the perception that spectator harassment is simply part of a professional athlete's job. Unlike most other jobs, professional athletes go to work expecting to be both cheered and jeered as they simultaneously play the role of hero to their supporters and villain to their opponents. As much as an organization may push good sportsmanship, the truth of the matter is that jeering is a vital part of the fan experience, as it allows fans to feel like they are doing their part to help their team win by rattling the opponent.[146] In a very real sense, teams and players directly profit from allowing fans to boo and taunt. Because a player voluntarily consents to play in hostile environments (i.e., road games) and is often paid handsomely for doing so, a court—and

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141. *Dani Alves Picks up and Eats Banana Thrown at Him as Barcelona Take on Villarreal*, TELEGRAPH (Apr. 28, 2014, 1:55 PM), https://www.telegraph.co.uk/sport/football/teams/barcelona/10792582/Dani-Alves-picks-up-and-eats-banana-thrown-at-him-as-Barcelona-take-on-Villarreal.html.

142. Harrison Mooney, *Alex Ovechkin Answers Rangers Fan Taunts with Goal, Hand to Ear Celebration*, YAHOO! SPORTS (Apr. 30, 2012, 10:31 PM), https://sports.yahoo.com/blogs/nhl-puck-daddy/alex-ovechkin-answers-rangers-fan-taunts-goal-hand-023118193.html.

143. Brian Mahoney, *Medvedev Encourages U.S. Open Fans to Boo, and They Respond*, AP NEWS (Aug. 31, 2019), https://apnews.com/article/e659af5b377941f98a681cfe0aff5dd9.

144. *Id.*

145. *Id.*

146. *See* Chris Mannix, *Heckling Can Be Fun. It's Up to NBA Fans to Keep It That Way*, SPORTS ILLUSTRATED (Mar. 15, 2019), https://www.si.com/nba/2019/03/15/russell-westbrook-thunder-jazz-fan-banned-nba-fine-shane-keisel ("Here's the thing about heckling: At its best, it's fantastic. Home court advantage isn't restricted to cheer and boos. There's a place for creative and well-placed heckles.").

especially a jury—may have difficulty believing the harassment was truly unwelcome.[147]

*2. Solutions*

Players should argue they are entitled to a presumption that spectator harassment is always unwelcome. This is because spectator harassment has no intrinsic social value, so a player would never have reason to welcome it. Whereas it is possible for a sexual-harassment plaintiff to welcome advances, comments, innuendo, or even touching because such conduct can be part of the process by which people engage in legitimate dating activities, the same cannot be said of a player who is subjected to bigoted taunts and slurs. The Equal Employment Opportunity Commission ("EEOC") has long endorsed this position, reasoning that "[w]hereas racial slurs are intrinsically offensive and presumptively unwelcome, sexual advances and innuendo are ambiguous: depending on their context, they may be intended by the initiator, and perceived by the recipient, as denigrating or complimentary, as threatening or welcome, as malevolent or innocuous."[148] Several courts have adopted the EEOC's position, holding that racist, religious, and ethnic slurs are presumptively unwelcome.[149] Although courts ordinarily do not extend this presumption to sexual harassment claims, the case for doing so in spectator harassment cases is strong. When a fan makes sexual comments or gestures to an athlete, he does so to demean and

147. This may be particularly true for professional cheerleaders, whose revealing costumes and provocative dance moves may be construed as welcoming at least some behaviors that in other settings would be unequivocally unwanted. *See* Macur & Branch, *supra* note 91 ("Many cheerleaders . . . said that . . . uncomfortable situations just came with the territory."). A former Tennessee Titans cheerleader commented, "[w]hen you have on a push-up bra and a fringed skirt, it can sometimes, unfortunately, feel like it comes with the territory." *Id.*

148. Brief for the United States and the EEOC as Amici Curiae Supporting Petitioner, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (No. 84-1979), 1985 WL 670162, at *13; *see also* EEOC, SECTION 15 RACE AND COLOR DISCRIMINATION, N-915.003 (2006), https://www.eeoc.gov/policy/docs/race-color.html ("When the conduct involves mistreatment or is racially derogatory in nature, unwelcomeness usually is not an issue . . . .").

149. *See, e.g.*, Washington v. Koch Foods of Gadsden, L.L.C., No. 1:16-CV-01100-SGC, 2017 WL 6034194, at *5 (N.D. Ala. Dec. 6, 2017) ("The court need not question whether Plaintiff subjectively perceived Nichols's use of racial slurs as a severe form of 'unwelcome racial harassment.' The court will assume that he did perceive it as such; certainly, he would have been reasonable in doing so."); Reed v. Airtran Airways, 531 F. Supp. 2d 660, 669 n.14 (D. Md. 2008) ("Although [unwelcomeness] is frequently litigated in cases alleging sexual harassment, where race-based harassment is alleged, courts generally assume the conduct was 'unwelcome.'" (citing Newman v. Fed. Express Corp., 266 F.3d 401, 405–06 (6th Cir. 2001)).

humiliate—not to flirt or solicit. As with other types of spectator harassment, courts should presume athletes do not welcome sex-based harassment because there is no inherent value in it. Professional cheerleaders gain nothing from being sexually demeaned.

A player should likewise argue that a court should not ordinarily consider the player's own actions in assessing unwelcomeness because spectator harassment has no social value. Here, context matters. As previously discussed, there are a number of reasons why a player may pretend to be unfazed by taunting. The fact that a player does not retaliate or complain should not be mistaken for welcomeness. Even when a player appears to egg the crowd on or plead with fans to continue, such actions should be understood for what they are: a face-saving, defense mechanism intended to insulate the player from further humiliation while under intense pressure to perform.

There are at least two responses to the claim that professional athletes implicitly welcome spectator harassment as part of their job. One is that the Supreme Court long ago dispensed with the notion that voluntariness equates to welcomeness. In *Meritor Savings Bank, FSB v. Vinson*,[150] the Court explained that the plaintiff's voluntary participation in sex-related conduct was not a defense to a sexual harassment claim.[151] What matters is whether the alleged harassment was unwelcome, not whether the plaintiff's participation in the harassment was voluntary.[152] By the same token, a player cannot be said to have welcomed spectator harassment simply because he chooses to play in front of hostile crowds.

The other response is that harassment is never part of the job—no matter how much employees are paid or what line of work they are in. The law on this point is somewhat complicated. Courts disagree over whether the environment in which the conduct occurs should factor into whether a plaintiff has experienced unwelcome harassment. The Sixth Circuit has held that a plaintiff's work environment is irrelevant because it is "illogical" that "women working in the [male-dominated] trades . . . deserve less protection from the law than women working in a courthouse."[153] By contrast,

150. 477 U.S. 57 (1986).

151. *Id.* at 68.

152. *Id.*

153. Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999); *see also* O'Rourke v. City of Providence, 235 F.3d 713, 735 (1st Cir. 2001) (rejecting the argument that the defendant was entitled to a jury instruction that the firefighters' conduct should be evaluated in the context of a blue-collar environment); *id.* ("As always, regardless of the setting, 'the critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment . . . .'" (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring))).

the Tenth Circuit has reached the opposite conclusion, reasoning that "[s]peech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other work environments."[154] Regardless of the jurisdiction, there is a limit to the type and amount of harassment an employee can be said to welcome.[155] At the very least, a player should never be deemed to have welcomed conduct that his own employer forbids. If a team prohibits behavior that would amount to spectator harassment as part of its fan code, it should be clear that the player could not have welcomed it.

### *B. Based on a Protected Characteristic*

Harassment is actionable under Title VII only if it occurs because of the victim's protected characteristic.[156] Although a plaintiff need not show the conduct was explicitly discriminatory, it must have an impermissible "character or purpose" to support a harassment claim.[157] Courts have little trouble finding explicitly bigoted conduct to be based on a protected characteristic, but they must probe deeper when the motivation behind the conduct is less apparent. In *Williams v. CSX Transportation Co.*,[158] a Black janitor alleged that her supervisors harassed her because of her race.[159] She claimed one supervisor made several racist statements to her, including that she was a Democrat only because she was a Black woman and "that [B]lack people should 'go back to where [they] came from.'"[160] She further alleged that, because of her race, a second supervisor forced

154. Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1538 (10th Cir. 1995); *see also* Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65, 68 (2006) (criticizing the view that the legal definition of harassment should be uniform as it "assumes that hostile work environments are static, definable conditions unrelated to the workplace or the job in question."); *id.* ("There is no question, however, that the social context of the workplace is extremely important in determining whether sexual harassment occurs.").

155. *See, e.g.*, Clark v. Top Shelf Ent., L.L.C., No. 16-CV-00144-MOC-DSC, 2017 WL 971051, at *4 (W.D.N.C. Mar. 13, 2017) ("Workers, including exotic dancers, have protections at the workplace, including protections from sexual harassment . . . .").

156. Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 809 n.3 (11th Cir. 2010) ("[T]he Courts of Appeals have uniformly observed that Title VII is not a civility code, and that harassment must discriminate on the basis of a protected characteristic in order to be actionable.").

157. Luckie v. Ameritech Corp., 389 F.3d 708, 713 (7th Cir. 2004) (explaining that, although a plaintiff need not show the conduct against him was explicitly racist, the plaintiff "must have a racial character or purpose to support a hostile work environment claim.").

158. 643 F.3d 502 (6th Cir. 2011).

159. *Id.* at 505–07.

160. *Id.* at 506.

her to clean feces off a restroom wall, ordered her to strip a bathroom floor with an inappropriately small device, and refused to reimburse her mileage cost.[161] The Sixth Circuit found that the first supervisor's comments were "plainly based on race" but concluded that the mistreatment from the second supervisor was not race based because "[n]one of it involved the use of racist language," there was no evidence that the second supervisor ever used such language, and the mere fact that the first supervisor used racist language did "not imply that . . . [the second supervisor] harbored the same prejudices."[162]

*1. Obstacles*

Proving spectator harassment was based on a protected characteristic can be very easy or very difficult, depending on the nature of the conduct. As Part I illustrates, spectator harassment is often overtly discriminatory. When fans use explicitly discriminatory language, such as calling a player the N-word, there can be no doubt that such behavior is racially motivated. Some fans believe the more shocking and offensive they can be, the more likely they are to get inside a player's head. Athletes typically are unfazed by garden-variety heckling but may have a much different reaction to an explicitly racial or homophobic taunt.[163] Thus, fans have an incentive to make their conduct as blatantly discriminatory as possible, and the social psychological conditions that fans experience at sporting events may give them the audacity to act on that impulse.[164]

Not all spectator harassment is explicitly discriminatory. Fans concerned about getting ejected may resort to more covert tactics, such as making animal noises when Black players are present[165] or chanting "U-S-A" at Latino players.[166] In some cases, fans may

161. *Id.* at 505–06.

162. *Id.* at 512.

163. When the fan told Westbrook to get on his knees, Westbrook angrily replied, "[y]ou think I'm playing? I swear to God. I swear to God. I'll f[**k] you up. You and your wife. I'll f[**] you up." Jason Owens, *Russell Westbrook to Fan at Jazz Game: 'I'll F— You up, You and Your Wife,'* YAHOO SPORTS (Mar. 11, 2019), https://sports.yahoo.com/russell-westbrook-to-jazz-fans-ill-f-you-up-you-and-your-wife-030745972.html.

164. *See supra* text accompanying notes 108–11.

165. *See, e.g.*, Max Brantley, *Report: Racial Taunts Greet Visiting Basketball Team in Harrison*, ARK. TIMES (Jan. 15, 2018, 5:28 PM), https://arktimes.com/arkansas-blog/2018/01/15/report-racial-taunts-greet-visiting-basketball-team-in-harrison (reporting that spectators at a college basketball game in Arkansas made monkey and crow-cawing noises in the presence of Black players).

166. *See, e.g.*, Des Bieler, *In Iowa, Fans Chant 'Trump! Trump!' at Racially Diverse High School Basketball Team*, WASH. POST (Feb. 25, 2016, 1:21 AM), https://www.washingtonpost.com/news/early-lead/wp/2016/02/25/in-iowa-fans-chant-trump-trump-at-racially-diverse-high-school-basketball-team/ (reporting that spectators at a high school basketball game in Iowa "were chanting 'Trump! Trump! Trump!' and 'U-S-A'" at opposing players of color).

disguise discriminatory behavior through facially neutral tactics such as booing or yelling "[y]ou suck." If a fan engages in such conduct because of a player's protected trait, the harassment is actionable even though it may appear facially nondiscriminatory. But proving this is challenging. Unlike other workplaces, sports venues are meant to be hostile to visiting players. If all of the players on a team are getting booed and jeered, how can a Lutheran player prove the generic boos directed at her were because of her religious beliefs? Even if she is subjected to more ridicule than her teammates, this does not necessarily mean it is because of her religion. Fans may single her out for a host of nondiscriminatory reasons, such as her aggressive style of play or political views. When former Washington Nationals All-Star Bryce Harper returned to Washington, D.C., after leaving the team for the rival Philadelphia Phillies, fans who once adored him showered him with insults—not because of any protected trait but because they viewed him as a traitor.[167]

*2. Solutions*

If spectator harassment is not overtly discriminatory, one way a player can prove the conduct was based on a protected characteristic is by tying it to a stereotype or historical event. If a fan holds up a picture of a monkey every time a Black player shoots free throws, she could prove the monkey picture was racially motivated by pointing to the ugly history of Blacks being portrayed as monkeys or apes. In *Burkes v. Holder*,[168] the district court held that a stuffed monkey hanging by its neck on an eraser board constituted race-based harassment.[169] The court reasoned that the monkey and noose "are powerful symbols of racism and violence against African Americans," and that "[g]iven the history of racial stereotypes against African-Americans . . . as animals or monkeys, it is a reasonable—perhaps even an obvious—conclusion that the use of monkey imagery is intended as a racial insult where no benign explanation for the imagery appears."[170]

If spectator harassment cannot be tied to stereotypes or historical events, it will be harder to prove discriminatory motive. A player will first have to establish that the conduct directed at her was more frequent or materially different than what other players experienced. Even then, she could have been singled out for a variety of reasons unrelated to a protected trait. She could strengthen her argument by

167. *See* Jesse Dougherty & Bryan Flaherty, *'T-R-A-I-T-O-R': Bryce Harper Booed in His First Trip Back to Nats Park*, WASH. POST (Apr. 2, 2019, 10:04 PM), https://www.washingtonpost.com/sports/2019/04/02/bryce-harper-nationals-park-reception-i-hope-i-get-great-one/.

168. 953 F. Supp. 2d 167 (D.D.C. 2013) (mem.).

169. *Id.* at 179.

170. *Id.* (citations omitted) (quoting Jones v. UPS Ground Freight, 683 F.3d 1283, 1297 (11th Cir. 2012)).

eliminating other possible explanations for her differential treatment, but the difficulty of this tactic, of course, is that there are virtually infinite nondiscriminatory reasons why fans might single out the player for heckling. Eliminating all of those reasons would be practically impossible.

Another way to show facially nondiscriminatory conduct has an impermissible motive is by considering the broader context in which the conduct occurred. If a spectator yells generic insults at a Jewish player but also makes a Nazi salute gesture at him, the player may be able to show there was religious animus behind the generic insults as well. In *Johnson v. Spencer Press of Maine, Inc.*,[171] the First Circuit held that the jury could consider generic slurs to be religious harassment because the perpetrator had also made several derogatory comments to the victim about his religion.[172] The court explained, "[g]iven the consistency of the harassment that specifically invoked Johnson's religion and the more frequent harassment that did not, the jury could easily have concluded that the underlying motivation—religious discrimination—was the same for each."[173] Using context to expose discriminatory motive becomes more challenging when the perpetrator of the facially neutral conduct is different from the perpetrator of the explicitly discriminatory conduct. If one spectator makes a Nazi salute and the person in the next seat simply boos the Jewish player, imputing the saluting fan's discriminatory motive to the booing fan would be nearly impossible.

### *C. Severe or Pervasive*

Harassment is actionable only if the "'discriminatory intimidation, ridicule, and insult' . . . is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[174] A plaintiff must show the work environment was both subjectively and objectively offensive, "one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."[175] Whether harassment is severe or pervasive is "not answered by 'a mathematically precise test'"[176] but depends on the totality of the circumstances.[177] Courts

171. 364 F.3d 368 (1st Cir. 2004).

172. *Id.* at 376.

173. *Id.*

174. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (citations omitted) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65, 67 (1986)).

175. Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998).

176. Walker v. Mod-U-Kraf Homes, L.L.C., 775 F.3d 202, 209 (4th Cir. 2014) (quoting *Harris*, 510 U.S. at 22).

177. Guessous v. Fairview Prop. Invs., L.L.C., 828 F.3d 208, 224 (4th Cir. 2016) (finding the district court erred by failing to consider the "totality of circumstances" in determining whether the conduct was severe or pervasive (citing Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 277 (4th Cir. 2015)));

consider various factors, such as "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[178] The severe or pervasive requirement tends to run on a sliding scale: a few isolated occurrences will not suffice unless they are quite severe, but a slew of less severe incidents that continue over an extended period may meet the standard.[179] Because this is a fact-intensive inquiry, courts often find themselves "in the unfortunate position of . . . 'resorting to crudity comparables,'" weighing the "crudity and 'lewdity' found in one case" against conduct deemed sufficiently severe or pervasive in another.[180]

*1. Obstacles*

Proving spectator harassment is severe or pervasive enough to be actionable is one of the biggest obstacles an athlete is likely to encounter in prevailing on a Title VII claim. This is not because spectator harassment is not serious but rather because it tends to look different from the types of harassment courts are accustomed to analyzing. Most of the case law interpreting the severe or pervasive standard involves employee-on-employee harassment. This type of harassment typically occurs in private, giving the harasser the ability to engage in a wide variety of conduct toward a victim. A harasser who is a fellow employee typically has ample opportunity to repeatedly harass a victim through their regular workplace interactions. The high standard courts impose for what constitutes severe or pervasive conduct is a function of how harassment typically occurs between employees. Applying these standards to spectator harassment is like fitting a square peg into a round hole. Spectator harassment occurs in public, where fans do not have the same access to players as coworkers have to each other. Consequently, most

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Jennings v. Univ. of N.C., 482 F.3d 686, 696 (4th Cir. 2007) (en banc) ("Whether gender-oriented harassment amounts to actionable (severe or pervasive) discrimination 'depends on a constellation of surrounding circumstances, expectations, and relationships.' All the circumstances are examined . . . ." (citations omitted) (quoting Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. Educ., 526 U.S. 629, 651 (1999)).

178. *Harris*, 510 U.S. at 24.

179. *See* Haqq v. Penn. Dep't Pub. Welfare, No. 09-0042, 2010 WL 1253452, at *9 (E.D. Pa. Mar. 23, 2010) ("Courts in this Circuit have considered evidence of harassment on a sliding scale: 'some harassment may be severe enough to contaminate an environment even if not pervasive; other, less objectionable, conduct will contaminate the workplace only if it is pervasive.'" (quoting EEOC v. Bimbo Bakeries USA, Inc., No. 09-1872, 2010 WL 598641, at *5 (M.D. Pa. Feb. 17, 2010))).

180. Scarbary v. Ga. Dep't Nat. Res., No. 1:15-CV-02183-SCJ-AJB, 2017 WL 1132726, at *11 (N.D. Ga. Jan. 31, 2017) (quoting Breda v. Wolf Camera, Inc., 148 F. Supp. 2d 1371, 1376 (S.D. Ga. 2001)).

spectator harassment is limited to slurs and insults rather than physical contact. Moreover, a fan who wishes to harass a player may only have one or two opportunities to do so each season, depending on how often the athlete plays at a location that is accessible to the fan.

Derogatory language in the form of name-calling, slurs, taunts, chants, and signs is by far the most common form of spectator harassment. Courts generally do not consider abusive language actionable unless the victim is subjected to "a steady barrage of opprobrious comments."[181] The Supreme Court has made clear that Title VII is only implicated in the case of a workplace "permeated with 'discriminatory intimidation, ridicule and insult,'" not where there is the "mere utterance of an . . . epithet."[182] For example, the Seventh Circuit held that eight gender-related comments, including that "the only valuable thing to a woman is that she has breasts and a vagina," over a five-year period were too sporadic to constitute severe or pervasive harassment.[183] By comparison, the Eleventh Circuit upheld a jury verdict for a Mexican-American auto-parts salesman, whose supervisor called him "W[*****]k," "S[**]c," and "Mexican M[*****] F****r" three to four times a day for an entire month.[184] In the past, players like Jackie Robinson probably could have met the "steady barrage" requirement because they were ridiculed and threatened nearly every time they took the field. But today, players may go several games or even seasons between incidents, and when such incidents do occur, they are typically confined to an individual or small group of fans, not the entire crowd. This is obviously a positive development from a normative standpoint, but it makes it more difficult for a player to meet the severe or pervasive standard based on verbal taunts alone.

In certain circumstances, a harassment victim who is subjected to less than a "steady barrage" of name-calling may nevertheless have an actionable claim. Courts have acknowledged that some slurs are more harmful than others and "can have a highly disturbing impact on the listener."[185] One district court explained that "terms like

181. Bolden v. PRC Inc., 43 F.3d 545, 551 (10th Cir. 1994) ("The plaintiff must show 'more than a few isolated incidents of racial enmity. Instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments." (citations omitted) (quoting Hicks v. Gates Rubber Co., 833 F.2d 1406, 1412–13 (10th Cir. 1987)).

182. *Harris*, 510 U.S. at 21 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)).

183. Patt v. Fam. Health Sys., Inc., 280 F.3d 749, 754 (7th Cir. 2002).

184. Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1273, 1276–77 (11th Cir. 2002).

185. Hrobowski v. Worthington Steel Co., 358 F.3d 473, 477 (7th Cir. 2004) ("Given American history, we recognize that the word 'n[****r]' can have a highly disturbing impact on the listener."). Regarding the N-word, the Fourth Circuit explained, far more than a mere offensive utterance, "'n[****r]' is pure anathema to African-Americans," as "[u]se of that word is the kind of insult that can create

'n[****]r,' 's[**]c,' 'f[****]t,' and 'k[**]e' evoke and reinforce entire cultural histories of oppression and subordination[,] . . . remind[ing] the target that his or her group has always been and remains unequal in status to the majority group."[186] The Seventh Circuit likewise observed that "an unambiguously racial epithet falls on the 'more severe' end of the spectrum."[187] Although some courts have held that sporadic use of especially egregious epithets can be actionable, they have limited this holding to situations in which a supervisor rather than a coworker uttered the slur.[188] Courts treat epithets spoken by supervisors more seriously because they "impact[] the work environment far more severely than use by co-equals."[189] Because fans are probably more like coworkers than supervisors for Title VII purposes, because they wield no authority over players,[190] it is unlikely that a spectator harassment claim based on sporadic verbal taunts would be actionable based on egregiousness alone.

Fans may also resort to nonverbal tactics, such as gestures, pictures, flags, clothing, costumes, and props to harass athletes. Proving nonverbal conduct is severe or pervasive enough to be actionable presents several challenges. In the context of sporting events, nonverbal harassment is probably less common than verbal taunts because it is easier to identify and eject a fan who brings in or holds up an offensive sign than one who simply yells out a slur. Because nonverbal harassment is easier to spot, perpetrators may resort to nonverbal tactics that are not blatantly offensive but are

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an abusive working environment in an instant . . . ." Pryor v. United Air Lines, Inc., 791 F.3d 488, 496 (4th Cir. 2015). It likewise considered the term "porch monkey" to be "about as odious" as the N-word because "suggest[ing] that a human being's physical appearance is essentially a caricature of a jungle beast goes far beyond the merely unflattering; it is degrading and humiliating in the extreme." Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 280 (4th Cir. 2015) (quoting Spriggs v. Diamond Auto Glass, 242 F.3d 179, 185 (4th Cir. 2001)).

186. Jones v. Ark. Game & Fish Comm'n, No. 3:04CV00030-WRW, 2005 WL 8164556, at *1 (E.D. Ark. Sept. 20, 2005).

187. Cerros v. Steel Techs., Inc., 288 F.3d 1040, 1047 (7th Cir. 2002) ("While there is no 'magic number' of slurs that indicate a hostile work environment . . . an unambiguously racial epithet falls on the 'more severe' end of the spectrum." (quoting Rodgers v. W.-S. Life Ins. Co., 12 F.3d 668, 674 (7th Cir.1993)).

188. *See, e.g.*, Gates v. Bd. of Educ. of Chi., 916 F.3d 631, 638 (7th Cir. 2019) ("We have repeatedly treated a supervisor's use of racially toxic language in the workplace as much more serious than a co-worker's.").

189. *Rodgers*, 12 F.3d at 675.

190. *See* Torres-Negrón v. Merck & Co., Inc., 488 F.3d 34, 40 (1st Cir. 2007) (observing that courts "seem to be in general agreement" that cases involving harassment by non-employees "should be analyzed using the same standard that is applied in the case of co-employee harassment"); Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1074 (10th Cir. 1998) ("Because harassment by customers is more analogous to harassment by co-workers than by supervisors, we hold the same standard of liability applies to both co-worker and customer harassment.").

open to multiple interpretations.[191] When students at a high school football game were accused of racism after passing around a watermelon during a game against a predominantly Black school, their principal responded, "[w]hile we do not know the purpose or the intent, we recognize it was inappropriate, insensitive and we are addressing [it]."[192]

Even when the discriminatory meaning of nonverbal conduct is clear, courts will not ordinarily deem isolated or sporadic instances actionable unless the conduct is shocking,[193] humiliating,[194] or physically threatening,[195] involves physical contact,[196] is directed specifically at the victim,[197] or otherwise unreasonably interferes with

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191. *See, e.g.*, Howard Blume & Sonali Kohli, *In the Age of Trump, There's a Fine Line Between Racism and Free Speech. Even at High School Football Games*, L.A. TIMES (Sept. 11, 2018, 4:05 PM), https://www.latimes.com/local/lanow/la-me-edu-trump-schools-20180911-story.html (reporting that spectators at a high school football game dressed in red, white, and blue; chanted "USA!" "USA!;" and displayed signs that said "[w]e like White," prompting complaints of racism from the visiting school's principal); Bracey Harris, *Flag Debate Flies at Ole Miss' Vaught-Hemingway*, CLARION-LEDGER (Oct. 11, 2016, 10:18 AM), https://www.clarionledger.com/story/news/politics/2016/10/08/flag-debate-comes-ole-misss-vaught hemingway/91746726/ (describing how some fans at the University of Mississippi construe the song "Dixie" and the Confederate flag as sources of southern pride, not racism).

192. Thomas Novelly, *Ballard Students' Watermelon Stunt Prompts Complaints of Racism, Apology*, COURIER J. (Sept. 9, 2018, 4:01 PM), https://www.courier-journal.com/story/news/2018/09/09/ballard-principal-watermelon-bleachers-inappropriate/1249070002/.

193. *See, e.g.*, Rogers v. City of New Britain, 189 F. Supp. 3d 345, 356 (D. Conn. 2016) ("The dressing-up of a stuffed gorilla in [the plaintiff's] work clothes is also shocking and severe. In light of the exceptionally ugly history of depicting African Americans as apes[,] . . . that act might be sufficiently severe by itself to make a hostile work environment.").

194. *See, e.g.*, Williams v. Asplundh Tree Expert Co., No. 3:05-CV-479-J-33MCR, 2006 WL 2131299, at *7 (M.D. Fla. July 28, 2006) (finding evidence of physically threatening and humiliating harassment sufficient to overcome summary judgment where, among other things, supervisors constructed a noose and told the plaintiff to "try it on, N[****]r," the supervisor told the plaintiff to run through the woods "like a hog" so hunting dogs could chase him, and the supervisor threatened injury with a wood chipper).

195. *See, e.g.*, Washington v. Kroger Co., 218 F. App'x 822, 823, 825 (11th Cir. 2007) (determining that hanging a figurine from a rope that was meant to resemble the Black plaintiff "may have been severe conduct that was physically threatening").

196. *See, e.g.*, Glemser v. Sugar Creek Realty, L.L.C., 970 F. Supp. 2d 866, 872 (C.D. Ill. 2013) ("[A] single act, if sufficiently severe, can create a hostile work environment, and instances of uninvited physical contact with intimate parts of the body are among the most severe types of harassment." (quoting Berry v. Chi. Transit Auth., 618 F.3d 688, 692 (7th Cir. 2010))).

197. *See, e.g.*, Quantock v. Shared Mktg. Servs., Inc., 312 F.3d 899, 904 (7th Cir. 2002) (an employee's outright solicitation for numerous sex acts, which were

the victim's ability to work.[198] Although courts do not require a steady barrage of such behavior, the likelihood of the court finding the behavior actionable increases when more than a single incident has occurred. Thus, a player who spots a swastika in the crowd—as repulsive as this may be—is unlikely to meet the severe or pervasive standard unless the act is coupled with at least some additional instances of abuse.

*2. Solutions*

Because most spectator harassment consists of sporadic taunts, a player is likely to encounter difficulty meeting the severe or pervasive standard. One way a player may potentially overcome this barrier is by arguing that such conduct is more severe when it occurs at sporting events than in other workplace settings, such that even an isolated incident can meet the standard. This may seem counterintuitive, given that a higher level of insult is not only permitted but encouraged at sporting events compared to other workplaces. Why is it worse for a fan to call a player the N-word than it is for a nurse to call another nurse that word? There are three reasons why slurs hurled at players during a sporting event may be more harmful than in a private setting: (1) the public nature of spectator harassment makes it especially humiliating to the player, (2) the harm it causes reverberates beyond the immediate victim to include other spectators and broader communities, and (3) spectator harassment is specifically intended to interfere with a player's job performance.

a. Public Humiliation

The Supreme Court has recognized that conduct that is humiliating can be sufficiently severe to constitute a hostile work environment.[199] Several courts have found conduct sufficiently humiliating to be actionable because it occurred in front of others. In *Breeding v. Cendant Corp.*,[200] the plaintiff alleged her supervisor made sexually suggestive comments about her in front of coworkers

made directly to the plaintiff, was more severe than "occasional vulgar banter[] tinged with sexual innuendo" (quoting McKenzie v. Ill. Dep't of Transp., 92 F.3d 473, 480 (7th Cir. 1996))).

198. *See, e.g.*, Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1072 (10th Cir. 1998) (describing a group of customers that unreasonably interfered with a waitress's ability to work by grabbing her hair and breast as she attempted to take their orders and serve them beer).

199. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (explaining that to determine whether an environment is hostile or abusive, a court should consider whether the discriminatory conduct was "physically threatening or humiliating, or a mere offensive utterance").

200. No. 01 Civ. 11563(GEL), 2003 WL 1907971 (S.D.N.Y. Apr. 17, 2003).

and clients on four occasions over a five-month period.[201] In rejecting the employer's defense that such comments were neither severe nor pervasive, the court emphasized that "it is not simply the number or frequency of the comments that determines whether they created a hostile environment, but also their nature, effect, and the circumstances in which they were made."[202] The court explained that the infrequency of the sexual comments was overridden by the fact that they were uttered in front of the plaintiff's coworkers and subordinates in a professional situation:

> [B]ecause [the supervisor's] use of humiliating sexual innuendo invariably took place in otherwise professional situations, the comments could have had the effect—intended or not—of severely undermining Breeding's position as a professional, and potentially changing her colleagues' perception of her. Thus, . . . [the supervisor] created—or attempted to create—a perception of Breeding as a sex object and a victim, rather than a competent professional and an equal. This is precisely the injury that Title VII seeks to prevent, as the repeated public humiliation of an employee in a sexual manner can undermine that employee's professional position just as surely as a failure to promote or a wrongful termination. Thus, where the harassment took place in front of colleagues and contained an element of professional humiliation or intimations of incompetence, courts generally have found that the harassment was sufficient to create a hostile working environment, regardless of the frequency of the abuse.[203]

The *Breeding* court is not alone in recognizing that isolated incidents of harassment can be actionable if they are publicly humiliating. The Tenth Circuit upheld a jury verdict for an employee whose supervisor made sexual comments to her within ear shot of her coworkers.[204] The court found it significant that the office where the conduct occurred was "a relatively small, open space without partitions or walls," such that "[t]his public setting only increased the humiliation, and, therefore, the severity of the discriminatory conduct."[205] Likewise, the Fifth Circuit held that sexually suggestive letters that a principal sent to teachers would have been more severe if they had been publicly circulated or displayed.[206] A number of district courts have reached similar conclusions. One court explained that "fussing at the plaintiff in front of others is actually more severe than just fussing at the plaintiff alone because it involves the

201. *Id.* at *4.
202. *Id.* at *5.
203. *Id.*
204. Smith v. Nw. Fin. Acceptance, Inc., 129 F.3d 1408, 1414 (10th Cir. 1997).
205. *Id.*
206. Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 269 (5th Cir. 1998).

humiliation of the plaintiff in front of her co-workers."[207] Another court found it "deeply humiliating" for a Black employee to have been denied access to a drinking fountain and publicly mocked by a coworker who imitated the behavior of an ape.[208]

A player who experiences spectator harassment should argue the harassment was humiliating and therefore actionable because it occurred in both a public and professional setting—in front of their teammates, opposing players, coaches, and other fans. As the *Breeding* court observed, such harassment can undermine a player's position as a professional, changing her colleagues' and fans' perceptions of her.[209] When a person is called a racial epithet in private, certainly that individual may feel demeaned. But when it occurs in public, such feelings can be even more intense, as the victim deals with the additional embarrassment of others witnessing such humiliating and reprehensible conduct. If courts are willing to find conduct humiliating when it takes place in front of a handful of coworkers, they should be even less tolerant of harassment that occurs in front of thousands of spectators—and is also likely to be broadcast, tweeted, and messaged to millions more.[210]

b. Far-Reaching Harm

A player may also be able to argue that isolated instances of spectator harassment are sufficiently severe to be actionable because of the far-reaching harm they inflict. Professor Williams explained that:

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207. Lasher v. Day & Zimmerman Int'l, Inc., 516 F. Supp. 2d 565, 572 (D.S.C. 2007).

208. Caldwell v. Boeing Co., No. C17-1741JLR, 2018 WL 2113980, at *7 (W.D. Wash. May 8, 2018); *see also* Salas v. N.Y.C. Dep't of Investigation, 298 F. Supp. 3d 676, 684 (S.D.N.Y. 2018) (denying the employer's motion to dismiss for failure to state a claim where the plaintiff alleged her coworker mimicked her stutter in front of her coworkers in a humiliating way on a daily basis); Albakri v. Sheriff of Orange Cnty., No. 6:15-CV-1969-ORL-31-GJK, 2017 WL 1196664, at *6 (M.D. Fla. Mar. 31, 2017) (characterizing harassment as humiliating and, thus, actionable where the plaintiff's supervisor called him homosexual slurs in public and in front of his peers).

209. Breeding v. Cendant Corp., No. 01 Civ. 11563(GEL), 2003 WL 1907971, at *5 (S.D.N.Y. April 17, 2003).

210. When Westbrook was told by a fan to get on his knees, he was likely not only humiliated because his coworkers and other fans in the vicinity heard the taunt but also because several million others witnessed it via television and social media. There are hundreds, if not thousands, of videos and stories on the internet about this incident, with several of the videos amassing millions of views each. *See, e.g.*, NBA on ESPN, *Russell Westbrook, Jazz Fan Share Their Sides to Heated Exchange*, YOUTUBE (Mar. 12, 2019), https://www.youtube.com/watch?v=LDiHXHof9uk.

> [t]he very public nature of racial harassment by fans creates a domino effect of anguish and anger that ripples across communities. When fans are allowed to persist in creating racially hostile environments, their harassment becomes more than simply personal encounters with the athletes. Their insults permeate to entire Black communities.[211]

When athletes are harassed at sporting events, they are not the only victims. Other spectators, though not the harasser's intended targets, can feel shocked and humiliated as well. And when the discriminatory conduct is subsequently broadcast via news outlets and social media, as is often the case, the "domino effect of anguish and anger" permeates entire communities, as Professor Williams indicates.[212] Spectator harassment not only causes shock and anger within the targeted community but also triggers a ripple effect to members of the majority community on what is tolerated and accepted. Inadequate responses to spectator harassment can lead other spectators to interpret the lack of consequences as a green light for them to act similarly.

As a member of the Church of Jesus Christ of Latter-day Saints ("LDS") and an avid supporter of the athletic programs at Brigham Young University ("BYU"), the Church's flagship educational institution, I have personally experienced the secondary effects of spectator harassment. I remember well the humiliation I felt years ago while watching BYU play a football game at the University of Utah, when I spotted two students positioned directly behind the BYU sideline, one dressed as a sacred figure in Mormon theology and the other holding a sign that read, "God can't help you now . . . ."[213] I experienced similar feelings years later while watching a basketball game between BYU and San Diego State University ("SDSU") on television. The broadcast showed students at SDSU dressed in white shirts, ties, homemade nametags, and bicycle helmets to mock the LDS Church's missionary program. It also showed a fan seated behind the basket holding up a sign directed at BYU's ailing star player, Jimmer Fredette, that read, "[w]hich wife gave you mono?," a dig at the LDS Church's past practice of polygamy. As the game ended, the broadcast picked up chants from the crowd of "[y]ou're still Mormon" as the BYU players exited the court in victory.[214] I do not recount these experiences to suggest I was victimized to the same

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211. Williams, *supra* note 45, at 313.

212. *Id.*

213. *See* Kurt Kragthorpe, *BYU-Utah Contest Hints of Religious Rift*, SALT LAKE TRIB. (Nov. 26, 2009, 7:44 PM), https://archive.sltrib.com/story.php?ref=/news/ci_13874118#gallery-carousel-446996 (displaying photos of the student and poster in the gallery accompanying the article).

214. *See* Doug Williams, *SDSU Fans Ready for Jimmer Fredette*, ESPN (Feb. 25, 2011), http://www.espn.com/espn/page2/story?sportCat=ncb&page=williams/110225_san_diego_state_aztecs_fans (recounting each of the foregoing incidents).

extent as the players but rather to illustrate the truth of Professor Williams's observation that spectator harassment inflicts harm that extends beyond the targeted athlete.

How public harm factors into a plaintiff's claim of harassment is something courts have yet to consider. Under Title VII, a court must evaluate a harassment claim against both a subjective and objective standard: the plaintiff must demonstrate that she was personally offended by the conduct and that a reasonable person would have had a similar reaction.[215] Although the harm spectator harassment inflicts on third parties may be irrelevant to an athlete's subjective experience, it may help to establish the objective offensiveness of the conduct. And since the Supreme Court has instructed lower courts to assess the severity or pervasiveness of harassment based on the "totality of circumstances,"[216] this creates space for a court to consider the toll that spectator harassment inflicts beyond the intended victim.

c. Intent to Undermine Job Performance

Players may also be able to satisfy the severe or pervasive standard by arguing that spectator harassment, even when sporadic or isolated, is actionable because it is specifically intended to undermine job performance. In assessing severity, courts routinely consider whether the conduct unreasonably interfered with the employee's job performance.[217] The Supreme Court explained that "[a] discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[218] In cases of employee-on-employee harassment, the motivation behind the harassment may not necessarily be to directly impede job performance. A harasser may engage in conduct as a form of hazing, to exercise power over the victim, to elevate her own status

215. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").

216. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 69 (1986) (addressing with approval EEOC guidelines emphasizing the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and "the totality of circumstances" (quoting 29 C.F.R. § 1604.11(b) (1985)).

217. *See* O'Rourke v. City of Providence, 235 F.3d 713, 729 (1st Cir. 2001) (noting that harassing conduct that "undermines [a plaintiff's] ability to succeed at her job" is relevant in assessing a hostile work environment claim); Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 270 (5th Cir. 1998) (explaining that harassment can be actionable if the conduct in question undermines the plaintiff's workplace competence).

218. *Harris*, 510 U.S. at 22.

in the eyes of coworkers, or, in the case of sexual harassment, as a means of pursuing a romantic relationship. Of course, harassment premised on any of these motives can negatively affect an employee's job performance despite this not being the primary objective. By contrast, in virtually every instance of spectator harassment, the harasser's intent is to specifically impede the athlete's ability to perform her job. Calling a player the N-word is not a mere power play; it is intended to rattle the player to the point he is unable to perform at a high level or, worse yet, to the point the player retaliates against the fan and is ultimately ejected. Thus, players should argue that spectator harassment is sufficiently severe to be actionable because the intent—not merely the consequence—is to undermine job performance.

### *D. Imputability to the Employer*

The existence of unwelcome conduct based on an athlete's protected trait, which is severe or pervasive enough to create a hostile work environment, is not on its own enough to hold a professional athlete's employer liable. The harassing conduct must also be imputable to the employer, which requires proof that the employer "was negligent in controlling working conditions."[219] Whether the employer was negligent depends on if it took reasonable steps to prevent and correct the harassment.[220] Courts examine various factors in assessing reasonableness. The Second Circuit considers "the gravity of the harm being inflicted upon the plaintiff, the nature of the employer's response in light of the employer's resources, and the nature of the work environment."[221] The Eighth Circuit looks to whether the employer's efforts were "appropriate in light of the circumstances, particularly the level of control and legal responsibility . . . [the employer] has with respect to . . . [the

219. Vance v. Ball State Univ., 570 U.S. 421, 424 (2013).

220. *Id.* at 448–49 ("Assuming that a harasser is not a supervisor, a plaintiff could still prevail by showing that his or her employer was negligent in failing to prevent harassment from taking place. Evidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant."); English v. Gen. Dynamics Info. Tech. Co., 536 F. App'x 537, 539 (6th Cir. 2013) (explaining that, to prevail on a hostile work environment claim, a plaintiff must prove, in part, that "the employer failed to take reasonable care to prevent and correct any harassing behavior"); *see also* Justin S. Weddle, Note, *Title VII Sexual Harassment: Recognizing an Employer's Non-Delegable Duty to Prevent a Hostile Workplace*, 95 COLUM. L. REV. 724, 737–38 (1995) (reasoning that if an employer were only liable for failing to remedy harassment and not for failing to prevent it in the first place, "[t]he employer is virtually able to ignore the possibility of workplace harassment until it is reported[,] . . . creat[ing] an incentive that runs counter to the preventive purposes of Title VII").

221. Martin v. New York, 799 F. App'x 68, 69–70 (2d Cir. 2020).

harasser's] behavior."[222] And the Ninth Circuit analyzes "the seriousness of the offense, the employer's ability to stop the harassment, the likelihood that the remedy will end the harassment, and 'the remedy's ability to persuade potential harassers to refrain from unlawful conduct.'"[223]

*1. Obstacles*

Players face two obstacles in imputing liability to their employers. First, a team's ability to prevent and correct spectator harassment is limited by the fact that athletes are more likely to experience spectator harassment on the road than at home. This is problematic from a liability perspective because a player's team typically has little, if any, control over how an opposing team regulates its crowd. If the only employer that athletes can sue for spectator harassment is the team they play for, their claims ordinarily would be limited to mistreatment they suffer at home games. Because it is rare for home fans to harass their own players, spectator harassment suits would be almost nonexistent. Moreover, if liability is limited to a player's own team, what incentive does an opposing team have to enact stronger measures to protect visiting players? Because spectator harassment is primarily a problem for players during road games, there must be a way to hold the home team accountable even though it is not the victim's employer.

The second obstacle is that most professional sports organizations have taken a number of steps to prevent and correct spectator harassment. As discussed in Part II, they promulgate fan codes of conduct; employ event staff to monitor spectators; warn, eject, and ban those who violate the rules; limit alcohol sales; and engage in public service campaigns to promote sportsmanship. Because the law imposes a negligence rather than strict liability standard, an employer would likely argue that, although these measures are not foolproof, they are entirely reasonable—particularly in light of the inherent difficulties of controlling thousands of fans in a high-intensity environment.

*2. Solutions*

Though formidable, the challenges of imputing liability to a sports organization are surmountable. Subpart III.D.2.a explains that employer liability for spectator harassment is not necessarily limited to a player's own team but may extend to the corresponding league under Title VII's joint-employer doctrine as well. This not only allows a player to recover for the harassment she suffers during road games but also potentially helps ensure that home teams take

222. Crist v. Focus Homes, Inc., 122 F.3d 1107, 1111 (8th Cir. 1997).

223. Intlekofer v. Turnage, 973 F.2d 773, 779 (9th Cir. 1992) (quoting Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991)).

appropriate steps to protect visiting players from abuse. Subpart III.D.2.b explains why most existing efforts to control spectator harassment, though seemingly aggressive, are ultimately unreasonable. Such efforts may suffice in other workplaces but are woefully inadequate in professional sports, where more effective measures are not only available but affordable for deep-pocketed sports organizations.

a. Leagues as Joint Employers

Players are most vulnerable to spectator harassment while playing at an opponent's venue, but making the player's own team responsible for fan behavior that occurs at road venues is not practical because the visiting team has virtually no control over how the home team regulates its fans. Holding the opposing team directly liable is likewise infeasible because an employee can bring a Title VII action against only his employer, which the opposing team quite clearly is not. One solution is to hold leagues liable for the spectator harassment a player suffers at road games based on the theory that a league is the player's joint employer for Title VII purposes. Although the home team would not be directly liable for the harassment of a visiting player, holding the league responsible would likely produce the same intended outcome: the league could force the team to take steps to better safeguard players from fan abuse. Indeed, when then-Miami Dolphins linebacker Bryan Cox sued the NFL for the racial harassment he suffered from Buffalo Bills fans, the league responded by issuing a mandate that teams eject fans who engage in racial taunts.[224]

Under Title VII, an entity can be liable for discrimination only if it is considered the plaintiff's "employer."[225] An employee can have more than one employer for purposes of the statute, even if he is not officially employed by both entities.[226] The joint-employer doctrine recognizes that two entities may simultaneously share control over the terms and conditions of employment, such that both should be liable for discrimination relating to those terms and conditions.[227] This doctrine can be invoked where an employee that is formally employed by one entity "is assigned to work in circumstances that justify the conclusion that the employee is at the same time

224. Cox v. Nat'l Football League, 889 F. Supp. 118, 119 (S.D.N.Y. 1995).

225. 42 U.S.C. § 2000e-2(a) (West 2021).

226. *See, e.g.*, Frey v. Hotel Coleman, 903 F.3d 671, 676–77 (7th Cir. 2018); Al-Saffy v. Vilsack, 827 F.3d 85, 96 (D.C. Cir. 2016); Faush v. Tuesday Morning, Inc., 808 F.3d 208, 215 (3d Cir. 2015); Butler v. Drive Auto. Indus. of Am., Inc., 793 F.3d 404, 408–10 (4th Cir. 2015).

227. *See* Bristol v. Bd. of Cnty. Comm'rs, 312 F.3d 1213, 1218 (10th Cir. 2002) ("This joint-employer test acknowledges that the two entities are separate, but [the test] looks to whether they co-determine the essential terms and conditions of employment.").

constructively employed by another entity."[228] In this situation, a court "may impose liability for violations of employment law on the constructive employer, on the theory that this other entity is the employee's joint employer."[229] Several courts have noted that because Title VII should be liberally construed in light of its remedial purposes, "[s]uch liberal construction is also to be given to the definition of 'employer.'"[230]

The test for determining whether a secondary employer constitutes a joint employer varies by jurisdiction. The Third Circuit has held that a joint-employment relationship exists when two entities exercise significant control over the same employee, such as the authority to hire and fire, promulgate work rules and assignments, set conditions of employment, exercise day-to-day supervision, and control employee records.[231] The Seventh Circuit applies a five-factor economic realities test, which examines the extent of the purported employer's control and supervision over work performance, the kind of occupation and nature of skill required, the responsibility for the cost of operation, the method and form of payment and benefits, and the length of job commitment and expectations.[232] By contrast, the Ninth Circuit has opted for the common law agency test, under which the principal guidepost is the extent of control that one may exercise over the details of the work of the other.[233] And in the Tenth Circuit, two entities constitute joint employers if they share or codetermine matters governing the essential terms and conditions of employment.[234] Although the factors courts consider vary, the central inquiry is consistent: the degree of control the secondary employer exercises over the aspect of employment in dispute.

Several courts have found that a secondary employer can constitute a joint employer in the context of a hostile work environment claim. For example, the Sixth Circuit reversed a district court's finding that a general contractor was not a plaintiff's joint employer as a matter of law.[235] In that case, the EEOC brought suit

228 Arculeo v. On-Site Sales & Mktg., L.L.C., 425 F.3d 193, 198 (2d Cir. 2005).

229. *Id.*

230. *See, e.g.*, Butler, 793 F.3d at 409–10 (quoting with approval Baker v. Stuart Broad. Co., 560 F.2d 389, 391 (8th Cir. 1977)); *see also* Magnuson v. Peach Tech. Servs., Inc., 808 F. Supp. 500, 508 (E.D. Va. 1992) (noting the "broad, remedial purpose of Title VII which militates against the adoption of a rigid rule strictly limiting 'employer' status under Title VII to an individual's direct or single employer").

231. Plaso v. IJKG, L.L.C., 553 F. App'x 199, 204–05 (3d Cir. 2014).

232. Love v. JP Cullen & Sons, Inc., 779 F.3d 697, 702–05 (7th Cir. 2015).

233. EEOC v. Glob. Horizons, Inc., 915 F.3d 631, 638 (9th Cir. 2019).

234. Knitter v. Corvias Mil. Living, L.L.C., 758 F.3d 1214, 1228 (10th Cir. 2014).

235. EEOC v. Skanska USA Bldg., Inc., 550 F. App'x 253, 256 (6th Cir. 2013).

on behalf of Black construction workers who were hired by a subcontractor to operate a construction elevator.[236] The workers were routinely called racist names and subjected to racist graffiti.[237] The appellate court held that the general contractor could be considered the workers' joint employer because it routinely exercised its authority to direct and supervise the operators' performance, set their hours and daily assignments, and handled their complaints.[238] Similarly, the Fourth Circuit held that a factory where a temporary staffing agency employee was assigned to work constituted a joint employer for purposes of a sexual harassment claim.[239] The agency and the factory both exercised control over various aspects of the employee's employment.[240] The employee wore the agency's uniform, was paid by the agency, and parked in a parking lot designated for agency employees, whereas the factory determined her work schedule, arranged portions of her training, and supervised her while she was on the floor.[241] The court concluded that although the agency disbursed the employee's paychecks, terminated her employment, and handled employee discipline, this did not prevent the factory from "having a substantial degree of control over the circumstances of . . . [her] employment."[242]

Whether a league can constitute a player's joint employer will depend on the facts of a case. Each league structures its relationship with its teams and players differently, and these relationships are nuanced and complicated. Full treatment of this issue is beyond this Article's scope, but it is clear that sports leagues exercise significant control over numerous aspects of a player's work that may justify imposition of joint-employer liability. The NFL is notorious for controlling nearly every aspect of its games, from the style of players' socks[243] to the height of the turf they play on.[244] NFL players are subject to the league's personal conduct policy, concussion protocols,

236. *Id.* at 253.

237. *Id.* at 254–55.

238. *Id.* at 256.

239. Butler v. Drive Auto. Indus. of Am., Inc., 793 F.3d 404, 415 (4th Cir. 2015).

240. *Id.* at 406.

241. *Id.* at 406–07.

242. *Id.* at 415.

243. ROGER GOODELL, NFL, 2020 OFFICIAL PLAYING RULES OF THE NATIONAL FOOTBALL LEAGUE, 20, 21 https://operations.nfl.com/media/4693/2020-nfl-rulebook.pdf (last visited Aug. 12, 2021) ("The exterior of a player's stocking must be (a) one-piece stocking that includes solid white from the top of the shoe to the mid-point of the lower leg, and approved team color or colors (non-white) from that point to the top of the stocking; or (b) solid color stocking.").

244. *See NFL Field Certification*, NFL FOOTBALL OPERATIONS, https://operations.nfl.com/gameday/pre-game/nfl-field-certification/ (last visited Aug. 12, 2021) (describing the process the NFL goes through to ensure playing fields meet its regulations).

and countless other rules.[245] When a player violates these rules, it is the league—not the team—that metes out the discipline.[246] The NFL likewise dictates how many games are played, when the games are played, and how the games are played. Players who fail to comport with these requirements face suspension or termination. The NFL is not unique in this regard—a similar model of control exists in other major professional sports leagues.[247]

In the context of spectator harassment, players should argue that the league's control over their employment should not be determined by who pays their salary or has the authority to fire them. These factors would be relevant in a pay discrimination or wrongful termination case, respectively, but they have no bearing on the dimension of employment that is actually in dispute in a harassment suit: the environment in which the player performs his job. Thus, players should center the joint-employer inquiry on whether the league exercised sufficient control over the environment in which the spectator harassment occurred.[248] Players should argue that a league should constitute a joint employer because of its ability to prevent and correct harassment by compelling teams to adopt standards and policies relating to the game-day atmosphere, and because of its established track record of doing so. Once again, this will be a fact-specific inquiry, as different leagues regulate different aspects of the game-day experience. In many instances, leagues wield tremendous power in this regard. Each of the major sports leagues has promulgated a fan code of conduct, which individual teams are required to adopt.[249] This clearly shows that the leagues have power

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245. *See NFL Rules Compliance*, NFL FOOTBALL OPERATIONS, https://operations.nfl.com/inside-football-ops/rules-enforcement/nfl-rules-compliance/ (last visited Aug. 12, 2021) ("The Compliance Department's jurisdiction covers player behavior on the field, including endangering a fellow player's safety, fighting, unsportsmanlike conduct and other acts that could be deemed 'detrimental to the league.'").

246. *See Accountability: Fines & Appeals*, NFL FOOTBALL OPERATIONS, https://operations.nfl.com/inside-football-ops/rules-enforcement/accountability-fines-appeals/ (last visited Aug. 12, 2021) (describing the process of how NFL staff members respond to player infractions and issue fines).

247 *See generally* Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQUETTE SPORTS L. REV. 168 (1995) (discussing the disciplinary mechanisms in the four major professional sports leagues).

248. *See* Llampallas v. Mini-Cirs., Lab, Inc., 163 F.3d 1236, 1244–45 (11th Cir. 1998) (explaining that Title VII's joint-employer doctrine focuses "on the degree of control an entity has over the adverse employment decision"); *see also* Virgo v. Riviera Beach Assocs., 30 F.3d 1350, 1359–61 (11th Cir. 1994) (explaining that determining whether entities are "joint-employers" for purposes of Title VII involves analyzing the degree to which a business retains control and authority over the essential terms and conditions of another entity).

249. *See* NFL Code, *supra* note 101; Lauber, *supra* note 101; NBA Code, *supra* note 101; NHL Code, *supra* note 101.

to affect fan conduct. Beyond codes of conduct, leagues have implemented uniform alcohol-sales guidelines, fan-ejection policies, and security-staffing requirements.[250] The fact that leagues can compel teams to enforce these policies speaks to their power to control fan conduct.

Despite the numerous ways in which leagues exercise control over players, it is hardly certain that courts would deem them joint employers. Many leagues carefully structure their relationships with teams and players specifically to avoid joint-employer status. Interestingly, in *Cox v. National Football League*,[251] the lone case where a player brought a Title VII claim against a sports league for spectator harassment, the NFL chose not to contest its employer status.[252] Because the parties stipulated to dismiss the case,[253] it is unclear whether the NFL would have prevailed had it argued that it was not Cox's employer. The NFL's decision to not contest its employer status in that case is no guarantee that it or other leagues would refrain from doing so in future cases. But at a minimum, this case suggests that a league may have good reasons not to contest its joint-employer status. For instance, if a league cares more about negative publicity than its financial exposure, it may prefer to remain in the litigation on the theory that what is bad for the goose is bad for the gander. If a player brings a spectator harassment claim against the Boston Celtics, the NBA is certain to be subjected to negative press from the lawsuit, particularly since the league asserts so much control over how teams regulate fan conduct. By remaining in the suit as a joint employer, the league has greater ability to control not only the litigation itself but also the media narrative surrounding it.

b. Proving Unreasonableness

Demonstrating that a sports organization's efforts to correct or prevent spectator harassment are unreasonable will likely prove an uphill battle for players. The problem is twofold: the measures employed may seem stringent in comparison to those utilized in other workplace settings, and preventing and correcting harassment at sporting events is inherently more challenging than regulating harassment in other work contexts. On the surface, it may seem that sports organizations are doing more to combat workplace harassment in an environment that is much harder to control than most workplaces. To overcome this perception, a player should focus on the fact that the reasonableness of a sports organization's actions is relative. Indeed, courts have repeatedly cautioned that what is

250. *See supra* Part II.

251. 29 F. Supp. 2d 463 (N.D. Ill. 1998).

252. *Id.* at 466, 470.

253. *See* Jason Cole, *Cox Resolves Lawsuit with NFL*, SUN-SENTINEL (Feb. 10, 1995), https://www.sun-sentinel.com/news/fl-xpm-1995-02-10-9502090690-story.html.

reasonable for one employer may not be reasonable for another employer; the assessment is fact-specific and depends on the totality of circumstances.[254] Instead of determining reasonableness by how a sports organization's response compares to employers' responses in other workplace settings, reasonableness should be based on how effective that organization's measures are in comparison to other options the organization has at its disposal. The Seventh Circuit explained that "[l]iability attaches because a party has 'an arsenal of incentives and sanctions . . . that can be applied to affect conduct'" but fails to use them."[255] The Second Circuit has similarly noted that the reasonableness of an employer's response should be determined, in part, by "the nature of the employer's response in light of the employer's resources."[256] When cast in this light, the reasonableness of most efforts to prevent and correct spectator harassment breaks down.

As more fully discussed in Part II, many of the steps sports organizations take to protect athletes from spectator harassment are flawed. Fan codes of conduct are typically vague, communication about codes and other policies can be spotty, monitoring is often problematic, and enforcement can be uneven.[257] Courts have found each of these problems to be evidence that an employer's response to harassment was unreasonable in other settings.[258] Thus, a player's

254. *See, e.g.*, Williams-Boldware v. Denton Cnty., 741 F.3d 635, 641 (5th Cir. 2014) ("Whether an employer's response to discriminatory conduct is sufficient will necessarily depend on the particular facts of the case . . . ." (quoting Hirras v. Nat'l R.R. Passenger Corp., 95 F.3d 396, 399–400 (5th Cir. 1996))); Wyninger v. New Venture Gear, Inc., 361 F.3d 965, 976 (7th Cir. 2004) (imposing on employers the obligation to take reasonable steps under the circumstances to correct and prevent racial harassment); *see also* Whitworth v. Baker Hughes, Inc., No. 1:10-CV-203, 2011 WL 13196257, at *20 (E.D. Tex. Sept. 23, 2011) (finding that whether an employer has exercised reasonable care to prevent and promptly correct sexual harassment will depend on the facts of the case and whether the employer's steps were reasonably suited for its workplace and the alleged harassment).

255. Wetzel v. Glen St. Andrew Living Cmty., L.L.C., 901 F.3d 856, 865 (7th Cir. 2018) (quoting Dunn v. Wash. Cnty. Hosp., 429 F.3d 689, 691 (7th Cir. 2005)).

256. Martin v. New York, 799 F. App'x 68, 69–70 (2d Cir. 2020) (mem.) (quoting Distasio v. Perkin Elmer Corp., 157 F.3d 55, 65 (2d Cir. 1998)).

257. *See supra* Part II.

258. *See, e.g.*, Vance v. Ball State Univ., 570 U.S. 421, 449 (2013) (noting that evidence that an employer failed to monitor the workplace is relevant to whether the employer was negligent in failing to prevent harassment); EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 463 (5th Cir. 2013) (affirming a verdict against an employer whose anti-discrimination policy was vague and general, insofar as it contained generic statements such as "all working conditions will be maintained in a non-discriminatory manner"); Bailey v. USF Holland, Inc., 526 F.3d 880, 887 (6th Cir. 2008) (concluding that the employer took insufficient action in response to racial harassment because its harassment policy was not consistently enforced); Edwards v. Hyundai Motor Mfg. Ala., L.L.C., 603 F. Supp. 2d 1336,

first line of attack should be to point out any problems with how a fan code is worded, disseminated, monitored, or enforced.

Beyond identifying such defects, a player should challenge reasonableness by arguing that there are more effective ways to prevent and correct spectator harassment that sports organizations have at their disposal but choose not to implement. In doing so, a player should emphasize the vast resources many professional teams and leagues enjoy. Measures that might be prohibitively expensive for other employers could be quite reasonable in an industry so flush with cash that billion-dollar stadiums[259] and multimillion-dollar player contracts have become the norm.[260] Such measures may include the following:

*Better-worded fan codes.* Sports organizations should replace vague and generic proscriptions against inappropriate conduct with language that specifically prohibits fans from harassing players based on a protected characteristic. Some organizations have led out in this regard. The Los Angeles Dodgers supplemented MLB's generic misconduct policy with a provision that makes clear that the "organization does not tolerate the use of offensive language concerning another person's race, ethnicity, gender, religion, disability, age, sexual orientation, or national origin by any fan, whether such language is directed at players, umpires, MLB personnel, Dodger Stadium staff, or other fans."[261] In 2019, the NBA announced it was adding language to its code of conduct to prohibit "any sexist language or LGBTQ language, any denigrating language in that way, anything that is non-basketball related."[262] Likewise,

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1349 (M.D. Ala. 2009) (finding a fact issue as to whether the anti-harassment policy was adequately disseminated where the policy consisted of one paragraph in a forty-seven-page employee handbook and where the employee never received training on the policy).

259. *See, e.g.*, Christopher Palmeri, *Rams Owner Stan Kroenke Debuts His $5.5 Billion Dream Stadium*, BLOOMBERG (Sept. 10, 2020, 7:00 AM), https://www.bloomberg.com/news/articles/2020-09-10/rams-owner-stan-kroenke-debuts-his-5-5-billion-dream-stadium (reporting that the new home of the NFL's Los Angeles Chargers and Rams cost $5.5 billion and is the most expensive stadium in the world).

260. *See, e.g.*, Kevin Patra, *Chiefs, Patrick Mahomes Agree to 10-year, $503 Million Extension*, NAT'L FOOTBALL LEAGUE (July 6, 2020, 3:41 PM), https://www.nfl.com/news/chiefs-patrick-mahomes-agree-to-10-year-contract-extension (reporting that the contract is the largest in sports history, with quarterback Patrick Mahomes becoming the first athlete with a half-billion-dollar contract).

261. *Los Angeles Dodgers Fan Code of Conduct*, L.A. DODGERS, https://www.mlb.com/dodgers/ballpark/information/code-of-conduct (last visited Aug. 12, 2021).

262. *See* Tim Reynolds, *NBA Enacting Zero-Tolerance Rules for Abusive, Hateful Fan Behavior*, NBA (Oct. 21, 2019, 8:33 AM), https://www.nba.com/article/2019/10/21/nba-enacting-zero-tolerance-rules-fan-behavior.

MLS recently updated its fan code to prohibit "[d]isplaying signs, symbols, images, using language, or making gestures that are threatening, abusive, or discriminatory, including on the basis of race, ethnicity, national origin, religion, gender, gender identity, ability, and/or sexual orientation."[263]

*Better dissemination of fan codes.* Virtually every professional team posts its fan code to its website, but beyond that, there does not appear to be any set guidance on how a professional team communicates the code to spectators. When the NFL implemented its fan code in 2008, it announced that each team would "communicate its code during the preseason to season ticket holders and fans through mailings, online, and in-stadium signage, and other messages."[264] The extent to which the NFL and other leagues have communicated their codes in such manner is open for inquiry. Technological advances make it easier than ever to disseminate conduct codes to fans. A code could be included in the terms and conditions of a ticket purchase, spectators entering an arena could be required to click a button agreeing to abide by the code before the turnstile unlocks, and video messages about the code could be played more frequently throughout the game (and during times when spectators are more likely to be paying attention). Moreover, with the proliferation of game-day mobile apps designed to enhance the in-stadium experience, communicating with fans about the code has never been easier.[265]

*More effective monitoring.* Although hiring personnel to monitor fan behavior may seem like a reasonable way to prevent spectator harassment, it may not withstand scrutiny if personnel are not properly trained on how to spot rule violators. Monitoring efforts may also be unreasonable if a team is not strategic in how it positions event staff. Instead of dispersing staff evenly throughout an arena, a team should place additional personnel close to the playing surface, where players are more likely to see and hear fans.[266] Moreover, a

263. MLSsoccer Staff, *Updated MLS Fan Code of Conduct Released for 2020 Season*, MLS (Feb. 18, 2020, 3:56 PM), https://www.mlssoccer.com/post/2020/02/18/updated-mls-fan-code-conduct-released-2020-season.

264. NFL Code, *supra* note 101.

265. *See How Mobile Apps Fuel the Football Fan Experience*, NOWSECURE (Sept. 11, 2019), https://www.nowsecure.com/blog/2019/09/11/how-mobile-apps-fuel-the-football-fan-experience/ ("NFL teams have invested in mobile apps to improve fan engagement and customer service to help boost attendance and make the in-stadium experience more appealing than watching the game from the comfort of home").

266. *See Zero-Tolerance*, *supra* note 10 ("In the NBA, the league is expanding the area in arenas most closely monitored when it comes to player-fan interaction. The top-priority area used to be just those seated with feet on the court or maybe the first couple rows of courtside seats. Now, that area goes several rows deep in every building, plus the areas where teams and referees enter and exit the court.").

player may be able to argue that relying solely on event staff to monitor fans is inherently unreasonable in light of sophisticated video surveillance technologies that are becoming more readily available.[267]

*Better control over rowdy fan sections.* It is not uncommon for teams to reserve seating areas close to the playing surface where particularly rowdy fans can sit together. While this generates energy and intensity within the arena, it can also be a breeding ground for spectator harassment. The Cleveland Browns' Dawg Pound, the Las Vegas Raiders' Black Hole, and the New York Yankees' Bleacher Creatures are notorious for mercilessly taunting opposing players.[268] Teams should not be able to profit off these fan sections and then feign outrage when their behavior crosses the line. If teams want to maintain and even celebrate these sections, they should move them farther from the playing surface or, at the very least, substantially increase the number of event staff monitoring the area.

*Penalize teams.* A cost-free and potentially effective way to prevent spectator harassment is for leagues to empower game officials to assess in-game penalties against teams whose fans engage in abusive behavior toward players. Penalizing a team, such as by assessing a technical foul in basketball or a fifteen-yard penalty in football, could prove a powerful deterrent, as most fans will want to avoid hurting their team at all costs. Although it may seem unfair (and, thus, unreasonable) to penalize a team for its fans' behavior, in reality, many leagues already have rules in place that allow game officials to assess penalties for certain fan behavior. For example, the NFL gives referees discretion to assess an unsportsmanlike conduct penalty against the home team if the crowd throws objects onto the field.[269] If a team can be punished when fans throw objects onto the

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267. *ISJ Exclusive: Using Surveillance Technology to Protect Major Sporting Events*, INT'L SEC. J., https://internationalsecurityjournal.com/isj-exclusive-using-surveillance-technology-to-protect-major-sporting-events/ (last visited Aug. 12, 2021) (providing several examples of video surveillance upgrades at stadiums across Europe).

268. *See* Joe Cipolla, *The Most Intimidating Fans in Sports*, BLEACHER REP. (Aug. 12, 2010), https://bleacherreport.com/articles/434567-the-most-intimidating-fans-in-sports-with-video (reporting that the Dawg Pound "str[ikes] fear in the hearts of opposing teams" and that "their antics are the stuff of spectator legend"; the Black Hole "looks like a small portion of hell appeared in the endzone" and that "[t]heir appearance alone is enough to scare the hell out of visiting teams, not to mention how rowdy they get"; and that the Bleacher Creatures hurl "taunts so brutal that it wouldn't surprise me at all if [opposing players] went back to the dugout and cried").

269. *See* Charles Goldman, *Snowballs Thrown from Arrowhead Stadium Stands Almost Resulted in Penalty Against Chiefs*, CHIEFSWIRE (Jan. 12, 2019, 9:52 PM), https://chiefswire.usatoday.com/2019/01/12/snowballs-thrown-from-arrowhead-stands-almost-earned-chiefs-a-penalty/ (reporting that game officials approached the Chiefs' head coach about the potential of a penalty after fans continued throwing snowballs onto the field). Until 2013, the NFL likewise had

playing surface,[270] there is no reason a team could not also be penalized when fans harass players.[271]

*Hold season ticket owners responsible.* Season ticket holders should be held responsible for the actions of those who use their tickets. In most arenas, the seats closest to the playing surface are reserved for season tickets holders.[272] These are also the seats where fans are most likely to be able to harass players. If a team makes it clear to season ticket holders that they will be responsible for any misbehavior by fans using their seats, the team shifts some of the responsibility onto the season ticket holders to screen out guests who might violate the code of conduct. The team likewise incentivizes guests using someone else's season tickets to behave properly, particularly if the guest has a relationship with the season ticket holder. If a lawyer uses her firm's season tickets to take a client to a New York Knicks basketball game, she is likely to behave better—and to keep her client in line—if she knows the firm could lose its season tickets if she violates the rules. Several teams have implemented such a policy. For instance, the Philadelphia Eagles warn season ticket holders that they "are responsible for their conduct as well as the conduct of their guests and persons using their tickets. Violations, by Season Ticket Holders or anyone, may result in revoked account privileges without reimbursement . . . ."[273]

*Alcohol bans.* Perhaps the most effective—and controversial—way to control fan behavior is to ban alcohol outright and to both deny

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a rule that the home team would lose a timeout if crowd noise prevented the opposing quarterback from calling signals. *See* Jayson Jenks, *Remembering the Time the NFL Tried to Silence Its Fans*, ATHLETIC (Dec. 11, 2019), https://theathletic.com/1446285/.

270. *See, e.g.*, *Flyers Hit with Penalty After Fans Throw Wristbands on Ice*, ESPN, https://www.espn.com/nhl/story/_/id/15234552/ (Apr. 18, 2016, 9:59 AM) (reporting that referees assessed the Philadelphia Flyers a bench-minor penalty for delay of game after fans refused to stop throwing wristbands, which had been used as part of a pregame lightshow, onto the ice as their team was losing).

271. In 2019, FIFA, the international governing body of soccer, announced a new disciplinary code that includes rules empowering referees to end a match in a forfeit, thereby handing the win to the opposing team, if a referee detects racism in the stands. *See* Tod Perry, *FIFA's New Rules Say Referees Can End a Game if the Crowds Can't Stop Being Racist*, GOOD (July 12, 2019), https://www.good.is/articles/fifa-racist-fan-rule. Under the new protocol, the referee must first ask the public address announcer to issue a warning; if the behavior persists, the referee can halt the match; and if it continues beyond that, the referee can end the match and declare a forfeit. *See id.*

272. *See* Josh Alper, *Saints Reaching Out to Season Ticket Holders in First Eight Rows*, NBC SPORTS (June 25, 2020, 6:19 PM), https://profootballtalk.nbcsports.com/2020/06/25/saints-reaching-out-to-season-ticket-holders-in-first-eight-rows/ (noting that season ticket holders usually fill the first eight rows of seats closest to the playing field at NFL games).

273. LINCOLN FIN. FIELD, https://www.lincolnfinancialfield.com/tickets/ (last visited Sept. 1, 2021).

entrance to and eject spectators who are obviously intoxicated.[274] Professional sports organizations would certainly argue that such measures are unreasonable, given the cultural expectation of being able to drink at sporting events, to say nothing of the lost revenue. Despite these arguments, what may make an alcohol ban reasonable is its potential effectiveness in reducing spectator harassment. Indeed, the fact that many teams already place limitations on alcohol sales seems an admission that this is the case. If a team refuses to implement the measure that would be most effective in preventing spectator harassment, can it really be said to have acted reasonably by adopting less effective actions? And in terms of the cultural and financial hardships a ban would inflict on teams, it is worth noting that France has prohibited the sale of alcohol in sports stadiums since 1991 and that three of the college football programs with the strongest attendance and most on-field success—Clemson, Michigan and Notre Dame—all have chosen to ban alcohol sales at their games.[275]

*Stronger spectator bans.* In employee-on-employee harassment cases, one of the most reliable ways for an employer to show it took reasonable remedial measures is by firing the harasser.[276] Ejecting a fan who harasses an athlete is not analogous because, unlike firing an employee, ejecting a fan does not guarantee the harassment will stop. Unless a team takes additional measures to prevent the fan from returning, there is little to stop the fan from buying another ticket from a street scalper and reentering the arena or from purchasing a ticket to an upcoming game where the fan will be able to resume harassing the player. In addition to removing the fan, a sports organization can take steps such as stripping season ticket holders of their remaining tickets and banning all offenders from purchasing tickets to future games until they complete an anger-management course, similar to the NFL's policy.[277] Because banned fans may be able to circumvent such restrictions by purchasing tickets through a third party, teams should step up efforts to identify

274. *See* Agness, *supra* note 8 (quoting NBA player Wesley Matthews, who attributed fan misconduct to alcohol consumption); *id.* ("It's probably the liquid courage (for fans). That does it to a lot of people. It sucks, but it's life and it's something that people shouldn't have to deal with in the workplace period.").

275. *See* Allie Clouse, *How Do Other Power 5 Schools Handle Alcohol at College Football Games?*, KNOX NEWS (June 26, 2019, 9:28 AM), https://www.knoxnews.com/story/sports/2019/06/26/alcohol-college-football-games-policy-power-5-university/1358400001/.

276. *See, e.g.*, Cooper v. Roanoke, No. Civ. 7:02-CV-00673, 2003 WL 24117704, at *6 (W.D. Va. Jan. 10, 2003) (holding that the plaintiff could not claim her employer's harassment policy was ineffective when the alleged harasser was fired for his actions within days of her complaint); Dunegan v. City of Council Grove, Kan. Water Dep't, 77 F. Supp. 2d 1192, 1200 (D. Kan. 1999) ("We can think of no more effective response than termination of the purported harasser.").

277. *See* Kaplan, *supra* note 116.

such individuals as they attempt to enter an event. Providing event personnel with photographs of banned fans may be the best teams can do at this time, but as facial recognition and other identification technologies become more commonplace,[278] teams may need to take stronger measures.

In sum, players should not be dissuaded from suing sports organizations simply because teams and leagues have taken some steps to control spectator harassment. Many of the measures they have implemented are deeply flawed, and although they may seem sensible and even aggressive when compared to how other workplaces address harassment, they are susceptible to attack because sports organizations have more effective measures at their disposal but choose not to implement them.

## CONCLUSION

Spectator harassment is a serious problem. Not only is it deeply humiliating to the professional athletes who are targeted, but due to its public nature, the damage it inflicts extends to others, both in the immediate vicinity and more broadly. Sports organizations talk a good game about the importance of sportsmanship and respect, and to be fair, they have taken some steps to discourage fans from misbehaving. Unfortunately, these measures have proven inadequate. Spectator harassment is on the rise and threatens to spiral out of control unless teams and leagues take more forceful action. President Bill Clinton once remarked that "America, rightly or wrongly, is a sports crazy country . . . and we often see games as a metaphor or a symbol of what we are as a people."[279] Because sports both reflect and shape our fundamental values,[280] how sports organizations respond to spectator harassment has the very real potential to impact how other employers—and society at large—

278. *See* Parmy Olson, *Facial Recognition's Next Big Play: The Sports Stadium*, WALL ST. J. (Aug. 1, 2020, 10:00 AM), https://www.wsj.com/articles/facial-recognitions-next-big-play-the-sports-stadium-11596290400 (reporting that "[s]everal pro sports teams . . . are testing facial-recognition technology in stadiums" to make the process for admitting fans for entry "as touchless as possible during the coronavirus pandemic").

279. KATHRYN JAY, MORE THAN JUST A GAME: SPORTS IN AMERICAN LIFE SINCE 1945, at 2 (2004); *see also* Crane v. Ind. High Sch. Athletic Ass'n, 975 F.2d 1315, 1326 (7th Cir. 1992) (Posner, J., dissenting) (discussing "our sports-obsessed society"); William W. Berry III, *Educating Athletes: Re-Envisioning the Student-Athlete Model*, 81 TENN. L. REV. 795, 796–97 (2014) ("After unprecedented growth over the past decade, the obsession with college sports, particularly football and basketball, seems to deepen daily."); Matthew J. Mitten & Hayden Opie, *"Sports Law": Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution*, 85 TUL. L. REV. 269, 308 (2010) (observing that "[s]ports are an important cultural phenomenon . . . [and] a national obsession with millions of participants, spectators, and fans").

280. *See* Davis, *supra* note 42, at 1115–16.

respond when individuals are ridiculed because of their race, sex, or some other protected characteristic.

Given the difficulty of controlling the behavior of thousands of spectators in a tense and passionate environment, it may be tempting to dismiss this as a problem without a solution. That would be a mistake. Now is not the time to ease up but to double down. Sports organizations can and should do more to reduce the threat of spectator harassment. Some of the measures this Article suggests are simple, such as updating fan codes of conduct to more clearly convey expectations. Others, like banning alcohol or penalizing a team, are more complex. But complexity is not an excuse for inaction. One of the powerful lessons of the Black Lives Matter movement is that sports organizations are perfectly capable of solving complex problems when the public demands it. Within the span of thirty-three days in the summer of 2020, NASCAR banned spectators from flying the Confederate flag,[281] and Dan Snyder, owner of the NFL's Washington Redskins, announced he was retiring the team's name and racially insensitive logo[282]—two colossal changes that seemed unfathomable only weeks earlier.[283] If these organizations can make such drastic changes despite blowback from fans and potentially millions of dollars in lost revenue, there is no reason teams and leagues cannot enact more stringent measures to protect their players from abuse.

For too long, sports organizations have been able to pick and choose which anti-harassment measures to implement. Without any real threat of litigation, teams and leagues have been able to ride out the negative publicity they encounter when spectator harassment occurs simply by denouncing the conduct and pointing out all the ways they try to safeguard players from fan abuse. There is hope of eradicating this egregious form of discrimination, but it requires sports organizations to do more. This does not require the enactment of a new law but can be accomplished through Title VII—a statute whose very purpose is to ensure employers adequately protect their employees from discrimination.

Succeeding on a harassment claim under Title VII is almost never easy, and the unique nature of spectator harassment presents additional challenges. But it is possible for players to hold their

281. *NASCAR Statement on Confederate Flag*, NASCAR (June 10, 2020, 4:45 PM), https://www.nascar.com/news-media/2020/06/10/nascar-statement-on-confederate-flag/.

282. @WashingtonNFL, TWITTER (July 13, 2020, 9:00 AM), https://twitter.com/WashingtonNFL/status/1282661063943651328/photo/1.

283. As recently as 2013, Snyder told reporters, "We'll never change the name. It's that simple. NEVER—you can use caps." Erik Brady, *Daniel Snyder Says Redskins Will Never Change Name*, USA TODAY (May 10, 2013, 8:14 AM), https://www.usatoday.com/story/sports/nfl/redskins/2013/05/09/washington-redskins-daniel-snyder/2148127/.

teams, and perhaps even their leagues, accountable for the actions of fans. Even if a player is ultimately unsuccessful in litigation, the act of suing itself could bring about change. Defending itself in such a suit would force a sports organization to take the harasser's side, either by denying that the conduct occurred, downplaying its seriousness, or disclaiming responsibility. The public relations nightmare such defenses would unleash is not something sports leagues, which are hyperconscious about their images, would seem eager to inflict upon themselves.[284]

Professional sports organizations are uniquely positioned to lead out in the fight against discrimination. Stenciling "Black Lives Matter" onto basketball courts and pitching mounds[285] and allowing players and coaches to kneel during the national anthem[286] helped call attention to societal injustices, but teams and leagues should not overlook the work they need to do within their own organizations. A team cannot proclaim that Black lives matter, yet feign helplessness when fans mock and taunt Black players. Enacting more stringent measures to prohibit spectator harassment would send a powerful message, not only within the sports world but also to society at large, that taunting a person because of a protected characteristic is never acceptable. Sports organizations have the resources and ability to better protect players from spectator harassment. Title VII can help make this a reality.

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284. Perhaps it was for this reason that the day after Cox sued the NFL for spectator harassment, the league settled the case by agreeing to "distribute[] revised guidelines requiring, among other things, that teams remove from the stadiums fans who take part in 'racial taunts.'" Cox v. Nat'l Football League, 889 F. Supp. 118, 119 (S.D.N.Y. 1995).

285. *See* Malika Andrews, *NBA Unveils Black Lives Matter on Orlando Court*, ESPN (July 22, 2020, 7:26 AM), https://www.espn.com/nba/story/_/id/29510169/nba-unveils-black-lives-matter-orlando-court; Paul P. Murphy, *Baseball is Making Black Lives Matter Center Stage on Opening Day*, CNN (July 24, 2020, 10:10 AM), https://www.cnn.com/2020/07/23/us/opening-day-baseball-mlb-black-lives-matter-trnd/index.html.

286. *See* Ben Cohen, *NBA Players Kneel During National Anthem on Restart's Opening Night*, WALL ST. J. (July 30, 2020, 9:37 PM), https://www.wsj.com/articles/nba-players-kneel-during-national-anthem-on-restarts-opening-night-11596150590.