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America's Race-Based Caste Structure: Its Impact in College and Professional Sports

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AMERICA'S RACE-BASED CASTE STRUCTURE: ITS IMPACT IN COLLEGE AND PROFESSIONAL SPORTS

*by: Timothy Davis**

ABSTRACT

Racial inequities in college and professional sports remain prevalent and persistent despite the awareness of such inequities by those with the power to effectuate change. This Article proposes that explanations frequently offered for the slow pace of progress often fail to account for the hierarchy derived from a race-based caste system embedded in American society. Relying on the work of author Isabel Wilkerson, Part II describes major pillars of America's race-based caste structure. Part III examines how stereotypes of Blacks' presumed intellectual inferiority and a lack of fitness for leadership roles adversely impact their access to positions of power in both college and professional sports. Part IV discusses how the caste-system hierarchy and its accompanying mindset manifests in the academic marginalization of Black college athletes and the transfer of revenue disproportionately generated by them to predominantly White coaches, athletic administrators, and athletes in non-revenue generating sports. This Article discusses the limited effectiveness of legal doctrine, including anti-discrimination laws and contract law principles, to significantly diminish the above-referenced racial inequities in college and professional sport. In addition, it proposes specific policies that may assist in achieving greater racial equity in sport. It concludes, however, that a necessary step in moving toward greater racial equity in college and professional sports is an honest recognition that systemic racial inequities are, in part, a product of a caste-system mindset.

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I. INTRODUCTION

The year following the death of George Floyd was accompanied by demands for American institutions and citizens to eradicate racial injustice and inequities in the United States. In sports, such demands resulted in varied reactions, including NASCAR banning Confederate flags from its events and properties, the National Basketball Association’s (“NBA”) Milwaukee Bucks’s refusal to play a game in protest of a police shooting, and the National Football League’s (“NFL”) Washington Redskins dropping its 88-year-old name and logo depict-

ing a Native American.¹ Initiatives undertaken by the major sports leagues² include the 30 NBA teams' cumulative pledge of \$300 million³ and the NFL's pledge of \$250 million⁴ to initiatives seeking to achieve greater social and racial justice in America.

Although the above-referenced changes and initiatives are welcome, they fail to adequately address persistent and structural racial inequities in college and professional sports. At both levels, race-related impediments contribute to limiting opportunities for Blacks to ascend, consistently over time, to coaching and other positions of power. In college sports, Black Football Bowl Subdivision ("FBS") players and Division I men's basketball players disproportionately

1. Giulia McDonnell Nieto del Rio, John Eligon & Adeel Hassan, *A Timeline of What Has Happened in the Year Since George Floyd's Death*, N.Y. TIMES, <https://www.nytimes.com/2021/05/25/us/george-floyd-protests-unrest-events-timeline.html> (Oct. 2, 2021) [<https://perma.cc/JP3A-VTBM>].

2. In addition to the efforts undertaken by the NFL and NBA, Major League Baseball ("MLB") "enhanced existing partnerships with the Jackie Robinson Foundation and the Negro Leagues Baseball Museum, made charitable donations to the NAACP Legal Defense and Education Fund, and launched the new [MLB] Diverse Business Partners Recovery Project." Alyson Footer, *Nats, Yanks Unify to Promote Social Justice*, MAJOR LEAGUE BASEBALL (July 24, 2020), <https://www.mlb.com/news/mlb-players-social-justice-inclusion-diversity> [<https://perma.cc/4Y6Z-Q5PV>]. Major League Soccer's efforts include financial donations to "Black Players for Change" and Black civic organizations (e.g., the National Coalition of 100 Black Women and 100 Black Men of America) and the formation of a diversity committee. Torrey Hart, *MLS Launches Series of Social Justice Initiatives*, FRONT OFF. SPORTS (Oct. 19, 2020), <https://frontofficesports.com/mls-social-justice-initiatives> [<https://perma.cc/Y7GC-7HCK>]. The Women's National Basketball Association ("WNBA") dedicated its 2020 season to social justice, launched a new platform designed to amplify the voices of WNBA players called "The Justice Movement," and created a Social Justice Council. *WNBA Announces a 2020 Season Dedicated to Social Justice*, WOMEN'S NAT'L BASKETBALL ASS'N (July 6, 2020), <https://www.wnba.com/news/wnba-announces-a-2020-season-dedicated-to-social-justice/> [<https://perma.cc/HLD3-2X5F>]. Finally, the National Hockey League's ("NHL") initiatives include continuing its work with partners such as the Thurgood Marshall College Fund and requiring that employees participate in inclusion training. NHL Public Relations, *NHL Announces Initiatives to Combat Racism, Accelerate Inclusion Efforts*, NAT'L HOCKEY LEAGUE (Sept. 3, 2020), <https://www.nhl.com/news/nhl-announces-initiatives-to-combat-racism-accelerate-inclusion-efforts/c-318873398> [<https://perma.cc/HDA7-K86C>].

3. Associated Press, *NBA Foundation Created, Pledges \$300 Million to Black Growth*, NBC NEWS (Aug. 5, 2020, 11:23 PM), <https://www.nbcnews.com/news/sports/nba-foundation-created-pledges-300-million-black-growth-n1235984> [<https://perma.cc/P3WL-YL9L>]. The NBA's commitment is "aimed at empowering Black communities, primarily through education and youth employment" over a 10-year period. Isabel Togoh, *The NBA Is Donating \$300 Million Over the Next Decade to Black Empowerment*, FORBES (Aug. 6, 2020, 05:45 AM), <https://www.forbes.com/sites/isabeltogoh/2020/08/06/the-nba-is-donating-300-million-over-the-next-decade-to-black-empowerment/?sh=2b85d93c1af4> [<https://perma.cc/7QLX-NNHQ>].

4. Associated Press, *NFL to Spend \$250 Million on Social Justice Initiatives*, USA TODAY, <https://www.usatoday.com/story/sports/nfl/2020/06/11/nfl-to-spend-250-million-on-social-justice-initiatives/111950734/> (Jun. 11, 2020, 7:52 PM) [<https://perma.cc/TE9D-U973>]. In announcing the initiative, the NFL stated that it plans to "work collaboratively with NFL players to support programs to address criminal justice reform, police reforms, and economic and educational advancement." *Id.*

generate the revenue that funds the National Collegiate Athletic Association (“NCAA”) and college athletics programs.⁵ This transfer of wealth from Black college athletes in revenue sports to primarily White NCAA administrators, university athletic directors, coaches, and the White athletes who predominate non-revenue producing sports is exacerbated by the academic marginalization of Black athletes.⁶ Practices such as clustering athletes in academic majors of dubious value⁷ deprive Black college athletes of full access to an educational opportunity and thereby undermine the essence of the bargain between colleges and their athletes—playing intercollegiate sports in exchange for genuine opportunities to acquire a quality education. In addition, in both college and professional sports, Black athletes are subjected to race-based indignities that diminish their humanity.⁸

Although college presidents, athletic directors, coaches, and team owners⁹ are in the position to effectuate change, they choose not to do so notwithstanding varying levels of awareness of the inequities and indignities experienced by Blacks in American sport.¹⁰ Awareness coupled with an absence of meaningful and consistent actions to address race-based inequities raises the question of why. Isabel Wilkerson’s caste-system framework explained in her book *Caste: The Origins of Our Discontent*¹¹ offers insight into why racial inequities in sport remain prevalent and persistent.

In Part II, this Article describes the major pillars of America’s race-based caste structure. This socially constructed system, which uses

5. See generally Ramogi Huma & Ellen J. Staurowsky, *How the NCAA’s Empire Robs Predominately Black Athletes of Billions in Generational Wealth*, NAT’L COLLEGE PLAYERS ASS’N 1–19 (July 31, 2020), <https://www.breakingviews.com/wp-content/uploads/2020/08/National-College-Players-Association-study.pdf> [<https://perma.cc/K28Y-DBLJ>].

6. *Id.* at 3.

7. *Id.* at 9.

8. See, e.g., Martenzie Johnson, *Kevin Durant and the Dehumanization of Black Athletes*, UNDEFEATED (June 13, 2019), <https://theundefeated.com/features/kevin-durant-and-the-dehumanization-of-black-athletes/> [<https://perma.cc/R2A7-JWBB>].

9. *Position Statement: A Continuing Disgrace—Intercollegiate Athletics Race Issues*, DRAKE GRP. 1, 14 (MAY 31, 2021), <https://www.thedrakegroup.org/wp-content/uploads/2021/05/FINAL-DRAFT-RACE-PAPER.pdf> [<https://perma.cc/64EA-GPE4>] [hereinafter Drake Group Position Statement] (concluding that predominantly White leaders, who control college intercollegiate athletes, neither acknowledge nor address policies and practices that adversely affect Black athletes, coaches, and administrators).

10. *Id.* at iii (stating that Whites, who control intercollegiate athletics, turn a blind eye to racial inequities); Goodell, *NFL Focused on Improving Diversity at All Levels*, SPORTS BUS. J. (Feb. 5, 2021), <https://www.sportsbusinessjournal.com/Daily/Issues/2021/02/05/Leagues-and-Governing-Bodies/NFL-Minorities.aspx> [<https://perma.cc/GB8F-BY8C>] [hereinafter *Improving Diversity at All Levels*] (acknowledging the awareness of the persistent racial inequities of the NFL).

11. ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENT* (2020) [hereinafter *CASTE*].

race as its metric, creates a hierarchy in which Whites reside at the top as the dominant class and Blacks reside at the bottom as the subordinate class.¹² America's race-based caste system embeds within the consciousness of members of each caste stereotypic beliefs and presumed societal roles.¹³

Part III discusses how the caste-system mindset contributes to barriers that artificially limit the ability of Blacks to attain positions of leadership within college and professional sports.¹⁴ After discussing the limits of anti-discrimination laws to achieve greater racial diversity in sports leadership, this Article offers specific recommendations for achieving greater diversity.¹⁵ Part IV discusses the manifestation of caste-system mindset and its adverse impact on Black college athletes, including the transfer of wealth that they disproportionately generate in the primary revenue producing sports. Part IV addresses policies and practices that diminish the ability of Black athletes in these sports to obtain a meaningful education.¹⁶ It then examines legal and non-legal strategies to protect the economic and academic interests of Black athletes.¹⁷ Part V discusses the dehumanizing indignities that Whites inflict upon Black athletes that are a consequence of the caste system.¹⁸ Once again, specific recommendations are made to address these behaviors.¹⁹ In Part VI, this Article concludes that in addition to the adoption of specific policies and practices, a necessary step in moving toward greater racial equity in college and professional sports is honest recognition that systemic racial inequities are, in part, a product of a caste-system mindset.²⁰

At the outset, it is important to be mindful of what caste is and is not. Caste is structure.²¹ It is not about feelings. Therefore, actions engaged in by White individuals are a product of an embedded caste-system mindset, which by itself does not make someone a racist who harbors and acts with racial animus toward Blacks. Rather, such conduct reflects the insidiousness of the caste system, its accompanying mindset, and profound influence on behavior. As Wilkerson states, the power of caste and its hierarchy is that it is not to be confused with feelings or emotions or morality.²² "It is about respect, authority, and

12. See discussion *infra* Part II; see also *CASTE*, *supra* note 11, at 52.

13. See *CASTE*, *supra* note 11, at 18, 52.

14. See discussion *infra* Part III.

15. See discussion *infra* Part III.

16. See discussion *infra* Part IV.

17. See discussion *infra* Part IV.

18. See discussion *infra* Part V.

19. See discussion *infra* Part V.

20. See discussion *infra* Part IV.

21. See *CASTE*, *supra* note 11, at 70 ("Caste is ranking. Caste is the boundaries that reinforce the fixed assignments based upon what people look like.").

22. *Id.* at 17 (stating further that caste is "about power—which groups have it and which do not").

assumptions of competence—who is accorded these and who is not.”²³ Therefore, practices engaged in by White people acting without conscious racial animus but which adversely impact the lives and well-being of Black Americans demonstrate that none of us “escapes [the] tentacles” of America’s caste system.²⁴

II. AMERICA’S RACE-BASED CASTE SYSTEM

In her book *Caste*, author Isabel Wilkerson discusses what she describes as America’s race-based caste system that reflects a state of mind, which originated during slavery and has become embedded within American society.²⁵ According to Wilkerson, caste is a social construct and race²⁶ is a metric used to divide people into a bipolar hierarchy²⁷ consisting of a dominant caste, occupied by Whites at the top of the hierarchy, and a subservient caste, occupied by Blacks at the bottom.²⁸ Latinx, Asian, Indigenous, and other peoples navigate between the dominant and subservient groups.²⁹

Although Wilkerson states that both race and caste are socially constructed, she differentiates them. She explains that caste is a structure that establishes the boundaries and “reinforce[s] the fixed assignments based upon what people look like.”³⁰ Elaborating on the critical role that race plays in the caste system hierarchy, Wilkerson states:

“Race is a social concept, not a scientific one,” . . . “We think we ‘see’ race when we encounter certain physical differences among people such as skin color, eye shape, and hair texture What we actually ‘see’ . . . are the learned social meanings, the stereotypes, that have been linked to those physical features by the ideology of race and the historical legacy it has left us.”³¹

Wilkerson states that caste “embeds into our bones an unconscious ranking of human characteristics and sets forth the rules, expectations, and stereotypes” that govern how people interact daily with members within and outside of their respective caste.³² As such, Wilkerson explains that the caste system trains us to view each other “in the language of race”³³ and to process information including the stereotypic

23. *Id.* at 18.

24. *Id.* at 384.

25. *Id.* at 18, 64.

26. Wilkerson states the use of physical characteristics as the basis for assigning inner abilities and group value may be the most clever way ever devised to manage and maintain a caste system. *Id.* at 20.

27. *Id.* at 19 (stating that while caste is immutable, race is more fluid and subject to redefinition when it suits the needs of the dominant caste).

28. *Id.* at 52.

29. *Id.*

30. *Id.* at 69–70.

31. *Id.* at 66–67.

32. *Id.* at 18.

33. *Id.*

and automatic assumptions about each other based on the caste to which we belong.³⁴ Thus, central to Wilkerson's caste conceptualization is the notion that Americans have inherited the "rules of engagement" of the country's caste system.³⁵

A principal pillar of America's caste system is the division of labor according to preassigned roles established for individuals notwithstanding their innate and learned capabilities.³⁶ These roles are derived from presumptions including the dominate caste's assumed intellectual superiority, leadership capabilities, and other characteristics that legitimize their entitlement to positions of power and leadership.³⁷ In addition, dominant caste members are presumed worthy of receiving empathy and the benefit of the doubt.³⁸ In contrast, the caste system assigns to members of the subordinate caste negative stereotypic assumptions regardless of their intrinsic abilities, including intellectual inferiority that situates them for menial positions of servitude to the dominant caste and falsely makes them unfit for leadership and positions of power.³⁹

While those of the subordinate caste are presumed born for physical activity, including sports, they are considered innately unfit for leadership positions.⁴⁰ As such, the dominant caste is expected to be in control while those of the subordinate caste are expected to take orders from the presumptively superior dominant caste members.⁴¹ Wilkerson states, "Caste is more than rank, it is a state of mind that holds everyone captive, the dominant imprisoned in an illusion of their own entitlement, the subordinate trapped in the purgatory of someone else's definition of who they are and who they should be."⁴² Wilkerson adds that presumptions that dominant caste members are inherently smarter, more capable, and deserving are burrowed within our subconscious, and unless we act intentionally to counteract its effect, we continue to act according to the script.⁴³

It is often said that sport is a microcosm of larger society⁴⁴ that shapes as well as reinforces the values within a society.⁴⁵ Accepting

34. *Id.*

35. *Id.* at 52.

36. *Id.* at 19; *see also id.* at 132–33.

37. *See id.* at 18–19, 62–63.

38. *Id.* at 287.

39. *See id.* at 18–19, 63–64.

40. *See id.* at 64.

41. *See id.* at 273.

42. *Id.* at 290.

43. *See id.* at 384.

44. BILLY HAWKINS, *THE NEW PLANTATION: BLACK ATHLETES, COLLEGE SPORTS, AND PREDOMINANTLY WHITE NCAA INSTITUTIONS* 10 (2010); *see also* MATTHEW J. MITTEN, TIMOTHY DAVIS, N. JEREMI DURU & BARBARA OSBORNE, *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 7 (Wolters Kluwer 2020).

45. MITTEN ET AL., *supra* note 44, at 5.

this idea as true, it follows that notwithstanding the ideal of sport as a meritocracy in which one is evaluated on the basis of their abilities,⁴⁶ sports like other American institutions have not escaped the invisible clutches of America's caste system. As discussed *infra*,⁴⁷ the invisible yet harmful assumptions of America's caste system disadvantages Blacks in sports in specific ways. Pillars of the race-based caste system that manifest in sport include (1) the presumed intellectual inferiority of Black athletes and the undue emphasis placed on their physicality, which results in their academic marginalization in college;⁴⁸ (2) the assumed unsuitability of Blacks for leadership roles such as coaches and general managers for sports teams and leagues and the reservation of leadership roles primarily for Whites;⁴⁹ (3) the caste-system notion that Blacks as members of the subordinate caste are to serve the interests of those of the dominant caste;⁵⁰ and (4) the idea that Blacks athletes are not as deserving of the respect and human kindness afforded White athletes.⁵¹

I share Wilkerson's caution that caste and race are not the determinants of every action or policy that adversely impacts African Americans in sport.⁵² I also agree with Wilkerson's observation, however, that no aspect of American society, including sport, can be fully understood without considering caste and its embedded hierarchy.⁵³ Thus, caste becomes a factor "to whatever infinitesimal degree" in how we interact with each other and the policies that affect Blacks, Whites, and others in both society at large and sports.⁵⁴ Accordingly, not considering the role of caste in examining the inequitable treatment of Blacks in sport will inhibit an understanding of the prevalence and persistence of such inequities.

46. *Id.* at 7.

47. See discussion *infra* Part IV.

48. See Drake Group Position Statement, *supra* note 9, at 41.

49. Wilkerson states that another central theme of caste is the reservation of leadership roles for members of the dominant caste. In America's socially constructed caste system, expectation and assumptions assign Blacks to role as servants of Whites. CASTE, *supra* note 11, at 134-35, 206.

50. See *id.* at 70.

51. See *id.* According to Wilkerson, "caste is the granting or withholding of respect, status, honor, attention, privileges, resources, benefit of the doubt, and human kindness to someone on the basis of their perceived rank or standing in the hierarchy." *Id.*

52. *Id.* at 72.

53. *Id.* at 324; see also MITTEN ET AL., *supra* note 44, at 699 (indicating race and sport are intertwined and sport cannot be meaningfully examined without considering race); HAWKINS, *supra* note 44, at 18 (stating as it relates to race, the experiences of Black college athletes mirror those of Blacks in American society generally).

54. CASTE, *supra* note 11, at 72.

III. LIMITED ACCESS TO LEADERSHIP POSITIONS IN SPORTS

A. *Leadership Inequity in Sports*

This Section proposes that America's race-based caste system contributes to impediments that limit Blacks' ability to ascend to leadership positions in both professional and college sports. It initially examines the racial demographics of persons holding leadership positions in two professional sports, the NFL and the NBA, in which Blacks constitute the majority of the players.⁵⁵ It then examines racial diversity in the leadership ranks of college sports, particularly FBS football and Division I men's basketball. As it relates to the NFL and NBA, there are occasional instances in which Blacks make inroads in acquiring leadership positions, such as the Washington Football Team hiring the first Black man to become president of an NFL franchise⁵⁶ and the hiring of Black men to fill seven of the eight open head coach positions in the NBA at the end of the 2020–2021 season.⁵⁷ Notwithstanding these glimpses of progress, the overall lack of sustained progress of Blacks hired to fill leadership positions in the NFL and NBA represent profound manifestations of the influence of the caste-system mindset in sport.

1. The National Football League

The end of the 2020–2021 NFL head-coach hiring cycle illustrates the difficulty Blacks encounter in becoming head football coaches in

55. Richard E. Lapchick, *2021 Racial and Gender Report Card: National Basketball Association*, INST. FOR DIVERSITY & ETHICS SPORTS 6 (2021), <https://www.tidesport.org/nba> (click on "2021 NBA RGRC") [<https://perma.cc/AK3W-CT6B>] [hereinafter *TIDES 2021 NBA Report Card*]; Richard E. Lapchick, *2020 Racial and Gender Report: National Football League*, INST. FOR DIVERSITY & ETHICS SPORTS 8 (2020), <https://www.tidesport.org/nfl> [<https://perma.cc/9V2U-CLV9>] (click on "2020 NFL RGRC") [hereinafter *TIDES 2020 NFL Report Card*]. An examination of the caste system's impact on leadership roles in other major professional sports leagues is beyond the scope of this paper. Impediments resulting, at least in part, from the caste-system mindset also restrict access for Blacks to leadership positions in these other sports. For a comprehensive study of the racial demographics of leadership positions in Major League Baseball and Major League Soccer, see Richard E. Lapchick, *2021 Racial and Gender Report Card: Major League Baseball*, INST. FOR DIVERSITY & ETHICS SPORTS (2021), <https://www.tidesport.org/mlb> [<https://perma.cc/963N-WR93>] (click on "2021 MLB RGRC"); Richard E. Lapchick, *2021 Racial and Gender Report: Major League Soccer*, INST. FOR DIVERSITY & ETHICS SPORTS (2021), <https://www.tidesport.org/mls> [<https://perma.cc/937N-NLEA>] (click on "2021 MLS RGRC").

56. Jason Wright was hired to the position by the NFL's Washington Football Team. Gillian R. Brassil & Eleanor Lutz, *In 30 Years, Little Progress for U.S. Sports Leagues on Leadership Diversity*, N.Y. TIMES (Dec. 23, 2020), <https://www.nytimes.com/interactive/2020/12/23/sports/diversity-coaches-sports.html> [<https://perma.cc/KS9D-P4P2>].

57. Marc J. Spears, 'We're Moving in the Right Direction': Black Coaching Hires in NBA Bring Excitement, UNDEFEATED (July 19, 2021), <https://theundefeated.com/features/were-moving-in-the-right-direction-black-coaching-hires-in-nba-bring-excitementn> [<https://perma.cc/N5JM-7APM>].

the league. Of the seven head coach openings, one was filled by a Black man.⁵⁸ Although Black athletes account for over 70% of NFL players, the most recent hire means only three of the NFL's 32 teams have a Black head coach.⁵⁹ In the face of yet another dismal hiring season and the overall lack of racial diversity in the NFL, the league's commissioner, Roger Goodell, expressed his disappointment.⁶⁰ “[L]ack of diversity isn’t just a head-coaching issue but an issue throughout positions on all clubs.”⁶¹

Voluntary efforts to increase racial diversity in NFL leadership have not achieved their intended results. In 2003, the NFL adopted the Rooney Rule, which requires NFL franchises to interview at least one candidate of color for head coaching positions.⁶² In 2009, the Rooney Rule was expanded to encompass senior football operations positions (i.e., “general manager jobs and equivalent front office positions”).⁶³ The Rule was further updated in 2020 to require franchises to interview at least two non-White candidates for head coach positions and also interview at least one non-White candidates for offensive and defensive coordinator positions.⁶⁴ The Rule does not, however, require franchises to hire any of the coaches of color who are interviewed.⁶⁵ Although the Rooney Rule is well intentioned, it has not resulted in appreciable sustained progress as team management circumvents the rule by engaging in token interviews of Black candidates⁶⁶ that fre-

58. Michael Rosenberg, *What It Means—and Doesn't Mean—That Eric Bieniemy Is Not a Head Coach*, SPORTS ILLUSTRATED (Feb. 5, 2021), <https://www.si.com/nfl/2021/02/05/closer-look-at-bieniemy-lack-of-black-nfl-coaches-daily-cover> [<https://perma.cc/SL78-H2G4>].

59. Brassil & Lutz, *supra* note 56.

60. *Improving Diversity at All Levels*, *supra* note 10.

61. *Id.*

62. K.L. Gallagher et al., *Field Studies: NFL Coach Hiring and Pathways in the Rooney Rule Era*, GLOB. SPORTS INST. 2 (Feb. 5, 2021), <https://globalsportmaters.com/wp-content/uploads/2021/02/GlobalSportInstitute-Field-StudiesNFLFeb2021.pdf> [<https://perma.cc/YZ37-GWPQ>].

63. Press Release, NFL Comm'ns, *NFL Expands Rooney Rule Requirements to Strengthen Diversity* (Dec. 12, 2018), <https://nflcommunications.com/Documents/NFL%20Expands%20Rooney%20Rule%20Requirements%20to%20Strengthen%20Diversity%2012.12.18%20FINAL%20for%20distribution.pdf> [<https://perma.cc/ZXp6-4KAR>]; *see also* Brassil & Lutz, *supra* note 56.

64. Brassil & Lutz, *supra* note 56.

65. *Id.*

66. Cedric Golden, *Golden: Why Black NFL Head Coaches Are Becoming an Endangered Species*, STATESMAN (Jan. 11, 2020, 2:30 PM), <https://www.statesman.com/sports/20200111/golden-why-black-nfl-head-coaches-are-becoming-endangered-species> [<https://perma.cc/L5SN-CWUA>] (stating that the Rooney Rule has become a token process); *see also* Drake Group Position Statement, *supra* note 10, at 11 (“Tokenism is the result of a system that allows low numbers of minority applicants coupled with failure to recruit highly qualified minority applicants within the marketplace.”).

quently occur after the decision already has been made to hire a White candidate.⁶⁷

A recent report examining the hiring of NFL coaches found no evidence of a “[c]onsistent increase in the number of [NFL] head coaches of [c]olor” between the seasons the Rooney Rule was adopted—namely, 2002–2003 and 2019–2020.⁶⁸ The report noted three seasons during this 18-year period in which no coaches of color were hired.⁶⁹ This included the year 2013 when there were eight head-coach vacancies.⁷⁰ According to the report, NFL teams also have a poor record of hiring Blacks and other persons of color to be offensive coordinators, the “most prolific pathway” to becoming an NFL head coach.⁷¹ During the 2002–2003 and 2019–2020 timeframe, Whites comprised 84.7% of outgoing offensive coordinators and 86.8% of incoming (newly hired) offensive coordinators.⁷² Year after year, team CEO/presidents and general managers have been predominantly White men,⁷³ prompting the lead author of the report to state: “There should be serious concern in the consistent lack of representation of people of color within general manager and team CEO/president roles on NFL teams as representation at positions of influence is vital for improving racial and gender hiring practices within the League.”⁷⁴

A New York Times analysis of data of the racial demographics in the five major sport leagues in the United States concluded that “[d]espite a handful of initiatives meant to increase diversity in the leadership of sports organization, coaching and management roles have mostly gone to [W]hite candidates in the past 30 years.”⁷⁵ This analysis also noted the gap between diversity hires and the leagues’ rhetoric that espouses the goal of increasing diversity in leadership.⁷⁶ It also noted the minimal progress in diversifying the leadership positions on NFL and NBA teams over a 30-year period.⁷⁷

67. Sally Jenkins, *NFL's Bleak Record on Diversity Hiring Ends with Owners but Starts with Coaches*, WASH. POST (Jan. 14, 2020) https://www.washingtonpost.com/sports/nfl/nfls-bleak-record-on-diversity-hiring-ends-with-owners-but-starts-with-coaches/2020/01/14/8aa2bc8e-36e7-11ea-bf30-ad313e4ec754_story.html [<https://perma.cc/55FT-MAMW>]; Shalise Manza Young, *Deeper Than Color, Good Coaches Continue to Be Passed Up*, GLOB. SPORTS MATTERS (Feb. 5, 2021), <https://global-sportmatters.com/culture/2021/02/05/deeper-than-color-good-coaches-continue-to-be-passed-up/> [<https://perma.cc/3MP5-A25M>] (commenting that even though it is well intentioned, the Rooney Rule has become ineffective).

68. Gallagher et al., *supra* note 62, at 2.

69. *Id.* at 5.

70. *Id.*

71. *Id.* at 13.

72. *Id.* at 15.

73. *TIDES 2020 NFL Report Card*, *supra* note 55, at 7, 14, 33–34.

74. *Id.* at 3.

75. Brassil & Lutz, *supra* note 56.

76. *Id.*

77. *Id.*

2. The National Basketball Association

As noted *supra*,⁷⁸ considerable progress was made in diversifying NBA head coaches during 2020-2021. Perhaps this significant increase in Black coaching hires will launch a sustained period of diversifying the NBA's leadership. Historically, this has not been true, in a league in which Black athletes currently comprise approximately 73% of NBA players.⁷⁹ While the percentage of Black coaches and general managers is more impressive than their NFL counterparts, a historical review reveals past years marked by substantial increases in the number of Black NBA coaches and general managers only to be followed by years of stagnation.⁸⁰ During the 2003–2004 season, Blacks constituted 36.7% of NBA head coaches.⁸¹ For the 2011–2012 season, the percentage increased to 46.7% only to fall to between 20% and 26.7% for the six seasons between 2015–2016 and 2020–2021.⁸² This lack of sustained progress also occurred with respect to Black CEO/Presidents. Blacks held 12.1% of these NBA positions during 2006–2007.⁸³ In the 13 seasons between 2007–2008 and 2020–2021, Black CEO/presidents ranged between 5.3% and 23.2%.⁸⁴ During the 2010–2011 season, Blacks accounted for 23.3% NBA general managers.⁸⁵ For the ten seasons between 2010–2011 and 2020–2021, the percentage of Black NBA general managers ranged between 6.7 and 26.75%.⁸⁶ Consequently, the 2021 substantial increase in the number of Black NBA head coaches must be met with guarded optimism.

The NBA does not have a Rooney-type rule that specifies guidelines. Rather, the NBA's primary initiative to increase the racial diversity of head coaches is the Coaches Equality Initiative (the "Initiative"), which is a partnership of the NBA and NBA Coaches Association.⁸⁷ The Initiative seeks to "identify and develop top coaching talent with the goal of growing the number of highly skilled coaches in the NBA and ensuring a level playing field for the development and advancement of all qualified coaching candidates."⁸⁸ The Initiative's programing includes coaching workshops aimed at developing coaching and executive competencies and networking.⁸⁹

78. See *supra* discussion accompanying note 50.

79. *TIDES 2021 NBA Report Card*, *supra* note 55, at 6.

80. *Id.* at 60.

81. *Id.*

82. *Id.*

83. *Id.* at 62.

84. *Id.*

85. *Id.* at 63.

86. *Id.*

87. *Id.* at 44.

88. *Recruiting and Development*, NBA, <https://inclusion.nba.com/recruiting-and-development/> [<https://perma.cc/RA44-ZDMW>].

89. *Id.*

3. Division I Intercollegiate Athletics

Unfortunately, efforts to diversify the leadership of Division I intercollegiate athletics more closely align with the NFL rather than the NBA. The most recent comprehensive examination of the racial demographics of college sports leadership makes a compelling case of the extent to which Whites predominate in power positions (e.g., head coach and athletic director) and the ineffectiveness of efforts to increase diversity.⁹⁰ In 2020, White people comprised 78% of Division I athletic directors.⁹¹ The overall Division I percentage mirrored those within the five most elite athletic conferences, the Power Five conferences—the Atlantic Coast Conference (“ACC”), Big 10 Conference, Big 12, PAC-12 and Southeastern Conference (“SEC”). Whites comprised 79% of athletic directors within Power Five institutions.⁹² Within this group of conferences, the percentage of White athletic directors ranged from an average of 60% for PAC 12 institutions to 93% for ACC institutions.⁹³

The forgoing statistics are mirrored in other power positions including those in the pipeline to become athletic directors.⁹⁴ In 2020, Whites comprised 84% of Division I associate athletic directors.⁹⁵ Within FBS Division I autonomy institutions, Whites held 84% of associate athletic director positions.⁹⁶ Whites also predominate in other positions of power including chancellors and presidents,⁹⁷ head athletic trainers,⁹⁸ and faculty athletic representatives.⁹⁹

90. Paul Steinbach, *College Racial and Gender Hiring Largely Unchanged*, ATHLETIC BUS. (Feb. 25, 2021), <https://www.athleticbusiness.com/staffing/college-racial-and-gender-hiring-largely-unchanged.html> [<https://perma.cc/6D2Y-X4HQ>]; see also Richard E. Lapchick, *2020 DI FBS Leadership College Racial and Gender Report Card*, INST. FOR DIVERSITY & ETHICS SPORTS (2021), <https://www.tidesport.org/division-1-leadership> [<https://perma.cc/8P5A-NKFZ>] [hereinafter *TIDES 2020 College Racial Gender Report Card*] (click on “2020-21 DI Leadership Report”).

91. *NCAA Demographics Database, Demographics by Race/Ethnicity*, NAT'L COLLEGIATE ATHLETIC ASS'N (Mar. 2021), <https://www.ncaa.org/about/resources/research/ncaa-demographics-database> (click on “Demographics by Race/Ethnicity”) [<https://perma.cc/HQ79-QDNY>] [hereinafter *NCAA Racial Diversity Research*].

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. When examined by conference, the percentage of White associate athletic directors ranged from 80% for Pac-12 universities to 89% for SEC schools. *Id.*

97. Within Division I athletic institutions, White comprised 79% of chancellors and presidents and Blacks held 11% of those positions. *Id.* Within FBS schools, the percentages were 85% and 3% for Whites and Blacks, respectively. *NCAA Racial Diversity Research, supra* note 91.

98. Whites comprised 90% and 92% of head athletic trainers within FBS autonomy and FBS non-autonomy conferences, respectively. *Id.*

99. Whites comprised 82%, 76%, and 88% of faculty athletic representatives within Division I overall, FBS autonomy, and FBS non-autonomy institutions, respectively. *Id.*

Whites also overwhelmingly predominate in the highly visible head coach positions in the intercollegiate athletics' primary revenue-producing sports, Division I FBS football and Division I men's basketball. For the 2019–20 season, Whites comprised 82%, 79%, and 91% of head men's football coaches within Division I overall, FBS autonomy, and Division I FBS non-autonomy institutions, respectively.¹⁰⁰ Within FBS autonomy conferences, the percentage of Whites holding head men's football coach positions ranged from 50% for Pac-12 institutions to 100% for Big 12 institutions, respectively.¹⁰¹ Whites also predominated as offensive and defensive coordinators, positions often considered springboards to becoming a head football coach.¹⁰² Whites accounted for 82%, 77%, and 87% of offensive coordinators, respectively, within Division I overall, FBS autonomy, and Division I FBS non-autonomy institutions.¹⁰³ Whites also accounted for 74%, 79%, and 76% percent of defensive coordinators within Division I, FBS autonomy, and Division I FBS non-autonomy institutions, respectively.¹⁰⁴ These percentages contrast sharply with racial demographics in Division I, FBS autonomy, and FBS non-autonomy institutions, where Black football players comprised 48%, 46%, and 52% of football players, respectively.¹⁰⁵

For the 2019–2020 season, Whites comprised 71%, 83%, and 70% of head football coaches within Division I overall, FBS autonomy, and Division I FBS non-autonomy institutions, respectively.¹⁰⁶ Within FBS autonomy schools, the percentage of White head coaches ranged from 73% within the ACC to 93% within the Big Ten.¹⁰⁷ As was true for football, these percentages contrast sharply with the demographics of basketball players. Black men comprised 56%, 50%, and 61% of basketball players within Division I overall, FBS autonomy, and FBS non-autonomy institutions, respectively.¹⁰⁸

The forgoing numbers demonstrate the lack of significant progress toward achieving greater racial diversity in leadership of college sports and the ineffectiveness of measures to increase diversity. In 2016, the NCAA adopted a “Pledge and Commitment to Promoting Diversity” in intercollegiate athletics.¹⁰⁹ Notwithstanding this pledge and statements calling for greater racial diversity in the leadership of Division I athletics, a lack of diversity persists.¹¹⁰ This lack of racial diversity is

100. *Id.* (click on “Coach and Student-Athlete Demographics by Sport”).

101. *Id.*

102. *Id.*

103. *Id.*

104. *NCAA Racial Diversity Research*, *supra* note 91 (click on “Coach and Student-Athlete Demographics by Sport”).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *TIDES 2020 College Racial Gender Report Card*, *supra* note 90, at 3.

110. *Id.* at 2.

also notable given the demographics of the athletes who coaches and other athletic personnel lead.¹¹¹

[The leadership fails to] reflect the far more diverse composition of students and student-athletes at colleges and universities across the country. They do not even reflect the composition of the American people. . . . Unfortunately, in college sports, specifically the FBS institutions, the overrepresentation of [W]hite men has strongly influenced the lack of opportunities for women and people of color. This is reflected in how Black football head coaches are vastly underrepresented compared to the number of Black football student-athletes.¹¹²

Thus, the Pledge recognizes the slow pace of progress.

A similar sentiment was expressed by the Knight Foundation Commission in its report titled *Achieving Racial Equity in College Sports*.¹¹³ “Whether due to implicit bias or explicit bias or other barriers, the stark reality is that there is a lack of diversity among coaches, athletic directors, other athletic department administrators, and faculty athletic representatives, and particularly a shortage of Black and other leaders of color and staff.”¹¹⁴ While acknowledging the occasional yearly improvements in the hiring of college Division I basketball coaches, the Knight Commission concluded that policies, including those intended to correct the “inequality[,] have been ineffective.”¹¹⁵ It also emphasized the “abject failure of FBS football programs to boost” the hiring of head FBS football coaches.¹¹⁶ This failure is evident in the racial gap between Black players and White head coaches within institutions in the SEC, the premier football conference. Between 2012 and 2020, Black players accounted for between 56% and 61% of SEC football players while within the same timeframe, Whites constituted a low of 71% in 2013 and a high of 87% in 2020 of SEC head football coaches.¹¹⁷

The gap in football is particularly glaring when recent head football coach hiring is considered. A 2020 study (the “Report”) examined FBS head football coaches hired between the 2009–2010 and 2018–19 seasons.¹¹⁸ Two findings are particularly salient. Noting the year-to-

111. *Id.* at 3 (arguing those in positions of leadership in college sport should reflect those whom they lead).

112. *Id.* at 2–3 (quotation omitted).

113. KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, *ACHIEVING RACIAL EQUITY IN COLLEGE SPORTS*, KNIGHT COMM'N 10 (May 2021), https://www.knightcommission.org/wp-content/uploads/2021/05/KCIA-Racial-Equity-Report_5.12.21.pdf [<https://perma.cc/D623-WS34>] [hereinafter KNIGHT COMM'N REPORT].

114. *Id.*

115. *Id.*

116. *Id.* at 11.

117. *NCAA Racial Diversity Research*, *supra* note 91.

118. S.N. Brooks et al., *Field Studies: A 10-Season Snapshot of NCAA Power Five Head Coaching Hires*, GLOBAL SPORTS INST. 2 (Sept. 24, 2020), <https://globalsport>

year variability in the racial demographics of college football head coaches, the Report noted a trend—the biggest increases were in the number of White coaches hired.¹¹⁹ The Report also concluded that the majority of new head football coach hires between the 2009–2010 and 2018–2019 seasons had played football in college.¹²⁰ An ESPN study concluded that even though there has been moderate increases in Black hires since 2010, overall there has not been a “sustained surge” in the hiring of Black head football coaches, offensive and defensive coordinators, and athletic directors at Power Five athletic programs since the 1980s.¹²¹ Given the high numbers of Black athletes who have played college football over the past 30 years, in a meritocracy, it would seem that more Blacks should have ascended to football head coach and other leadership positions.

4. The Caste-System Mindset and Sports Leadership

The overwhelming representation of White people in leadership roles in the NFL, NBA, and college sports reflect the pervasiveness and impact of the caste-system mindset in American sports. It may not be that the prominence of White males in sports’ leadership positions is a result of overt racism.¹²² It is, however, a consequence of America’s race-based caste system, including the presumed superior leadership attributes of Whites and the presumed unsuitability of Blacks for leadership roles and intellectual inferiority.¹²³

White team and league officials pronounce their desire to increase racial diversity in sports’ leadership positions, but their conduct often suggests otherwise, and the justifications offered to rationalize the lack of sustained progress ring hollow.¹²⁴ For example, reasons that

matters.com/wp-content/uploads/2020/12/Field-Studies-NCAA-Power-Five-FINAL-12.17.20.pdf [https://perma.cc/MX9Y-FLHF].

119. *Id.* at 5.

120. Regarding NCAA football coaches, 76% of White coaches and 71% of coaches of color had played college football. *Id.* at 8. Similarly, 17% of NCAA coaches of color and 9% of White coaches were previously NFL players. *Id.*

121. Adam Rittenberg, *Black Hires in College Football Leadership*, ESPN, https://www.espn.com/espn/feature/story/_/id/31905530/the-history-black-hires-college-football-leadership [https://perma.cc/KRX4-GMKR].

122. Kenneth L. Shropshire, *Field Studies: The Shape of the NFL Head Coaching River*, GLOB. SPORTS MATTERS (Jan. 13, 2020) <https://globalsportmatters.com/from-our-lab/2020/01/13/the-shape-of-the-nfl-coaching-river/> [https://perma.cc/7VLT-YU4J] (“Overt racism is rare in sport hiring, but the outcomes that imply different treatment based on race are still evident.”); Kevin Brown & Antonio Williams, *Out of Bounds: A Critical Race Theory Perspective on ‘Pay for Play’*, 29 J. LEGAL ASPECTS SPORT 30, 38, 71 (2019) (concluding the discrimination against Black college athletes may be the result of unconscious bias rather than overt discrimination, but Black athletes are nevertheless disproportionately impacted by policies that grow out of unconscious bias fed by stereotypes).

123. See CASTE, *supra* note 11, at 206.

124. Kurt Streeter, *The N.F.L.’s Flagging Effort to Hire Black Head Coaches*, N.Y. TIMES (Feb. 1, 2021), <https://www.nytimes.com/2021/02/01/sports/football/NFL-black-coaches-Eric-Bienemy.html> [https://perma.cc/V9Vz-EWKY] (rebutting the justifica-

have been articulated for the paucity of Black NFL head coaches include the following: insufficient numbers of Black candidates in the head coach pipeline; Blacks lack effective interviewing and communications skills; and Black candidates' lack of experience.¹²⁵ A disturbing explanation that transcends sports or leagues, which often masks unconscious racial bias, surfaces when the other rationales are not remotely applicable: "[H]e's qualified but not a good fit for our organization."¹²⁶

The longstanding racial stereotypes of intellectual inferiority that buttresses America's caste system influence White decisionmakers' hiring practices.¹²⁷ The embedded caste-system mindset operates invisibly to constrain White decisionmakers' ability to assign Black to positions of authority because doing so is contrary to the unconscious belief that Blacks are not to be placed in a position of authority over White people.¹²⁸ Consistent with the caste-system mindset, White decisionmakers are comfortable with Black players being of service in generating the revenue for sports teams but "when it comes to the face of the franchise, it's clear many of them don't see Black men as a fit for the role."¹²⁹ Thus, America's race-based caste system mindset artificially limits the number of African-American NFL head coaches, general managers, and upper-level sports personnel. Professor Kenneth Shropshire states: "Overt racism is rare in sport hiring, but outcomes that imply different treatment based on race are still evident."¹³⁰

For example, those in power speak of the heightened level of comfort with White candidates who are viewed as fitting into the organization. The owner of an NFL franchise explained his hire of a White head coach with very little coaching experience as follows: "[He] just has a certain presence about him."¹³¹ Another NFL team owner said the following about the White applicant he hired as head coach: "I knew [him] long before he ever walked through these doors, . . . [s]o

tions generally offered); *see also* Young, *supra* note 67 (commenting on how the rhetoric of decision-makers is inconsistent with their hiring practices).

125. Streeter, *supra* note 124.

126. Timothy Davis, *Racial Norming, Coaching, and NFL's Race-Based Caste System*, GLOB. SPORTS MATTERS (Mar. 1, 2021), <https://globalsportmatters.com/business/2021/03/01/racial-norming-coaches-and-the-nfls-race-based-caste-system/> [<https://perma.cc/U2BM-D7V9>].

127. *See* Jim Trotter, *Eric Bieniemy, Byron Leftwich Left Waiting as Number of Black NFL Head Coaches Stagnates*, NFL (Feb. 2, 2021, 4:40 PM), <https://www.nfl.com/news/eric-bieniemy-byron-leftwich-left-waiting-as-number-of-black-nfl-head-coaches-st> [<https://perma.cc/48B8-HN4K>] (commenting on those who influence owners' hiring decisions).

128. *See* CASTE, *supra* note 11, at 70, 136.

129. Young, *supra* note 67.

130. Shropshire, *supra* note 122.

131. Ken Belson, *In Competition for Top Jobs, in the N.F.L. and Beyond, It Pays to Be a White Man*, N.Y. TIMES (Jan. 12, 2020), <https://www.nytimes.com/2020/01/12/sports/football/rooney-rule-nfl-coach-diversity.html> [<https://perma.cc/3A5M-8GKN>].

much more went into how and why he's sitting at this table today."¹³² Such statements are representative of the flawed thinking and hiring processes used to evaluate top candidates at many elite institutions, including sports organizations such as the NFL.¹³³ These flawed processes stand out, however, in the NFL "because [B]lack athletes dominate team rosters and the league has long struggled on race issues."¹³⁴

The willingness of White decision makers to hire White coaches with little or no head coaching or assistant coaching experience is consistent with the caste-system mindset that affords those of the dominant caste with the presumption of competence and grants them the benefit of the doubt.¹³⁵ On the other hand, experienced Black coaching candidates are passed over for head coaching positions. "[N]o one has yet to offer a valid reason why someone with the depth of experience" of certain Black coaches develop over years are "grossly overlooked."¹³⁶ This commentator adds:

A perusal of team rosters in the league will show that around 70 percent of players are African-American, which makes it easy to conclude that owners are fine with Black men as entertainment, putting their bodies and brains on the line to play a brutal sport that pulls in billions in television rights and other revenues. . . . But when it comes to the face of the franchise, it's clear many of them don't see Black men as fit for the role.¹³⁷

Blacks are, therefore, denied the opportunity to be featured as head coaches, the most visible position on the football field.

In both professional and college sports, franchise owners and athletic directors and presidents, in college sports, are not solely responsible for the current lack of racial diversity of leadership. The longstanding racial stereotypes of the intellectual inferiority of Blacks influence the powerful network of others, including largely White front office personnel, league officials, coaches, search firms, and agents.¹³⁸ Coaches also impede the ability of Blacks to progress to

132. *Id.*

133. *Id.*

134. *Id.*

135. CASTE, *supra* note 11, at 70, 136.

136. Young, *supra* note 67 (commenting on how the rhetoric of decision-makers is inconsistent with their hiring practices).

137. *Id.*; see also Jarrett Bell, *Opinion: NFL Owners Keep Rejecting Black Head-Coaching Candidates. Is It Time for Legal Action?*, USA TODAY, <https://www.usatoday.com/story/sports/nfl/columnist/bell/2021/03/06/nfl-owners-rejecting-black-head-coaches-legal-action/4593280001/> (Mar. 6, 2021, 12:09 PM) [<https://perma.cc/7RCG-UEBR>].

138. Adam Rittenberg, *Even with Recent Push for Diversity, Fewer Black Coaches Getting Top FBS Head-Coaching Jobs*, UNDEFEATED (May 19, 2021), <https://theundefeated.com/features/even-with-the-recent-push-for-diversity-fewer-black-coaches-getting-top-fbs-head-coaching-jobs/> [<https://perma.cc/3RK9-OMLD>] (noting that search firms and agents who represent coaches are nearly exclusively White).

leadership positions. The presumed right of entitlement to leadership no doubt influences White coaches to promote younger White coaches and offensive coordinators who look like them and overlook more experienced Black candidates.¹³⁹ “Unspoken gentlemen’s agreements” as exemplified by the “reshuffling effect,” which occurs when White head and assistant coaches are rehired as coaches by other teams, impedes the upward mobility of Black candidates.¹⁴⁰ Data demonstrate the high rate at which White-male coaches are rehired. Since 1963, 112 White men lost NFL head coaching jobs only to be reemployed as head coaches, offensive and defensive coordinators, and other sideline positions.¹⁴¹ Over the same timeframe, 18 men of color who were terminated were rehired.¹⁴² Another study found that 29.5% of White NFL head coaches hired over a 10-year period had previously been NFL head coaches, while this was true for only 8.3% of the coaches of color hired during the period.¹⁴³

Reshuffling appears to have occurred in February 2021, when Urban Meyer, the novice head coach of the NFL’s Jacksonville team, hired Chris Doyle to serve as the team’s director of sports performance.¹⁴⁴ The hire was controversial because Doyle had served as the strength coach for the University of Iowa before signing a separation agreement with the institution.¹⁴⁵ The agreement followed accusations by several Black Iowa football players that Doyle mistreated them and used racist language.¹⁴⁶ The president of the Fritz Pollard Alliance, an organization dedicated to increasing diversity in sports, criticized the hire: “Urban Meyer’s statement, ‘I’ve known Chris for close to 20 years[.]’ reflects the *good ol’ boy* network that is precisely the reason there is such a disparity in employment opportunities for Black coaches.”¹⁴⁷

Apart from the denial of opportunities for Blacks in leadership positions, the over-representation of Whites in leadership and Blacks on the playing field led by White coaches indirectly perpetuates the stere-

139. See Jenkins, *supra* note 67.

140. *Id.*

141. *Id.*

142. *Id.*

143. Shropshire, *supra* note 122.

144. Michael DiRocco, *Jacksonville Jaguars’ Urban Meyer on Chris Doyle Departure: Saw ‘the Distraction’ His Hiring Caused*, ESPN (Mar. 9, 2021), https://www.espn.com/nfl/story/_/id/30882524/jacksonville-jaguars-urban-meyer-defends-hiring-controversial-chris-doyle [<https://perma.cc/RC4L-Z6N4>].

145. *Id.*

146. *Id.*

147. Reuters, *Fritz Pollard Alliance Criticizes Urban Meyer’s Hiring of Chris Doyle*, NAT’L POST (Feb. 12, 2021), <https://nationalpost.com/pmn/sports-pmn/fritz-pollard-alliance-criticizes-urban-meyers-hiring-of-chris-doyle> [<https://perma.cc/EHH4-6V68>] (emphasis added). The dominant caste’s presumed right of entitlement to leadership likely manifests in the award of apprenticeships that White decisionmakers give to their children and the children of colleagues. Rittenberg, *supra* note 138 (commenting on nepotism as an impediment to hiring Black coaches).

otypical beliefs that Whites are intellectually superior and innately deserving of leadership, particularly when leading and directing Black men. This coupled with the paucity of Blacks among the most visible leaders in sports, head coaches, reaffirms the caste system pillar that Blacks are “physically gifted” yet “lacking the necessary mental skills and intelligence needed for elite occupations” such as head coach or general manager.¹⁴⁸ Commenting on the absence of Blacks in athletic leadership, one of the few Black offensive coordinators in the FBS stated: “You have this mindset that’s been set in our country, in our minds, in our culture, why people aren’t equipped to do certain things. . . . It spills right over into everyone’s thinking. It’s not right, but it has been the norm.”¹⁴⁹ It also deprives members of all castes with the opportunity to see Blacks and Whites in positions that counter the caste-system’s embedded messages that only members of the dominant caste are deserving of leadership and respect.

B. Addressing Inequities in Leadership

1. Uncertainties of a Litigation Strategy

Even though the threat of a lawsuit was instrumental in persuading NFL owners to adopt the Rooney Rule and has spurred other changes in sport, experts are divided on the likelihood of success of filing a lawsuit against the NFL and teams to increase racial diversity in sports.¹⁵⁰ Impediments include finding a coaching prospect willing to initiate a lawsuit against either a college or professional team. It is likely that such a coach or a coordinator would be ostracized and would jeopardize their coaching career.¹⁵¹ Establishing the proof necessary to succeed on an intentional discrimination claim under Title VI and Title VII and a disparate impact claim under Title VII also creates a barrier.

*Jackson v. University of New Haven*¹⁵² is one of the few cases in which a Black candidate for a coaching job alleged he was not hired because of racial discrimination.¹⁵³ The University of New Haven’s

148. Brown & Williams, *supra* note 122, at 77.

149. Ivan Maisel, *The Lack of Black College Football Coaches Is Still Glaring, and so Are the Excuses Behind It*, ESPN (Dec. 3, 2020), https://www.espn.com/college-football/story/_/id/30435797/the-lack-black-college-football-coaches-glaring-the-excuses-it [<https://perma.cc/CT9J-MFML>].

150. See Bell, *supra* note 137; Tim Iannello, *Time to Sue? Legal Action May Be Necessary to Secure More Minority Head Coaches in NFL, Experts Say*, CRONKITE NEWS (Apr. 21, 2021), <https://cronkitenews.azpbs.org/2021/04/21/nfl-minority-head-coaches/> [<https://perma.cc/BN54-CFGF>]; Ron S. Hochbaum, “*And It Only Took Them 307 Years*”: *Ruminations on Legal and Non-Legal Approaches to Diversifying Head Coaching in College Football*, 17 VILL. SPORTS & ENTMT’T L.J. 161, 198 (2011) (disputing those who say that an intentional discrimination claim can succeed only by finding “smoking guns,” demonstrating an intent to discriminate).

151. Hochbaum, *supra* note 150, at 202.

152. 228 F. Supp. 2d 156 (D. Conn. 2002).

153. *Id.* at 158–59.

hiring criteria included prior coaching experience at the collegiate level.¹⁵⁴ Jackson possessed coaching experience but not collegiate experience.¹⁵⁵ He alleged that this hiring qualification amounted to intentional discrimination under Titles VI and VII and disparate treatment discrimination under Title VII.¹⁵⁶ Analyzing Jackson's intentional discrimination claim, the court applied the *McDonnell Douglas* burden shifting standard, which requires a plaintiff to proffer evidence of a *prima facie* case of discrimination.¹⁵⁷ In determining that Jackson had failed to establish a *prima facie* case before the burden shifted to the defendant, the court found that Jackson failed to establish a requisite for a *prima facie* case—"qualification for the employment."¹⁵⁸ The court stated that even though the plaintiff subjectively believed he met the conditions for the position, the facts objectively demonstrated he did meet the posted requirement—prior collegiate coaching experience.¹⁵⁹ The court also noted the broad deference afforded employers in determining hiring criteria.¹⁶⁰ "Absent a showing by the plaintiff that the employer's demands were made in bad faith . . . an employer . . . is not compelled to submit the reasonableness of its employment criteria to the assessment of either [a] judge or jury."¹⁶¹ The court continued, "Deference must be given the defendants in selecting college coaching experience as a qualification for the position of head coach."¹⁶²

Turning to the disparate impact claim, the *Jackson* court stated a plaintiff presents a *prima facie* case of disparate impact by showing "that a specific policy or practice of the defendant has had a disproportionately negative impact on the plaintiff's protected class."¹⁶³ It concluded that the plaintiff's statistical proof, an article in a sports journal, fell short.¹⁶⁴ In so ruling, the court recognized the validity of using statistical evidence.¹⁶⁵ It noted, however, that

in a case of discrimination in hiring or promoting, the relevant comparison is between the percentage of minority employees and the percentage of potential minority applicants in the qualified labor pool. . . . The mere absence of minority employees in upper-level

154. *Id.* at 157.

155. *Id.* at 158.

156. *Id.*

157. *Id.* at 159; see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

158. *Jackson*, 228 F. Supp. 2d at 160; see also *Green*, 411 U.S. at 802. The other requirements are membership in a protected class; an adverse employment decision; and circumstances giving rise to an inference of discrimination. *Green*, 411 U.S. at 802.

159. *Jackson*, 228 F. Supp. 2d at 161.

160. *Id.*

161. *Id.* (quoting *Thornley v. Penton Publ'g, Inc.*, 104 F.3d 26, 29 (2d Cir. 1997)).

162. *Id.* at 161.

163. *Id.* at 163.

164. *Id.* at 165.

165. *Id.* at 163.

positions does not suffice to prove a prima facie case of discrimination without a comparison to the relevant labor pool.¹⁶⁶

Jackson's inability to provide statistically reliable comparative hiring data justified the court's dismissal of his disparate impact claim.

Similar to the result in *New Haven*, Black coaching applicants have achieved very limited success in racial discrimination suits against their institutions. A limited victory was achieved in *Jackson v. National Football League*,¹⁶⁷ in which a Black applicant for a short-lived NFL affiliated league filed a Title VII action when he was neither interviewed nor hired for a coaching position.¹⁶⁸ The defendant asserted that the plaintiff was not hired because he lacked the minimum qualifications.¹⁶⁹ The court denied the defendant's motion for summary judgment because there were material issues of fact as to what minimum qualifications had been established for the affiliate's head coaches and whether plaintiff's coaching experience satisfied the criteria.¹⁷⁰ Other cases, arising primarily at the high school level, reflect mixed results for plaintiffs alleging racial discrimination was the basis for their not being promoted or hired for a coaching position.¹⁷¹

Jackson v. University of New Haven and other cases demonstrate the formidable legal obstacles to a plaintiff prevailing in a Title VII action against a college or professional sports league. This is particularly true given the subjective considerations that are inherent in the selection of head coaches and the deference courts afford defendants in making hiring decisions. This is not to say, however, that the obstacles are insurmountable for a plaintiff who has the legal and financial support necessary to engage in thorough discovery and obtain the statistical evidence that Jackson was unable to establish. At the same

166. *Id.* at 166 (quoting *Carter v. Ball*, 33 F.3d 450, 456 (4th Cir. 1994)).

167. No. 92 CIV. 7012, 1994 WL 282105, at *8 (S.D.N.Y. June 21, 1994).

168. *Id.* at *2.

169. *Id.*

170. *Id.* at *3.

171. *See, e.g.*, *Harris v. Birmingham Bd. of Educ.*, 712 F.2d 1377, 1383 (11th Cir. 1983) (denying defendant's motion for summary judgment for failure of school board to post coaching vacancies, have objective hiring criteria, and to provide evidence of rejection of plaintiff or nondiscriminatory reason for hiring another applicant was warranted). *But see Williams v. Anderson*, 562 F.2d 1081, 1095-96 (8th Cir. 1977) (holding that defendant successfully rebutted claim of intentional discrimination in coach's assignments); *Parker v. Chilton Cnty. Bd. of Educ.*, No. 2:12-cv-0650, 2014 WL 116341, at *8-9 (M.D. Ala. Jan 13, 2014) (granting defendant's motion for summary judgment given lack of evidence that school board hired another coach other than for its stated nondiscriminatory reason); *Burkette v. Montgomery Cnty. Bd. of Educ.*, No. 2:04-cv-01143, 2006 WL 3147435, at *7 (M.D. Ala. Oct. 31, 2006) (holding that the plaintiff, a Black applicant for coaching positions, failed to present evidence of his qualifications and that the school board's reasons for not promoting him and awarding positions to others were pretextual); *see also Rabalais v. St. Martin's Episcopal Sch.*, No. Civ.A. 95-3768, 1998 WL 13596, at *4-5 (E.D. La. Jan. 14, 1998) (rejecting a White coach's racial discrimination claim based on a Black woman being hired as head coach instead of the White coach).

time, the uncertainties of a litigation strategy warrant pursuing other efforts to achieve greater racial diversity in sport leadership positions.

2. Non-Litigation Strategies

Several suggestions have been offered to increase diversity of leadership in college and professional sports. At the college level, it has been suggested that universities adopt a “Russell Rule,” named after former NBA player Bill Russell, which would parallel the Rooney Rule in requiring colleges to include a member of a traditionally underrepresented group within the pool of candidates for upper-level management positions including athletic director, head and full-time assistant coaches, and senior administrators within the athletic department.¹⁷² The way in which the Rooney Rule has been circumvented demonstrates that a Russell Rule alone, however, will not likely enhance diversity of leadership.¹⁷³

In the NFL, NBA, and college sports, a multi-pronged approach will be necessary to increase racial diversity in leadership. If the NBA sustains the progress in hiring coaches it achieved in 2021, its multi-faceted approach could serve as a model. The NBA’s diversity initiatives include (1) a collaborative program of the NBA and NBA Coaches Association that seeks to increase the number of coaches in the pipeline through workshops focused on developing competencies required to be an effective head coach and networking;¹⁷⁴ (2) training intended to assist NBA employees to “understand and manage unconscious bias” and the connection between unconscious bias and diversity and inclusion;¹⁷⁵ (3) efforts that assist NBA teams in adopting and implementing anti-discrimination policies and procedures;¹⁷⁶ (4) NBA collaborations with affinity groups to enhance diversity and inclusion efforts;¹⁷⁷ and (5) collaborations with other sports leagues to promote best practices to promote equity and inclusion.¹⁷⁸ Additional steps that the NBA could undertake include: working with recruitment firms to develop a list of prospective candidates, including several persons of color, so that groundwork will have been undertaken before a position becomes open, and including persons of color in the decision-making process for hiring.

The forgoing could be adopted as is or modified to comport with hiring of sport leadership personnel in college sports. Other initiatives that could support advancing racial equity include (1) colleges providing Black and other athletes of color leadership opportunities within

172. KNIGHT COMM’N REPORT, *supra* note 113, at 12.

173. *See* Golden, *supra* note 66.

174. *TIDES 2021 NBA Report Card*, *supra* note 55, at 44.

175. *Id.*

176. *Id.* at 45.

177. *Id.* at 47.

178. *Id.*

and outside of athletics to ensure they receive the mentoring that often postures White athletes for professional positions in sports after college;¹⁷⁹ (2) adopting a certification program on unconscious bias, equity, and inclusion for college leaders and athletic administrators, including coaches;¹⁸⁰ (3) requiring search committees to include a critical mass of persons of color;¹⁸¹ and (4) engaging in active efforts to recruit applicants of color.

In addition to internal efforts, Black athletes and their supporters, including companies, must continue to advocate for equity and inclusion in the leadership ranks of teams, leagues, and conferences. In professional sports, owners and upper management must, at a minimum, know that athletes are watching hiring practices and are concerned about the lack of diversity.¹⁸² Even though some athletes do not believe that expressing their views on the issue will result in any consequence, it is unlikely that change will occur unless players advocate for diversity and show the same intentionality some players expressed in protesting against racial injustice in broader American society.¹⁸³ As discussed *infra*,¹⁸⁴ Black college players should also voice their displeasure with the lack of diversity in coaching and other leadership positions and consider attending schools, such as historically Black colleges and universities, where they will find such diversity.

IV. STUDENT-ATHLETE-CENTERED INEQUITIES IN COLLEGE SPORTS

Racial inequities in college sports have transformed over time. Before the late 1960s, segregationist policies excluded Black athletes from intercollegiate sports teams at predominantly white southern colleges.¹⁸⁵ The post-World War II era saw the erosion of informal numerical quotas that limited the number of Black athletes permitted to play for predominantly white northern institutions.¹⁸⁶ The removal of such barriers was a precursor to today's reality—Black college athletes are disproportionately represented in two primary revenue-pro-

179. See KNIGHT COMM'N REPORT, *supra* note 113, at 17.

180. *Id.* at 12.

181. See Drake Group Position Statement, *supra* note 9, at 11.

182. William C. Rhoden, *Without Players' Protests, NFL Won't Be Pressured into Hiring Black Coaches*, UNDEFEATED (Jan. 20, 2020), <https://theundefeated.com/features/without-players-protest-nfl-wont-be-pressured-into-hiring-black-coaches/> [<https://perma.cc/WNL2-HEPV>].

183. *Id.*

184. See *infra* discussion accompanying notes 369–81.

185. David K. Wiggins, *Critical Events Affecting Racism in Athletics*, in RACISM IN COLLEGE ATHLETICS: THE AFRICAN-AMERICAN ATHLETE'S EXPERIENCE 23, 35 (1993).

186. *Id.* at 24; Forrest J. Berghorn, Norman R. Yetman & William E. Hanna, *Racial Participation and Integration in Men's and Women's Intercollegiate Basketball: Continuity and Change, 1958-1985*, 5 SOCIO. SPORT J. 107, 108–11 (1988).

ducing intercollegiate sports, Division I FBS football and NCAA Division I men's basketball, in contrast to the low enrollment of nonathlete Black males in most Division I college and universities.¹⁸⁷ Black athletes comprise approximately 48.5% of FBS football players and 53.2% of Division I men's basketball players.¹⁸⁸ Yet distributive justice on the playing field has not eradicated policies and practices that negatively impact Black college athletes, particularly those who play in the revenue sports. A credible explanation for the persistence of two of the more significant inequities in college sports—the transfer of wealth from Black athletes primarily to Whites and the academic marginalization of Black athletes—is beliefs that lie at the core of a caste-system mindset.

A. *An Exploitive Transfer of Wealth*

1. The Commercialized Nature and Racial Demographics of FBS Football and Division I Men's Basketball

In *National Collegiate Athletic Association v. Alston*,¹⁸⁹ the Supreme Court upheld the district court's injunction enjoining the NCAA from limiting the amount of education-related compensation and benefits that colleges and universities can give to their athletes.¹⁹⁰ In establishing the factual backdrop for its decision, the Court acknowledged not only the commercialized nature of revenue generating sports, but the considerable revenues generated by Division I FBS football and NCAA Division I men's basketball. The Court defined the NCAA as a "sprawling enterprise," at the center of which sits a "massive business."¹⁹¹ In support of this characterization, the Court pointed to (1) the NCAA's contract to broadcast the Division I men's basketball tournament that alone generates \$1.1 billion in yearly revenue; (2) the \$470 million or so paid annually to college athletic conferences (to be distributed, in part, to their member institutions) for rights to broadcast the College Football Playoff;¹⁹² and (3) the annual revenue generated from regular season football games that, for example, yielded the

187. For example, a 2018 report found that Black males comprised 2.3% of Ohio State University undergraduates but 67% of football and men's basketball players. SHAUN R. HARPER, UNIV. OF S. CAL. RACE & EQUITY CTR., *BLACK MALE STUDENT-ATHLETES AND RACIAL INEQUITIES IN NCAA DIVISION I COLLEGE SPORTS* 10 (2018 ed. 2018). The gap was higher at the University of Florida where Black males comprised 2.2% of undergraduate students but 77.7% of FBS football and men's basketball players. *Id.* at 13.

188. These percentages are for the 2019–2020 athletic season. Richard E. Lapchick, *2020 Racial and Gender Report: College Sport*, INST. FOR DIVERSITY & ETHICS IN SPORTS 9 (2020), <https://www.tidesport.org/college> (click on "2020 CSRGR") [<https://perma.cc/G97C-E8A5>].

189. 141 S. Ct. 2141 (2021).

190. *Id.* at 2166.

191. *Id.* at 2150.

192. *Id.*

SEC \$650 million in total revenues, including \$409 million derived from television.¹⁹³ The Court added that these revenues increase consistently over time.¹⁹⁴

The Court noted the salaries paid to those in control of running the NCAA and its money-making enterprise. It pointed to the NCAA president's \$4 million annual salary, athletic commissioners' annual salaries of between \$2 and \$5 million, and athletic directors' annual salaries exceeding \$1 million.¹⁹⁵ The Court also remarked on annual salaries approaching \$11 million for some assistant football coaches.¹⁹⁶

If it had been a part of the record, the Court might have discussed other sources of revenue such as the estimated \$1 billion in total revenue that may be generated if the College Football Playoff is expanded to twelve teams.¹⁹⁷ In addition to direct financial benefits, colleges and universities derive indirect benefits from successful revenue generating sports programs. These benefits include (1) increases in college applications; (2) applicants with stronger academic profiles; (3) increased alumni giving; (4) enhanced prestige, visibility, and national recognition; and (5) increased athletic and non-athletic fundraising.¹⁹⁸

2. Transfer of Wealth and the Caste-System Mindset

As demonstrated in *Alston*, college sports' primary revenue producing sports are Division I FBS football and Division I men's basketball.¹⁹⁹ These sports generate substantial revenue for the NCAA, athletic conferences, and colleges and universities.²⁰⁰ Black athletes disproportionately play on the teams that generate this revenue. In 2020, Black male athletes comprised 46 percent of FBS football (autonomy schools) and 42 percent of Division I men's basketball players

193. *Id.* at 2150–51.

194. *Id.* at 2151.

195. *Id.*

196. *Id.*

197. Matt Hayes, *First and 10: Why Playoff Expansion Is the Most Significant Change in College Football History*, SATURDAY DOWN S., <https://www.saturdaydownsouth.com/sec-football/first-and-10-why-playoff-expansion-is-the-most-significant-change-in-college-football-history/> [<https://perma.cc/PPX9-PRYV>] (explaining that the television deal for a 12-team playoff could push earnings over \$1 billion annually).

198. Matthew J. Mitten, James L. Musselman & Bruce W. Burton, *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 793–97 (2010).

199. *Alston*, 141 S. Ct. at 2050.

200. Brown & Williams, *supra* note 122, at 44–45; Jayma Meyer & Andrew Zimbalist, *A Win Win: College Athletes Get Paid for Their Names, Images, and Likenesses and Colleges Maintain the Primacy of Academics*, 11 HARV. J. SPORTS & ENT. L. 247, 261 (2020); *Where Does the Money Go?*, NAT'L COLLEGIATE ATHLETICS ASS'N, <https://www.ncaa.org/about/where-does-money-go> [<https://perma.cc/8KWG-UWS8>] (describing NCAA's income and how it is either used by the NCAA or distributed).

(excluding historically black universities).²⁰¹ The percentages are even higher in some of the more powerful conferences. For example, Black male athletes comprised 57% and 52% of football players in the SEC and ACC, respectively.²⁰² In Division I men's basketball, Black athletes accounted for 62% and 54% of players in the Southeastern and Atlantic Coast conferences, respectively.²⁰³

It is also undisputed that those in control of FBS football and Division I men's basketball, such as athletic directors and coaches, are overwhelmingly White.²⁰⁴ Moreover, revenues generated in the revenue sports are also funneled to non-revenue sports (i.e., intercollegiate sports that generate insignificant or no revenues for their universities) where the overwhelming majority of athletes are White. Excluding Historically Black Colleges and Universities ("HCBUs"), Black males comprised only 14 percent of all Division I athletes.²⁰⁵ The percentages of White athletes who predominant in men's non-revenue sports, however, highlight the economics of big-time college athletics.²⁰⁶ For example, White and Black athletes comprised 83% and 4% of lacrosse players, respectively.²⁰⁷ Similarly, White and Black athletes comprised 72% and 8% of men's wrestlers, respectively.²⁰⁸

The combination of the disproportionate representation of Black athletes on FBS football teams and Division I men's basketball teams²⁰⁹ and White individuals being the primary beneficiaries of this revenue,²¹⁰ as well as NCAA rules that limit the compensation schools can pay to their student-athletes, coalesce to create an economic model that has been characterized as unfair or exploitive.²¹¹ These dynamics led the authors of a study to conclude that

between 2017-2020, approximately \$10 billion in generational wealth will have been transferred from college football and men's basketball players, the majority of whom are athletes of color, to

201. *NCAA Racial Diversity Research*, *supra* note 91 (click on "Coach and Student-Athlete Demographics by Sport").

202. *Id.*

203. *Id.*

204. *See generally NCAA Racial Diversity Research*, *supra* note 91.

205. *Id.* (click on "Demographics by Gender & Race/Ethnicity").

206. *Id.* (click on "Coach and Student-Athlete Demographics by Sport").

207. *Id.*

208. *Id.*

209. *See* William B. Gould IV, *American Amateur Players Arise: You Have Nothing to Lose but Your Amateurism*, 61 SANTA CLARA L. REV. 159, 162 (2020) (stating the reality that players in the most revenue-producing sports and those likely to become professional athletes are Black); *see also* Meyer & Zimbalist, *supra* note 200 (discussing the unfairness of the current economic model for Division I revenue sports); Huma & Staurowsky, *supra* note 5, at 2.

210. One consequence of this economic model is bloated salaries for coaches and administrators. Meyer & Zimbalist, *supra* note 200, at 261; Huma & Staurowsky, *supra* note 5, at 3 (concluding the increase in coaches' salaries is a result in part of the restrictions prohibiting athletes from gaining a share of the wealth they generate).

211. Meyer & Zimbalist, *supra* note 200, at 248.

coaches, athletic administrators, and college administrators who are predominantly White or to institutions and programs that serve majority White constituencies. This transfer of wealth takes the form of lucrative salaries for athletic directors, conference commissioners, college sport leaders and bowl championship directors, and coaches. This wealth transfer has significant consequences for the athletes who are deprived of their fair share of the revenues they produce for the college sport industry.²¹²

Although there might be disagreement regarding how the \$10 billion figure was calculated, there is no dispute that the transfer of wealth occurs.²¹³

The racial demographics of those who benefit underscore the unfairness that Justice Kavanaugh addressed in his concurrence in *Alston*. There, he was critical of the NCAA's economic model:

The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing.²¹⁴

Thus, Justice Kavanaugh specifically recognizes how the existing intercollegiate economic model disadvantages Black student athletes who participate in revenue-generating intercollegiate athletics.

The current structure of NCAA Division I intercollegiate athletics is one in which “[t]he NCAA profits immensely from the labor of talented, hard-working—and disproportionately Black—college athletes, especially those playing on the courts of the women’s and men’s tournaments that remain the most lucrative property for the NCAA.”²¹⁵ It

212. Huma & Staurowsky, *supra* note 5, at 3 (footnote omitted). Receiving their fair share of the revenues may minimize the negative consequences currently suffered by Black college athletes who have lower homeownership rates, net worth, financial security and graduate rates compared to White college athletes. *Id.* at 4–5.

213. Writing in 2018, Professor Paul Campos estimated that the “average football or men’s basketball player at a major conference college now generates between \$1.5 and \$2.3 million in revenue for his college per year.” Paul F. Campos, *A Fair Wage for Elite Athletes? How About \$750,000?*, CHRON. HIGHER EDUC. (Mar. 22, 2018), <https://www.chronicle.com/article/a-fair-wage-for-elite-athletes-how-about-750-000/> [<https://perma.cc/MRA3-P8C8>].

214. Nat’l Collegiate Athletic Ass’n v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

215. Julie Sommer & Andrew Zimbalist, *The NCAA Is Playing the Ball in the Wrong Court*, FORBES (Mar. 22, 2021, 7:17 AM), <https://www.forbes.com/sites/andrewzimbalist/2021/03/22/the-ncaa-is-playing-the-ball-in-the-wrong-court-by-julie-sommer-and-andrew-zimbalist/?sh=1002e9fe1676> [<https://perma.cc/674J-24Q3>]. Huma & Staurowsky, *supra* note 5, at 5–6; see Brown & Williams, *supra* note 122, at 44–45

is reminiscent of extended periods of American history in which Whites commodified Black bodies and benefitted from their services without giving a fair exchange for the latter's services.²¹⁶

One of the central assumptions of America's caste structure is that Blacks are to be of service to Whites and not to be fully compensated for the services that they perform.²¹⁷ This grows out of the belief that those of the dominant caste are deserving of the fruits of the labor of subordinate caste members.²¹⁸ This mindset also allows the dominant caste to more easily overlook the exploitation of members of the subordinate caste.²¹⁹ Therefore, a seemingly natural extension of these enduring aspects of the caste system is the one-sided nature of the exchange between Black college athletes in revenue-producing sports and their institutions.

B. *Academic Marginalization of Black College Athletes*

The collegiate model of intercollegiate athletics that has amateurism at its core principle is premised on the notion that student-athletes' athletic participation "should be motivated primarily by education and by the physical, mental and social benefits to be derived."²²⁰ In its "*Commitments to the Division I Collegiate Model*," the NCAA states that "[s]tandards of the Association governing participation in intercollegiate athletics . . . shall be designed to ensure proper emphasis on educational objectives and the opportunity for academic success, including graduation, of student-athletes who choose to participate at a member institution."²²¹ It further states that "[i]ntercollegiate athletics programs shall be maintained as an important component of the educational program, and student-athletes shall be an integral part of the student body."²²² Moreover, the essence of the contract between scholarship athletes and their colleges is the athletes' promise to participate athletically in exchange for a scholarship that facilitates college attendance with the goal of obtaining a meaningful education.²²³

(noting the significant extent to which the NCAA benefits from revenue generated from the Division I men's basketball tournament).

216. See HAWKINS, *supra* note 44, at 11, 16.

217. CASTE, *supra* note 11, at 142, 193.

218. *Id.* at 19, 193.

219. *Id.* at 193.

220. NAT'L COLLEGIATE ATHLETIC ASS'N, 2020-21 NCAA DIVISION I MANUAL 3 (2020) <https://www.ncaapublications.com/productdownloads/D121.pdf> [<https://perma.cc/98XB-5SW8>].

221. *Id.* at xiii.

222. *Id.*

223. *McAdoo v. Univ. of N.C. at Chapel Hill*, 736 S.E.2d 811, 821 (N.C. Ct. App. 2013) (stating that in financial aid agreement, the university promised to pay for tuition and board in exchange for the athlete conducting himself "in accordance with all UNC, ACC, and NCAA regulations"); *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379, 382 (N.C. Ct. App. 1972) (finding that the student aid application created a contract).

Evidence indicates, however, that the collegiate model on which the foregoing ideals are premised is often unattainable, particularly for Black FBS football and NCAA Division I men's basketball players. As demonstrated below, notwithstanding graduation rates that suggest the bargain is being fully honored, practices engaged in by colleges and universities deny too many Black college athletes meaningful access to an educational opportunity.

1. Graduation Rates for FBS and Men's Basketball Players

The NCAA and college leaders celebrate improved graduation rates²²⁴ and tout them as demonstrating the academic achievement of student-athletes,²²⁵ including Black athletes in the primary revenue producing sports—FBS football and Division I men's basketball.²²⁶ Higher graduation rates reflected in the NCAA's graduation metric, the Graduation Success Rate ("GSR"), have been attributed to NCAA academic reforms, including: (1) the enhanced initial eligibility requirements; (2) the increased high school core-course requirements for high school athletes seeking athletic scholarships and eligibility for intercollegiate competition during their first year; (3) the adoption of progress-toward-degree requirements; (4) the development of the Academic Progress Rate ("APR"); and (5) the NCAA's regular collection of graduate rate data.²²⁷

The GSRs²²⁸ suggest that all athletes, including Black athletes, have made impressive gains in graduation rates over the past 20 years. In 2002, the GSR for White and Black men's Division I basketball play-

224. Gerald S. Gurney, *Stop Lowering the Bar for College Athletes*, CHRON. HIGHER EDUC. (Apr. 10, 2011), <https://www.chronicle.com/article/stop-lowering-the-bar-for-college-athletes/> [<https://perma.cc/M4P-98EZ>] (commenting on the fanfare and self-congratulation that the NCAA engages in each year when it reports graduation rates and APR scores).

225. Jeffrey J. Fountain & Peter S. Finley, *Academic Majors of Upperclassmen Football Players in the Atlantic Coast Conference: An Analysis of Academic Clustering Comparing White and Minority Players*, 2 J. ISSUES INTERCOLLEGIATE ATHLETICS 1, 2 (2009) [hereinafter Fountain & Finley, *Academic Majors of ACC Football Players*] (discussing the NCAA's defense of the collegiate model of sports by emphasizing high graduation rates); see also Jeffrey J. Fountain & Peter S. Finley, *Academic Clustering: A Longitudinal Analysis of a Division I Football Program*, 4 J. ISSUES INTERCOLLEGIATE ATHLETICS 24, 25 (2011) [hereinafter Fountain & Finley, *Academic Clustering: A Longitudinal Analysis*] (noting how the NCAA touts academic reforms).

226. HARPER, *supra* note 187, at 3.

227. See *NCAA Graduation Rates: A Quarter-Century of Tracking Academic Success*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/about/resources/research/ncaa-graduation-rates-quarter-century-tracking-academic-success> [<https://perma.cc/4ZGG-VP4F>]; see also Mitten et al., *supra* note 44, at 130–32 (discussing a range of NCAA academic reform measures).

228. The GSR examines graduation rates six years after a scholarship athlete matriculates as a full-time student at a college or university. *Graduation Rates*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/about/resources/research/graduation-rates> [<https://perma.cc/RC5P-XZGG>]. Unlike the calculation of federal graduation rates, the GSR includes student-athletes who transfer into an institution in that

ers was 76% and 46%, respectively.²²⁹ In 2020, the GSR for this cohort was 92% for White and 85% for Black men's basketball players, respectively.²³⁰ The 2002 GSR for White and Black FBS football players was 76% and 53%, respectively.²³¹ In 2020, the GSRs had increased to 90% for White and 77% for Black FBS players, respectively.²³² In women's Division I basketball, GSRs increased from 87% in 2002 for White women to 97% in 2020.²³³ For their Black counterparts, the GSR increased from 70% in 2002 to 90% in 2020.²³⁴

2. Misleading Graduation Data, Clustering, and Isolation

a. Gaps in Graduation Rates

As noted above, impressively high aggregate student-athlete GSRs have been strategically used to bolster the NCAA's amateurism principle and rebut assertions that Black FBS football and men's Division I men's basketball players are being exploited. High GSRs, however, communicate incomplete and misleading narratives that obscure the academic and social experiences of many Black college athletes. For example, the NCAA's GSR metric shows longstanding gaps in the graduation rates of White and Black players in the most successful FBS and Division I men's basketball programs. Illustrative are the gaps in the graduation rates of White and Black athletes on teams that participated in the 2021 NCAA men's Division I men's basketball tournament. White athletes graduated at a rate of 13.5% higher than Black athletes (93.8% compared to 80.3%).²³⁵ In addition, 22% of the teams that participated in the tournament had a 30% or greater gap between the GSRs for their Black and White players.²³⁶

Such gaps appear in the most successful FBS football programs. Among the 56 teams that comprised 2019–2020 FBS bowl teams, the average GSRs for Black football players stood at 73.8% and 89.4%

school's overall graduation statistics. The GSR does not, however, include the graduation statistics of athletes who transfer to another college or university. *Id.*

229. NCAA RSCH. STAFF, *Comparison of Graduation Success Rates from Reporting Cohorts of 2002 and 2020*, in TRENDS IN GRADUATION SUCCESS RATES AND FEDERAL GRADUATION RATES AT NCAA DIVISION I SCHOOLS, Nov. 2020, at 20, 21, https://ncaaorg.s3.amazonaws.com/research/gradrates/2020/2020D1RES_FedGSR Trends.pdf [<https://perma.cc/A6WG-MFXW>].

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. Richard E. Lapchick, *Keeping Score When It Counts: Academic Progress/Graduation Success Rate Study of the 2021 NCAA Division I Men's and Women's Basketball Tournament Teams*, INST. FOR DIVERSITY & ETHICS SPORT 2 (2021), <https://www.tidesport.org/mens-basketball> [<https://perma.cc/AWM7-E28A>] (click on "2021 Men's Basketball").

236. *Id.* at 3; KNIGHT COMM'N REPORT, *supra* note 113, at 6.

for White football players.²³⁷ Although no FBS teams graduated less than half of their white football players, one team graduated less than half of their Black football players.²³⁸ Moreover, 23 (i.e., 32%) of the FBS bowl-bound teams had GSRs for Black football athletes that were at least 20% lower than the GSRs for White football players on these bowl-bound teams.²³⁹

In addition, critics assert that the NCAA's use of the GSR rather than the Federal Graduation Rate ("FGR") inflates graduation rates and amounts to academic fraud. One report noted that the 47% FGR for the 2014–2017 cohort of Division I men's basketball players was slightly worse than the 48% FGR for the 2001–2004 cohort of Division I men's basketball players.²⁴⁰ Another major study concluded that the NCAA is complicit in the exploitation of Black athletes

through the advancement of an academic metrics system that is purposefully intended to inflate the perception of academic success, hide embarrassing data that would reveal huge educational failures affecting Black athletes in football and basketball, and intentionally prevent the comparison of athlete academic performance with that of the general student body.²⁴¹

In 2018–2019, NCAA-reported FGRs within the Power Five colleges and universities revealed that Black football players were less likely to graduate when compared to all other students.²⁴² The data also showed persistently large gaps in the FGRs for Black athletes compared to both White athletes and all students.²⁴³ Within SEC institutions, for example, the gaps between the FGRs of Black football players and all students was 20%.²⁴⁴ The FGR gap was 29.93% when Black football players were compared to their White counterparts.²⁴⁵

b. Clustering

In addition to graduation gaps, clustering and other practices resulting in the disproportionate academic and cultural isolation of Black athletes within their colleges and universities challenge the prevailing narrative that increased aggregate GSRs demonstrate the fulfillment

237. Richard E. Lapchick, *Keeping Score When It Counts: Assessing the Academic Records of the 2020–2021 Bowl-Bound College Teams*, INST. FOR DIVERSITY & ETHICS SPORT 2 (2020), <https://www.tidesport.org/bowl-bound> [<https://perma.cc/GC23-SM4Z>] (click on "2020-21 Bowl Bound Football").

238. *Id.*

239. *Id.*

240. Huma & Staurowsky, *supra* note 5, at 10.

241. Drake Group Position Statement, *supra* note 9, at 14.

242. Huma & Staurowsky, *supra* note 5, at 10. The Power 5 consists of 65 universities within the five most financially lucrative athletic conferences: ACC, Big Ten Conference, Big 12 Conference, PAC-12 Conference, and SEC. HARPER, *supra* note 187, at 4.

243. Huma & Staurowsky, *supra* note 5, at 9–11.

244. *Id.* at 10.

245. *Id.* at 11.

of the promise that lies at the core of the relationship between student-athletes and their colleges. For too many Black athletes, the promise—an athletic scholarship in exchange for the opportunity to obtain a meaningful education and compete in intercollegiate competition—is unfulfilled.²⁴⁶ The persistence of these practices, which diminish the overall academic and social experiences of Black FBS football and Division I men's basketball players, reflect a caste-system mindset that minimizes the intellectual capabilities and academic interest of Black Americans, including Black athletes.

i. The Prevalence and Persistence of Clustering

In a groundbreaking study published in 1987, researchers found clustering among the academic majors of basketball players on 71% of 55 participating NCAA Division I men's basketball teams.²⁴⁷ Clustering occurs when a disproportionate number of athletes, 25% or more, on a college sports team are enrolled in a particular major in comparison to other students at the college.²⁴⁸ The report's authors concluded that “[c]lustering is evidenced more among males than females, more among [B]lack athletes than [W]hite athletes, and more among ‘big time’ and academically elite schools.”²⁴⁹

Subsequent research has confirmed the prevalence and persistence of academic clustering among student-athletes.²⁵⁰ A study published in 2009 examined the extent of clustering in FBS football programs at 11 of the 12 teams that then comprised the ACC.²⁵¹ The report found that the percentage of football players concentrated in only one major generally not only exceeded the 25% threshold but was often in excess

246. See Fountain & Finley, *Academic Clustering: A Longitudinal Analysis*, *supra* note 225, at 2 (critiquing that the NCAA reform efforts, which are largely focused on increasing graduation rates, suggest that graduating is the only important outcome of a college experience instead of a complete academic experience).

247. Bob Case et al., *Academic Clustering in Athletics: Myth or Reality?*, 11 *ARENA REV.* 48, 50 (1987) [hereinafter Case et al., *Academic Clustering in Athletics*]; see Fountain & Finley, *Academic Majors of ACC Football Players*, *supra* note 226, at 4–5.

248. See Case et al., *Academic Clustering in Athletics*, *supra* note 247; Fountain & Finley, *Academic Clustering: A Longitudinal Analysis*, *supra* note 225, at 24.

249. Case et al., *Academic Clustering in Athletics*, *supra* note 247, at 51; see also Adam Love et al., *Admissions Selectivity and Major Distribution in Big-Time College Football*, 10 *J. ISSUES INTERCOLLEGIATE ATHLETICS* 1, 12 (2017) (finding that clustering was more common at highly selective FBS institutions for football players); Fountain & Finley, *Academic Clustering: A Longitudinal Analysis*, *supra* note 225, at 38 (finding that clustering occurred more frequently among minority athletes in an FBS football program).

250. See generally Steve Ganczaruk, *Student Athletes Gravitate Toward Similar Degrees*, *DEVIL'S TALE*, <https://cronkitezone.asu.edu/spring2004/athletes.html> [<https://perma.cc/5QMA-Z6R8>]; see also Jill Lieber Steeg et al., *College Athletes Studies Guided Toward ‘Major in Eligibility’*, *USA TODAY*, https://usatoday30.usatoday.com/sports/college/2008-11-18-majors-cover_N.htm [<https://perma.cc/6XAZ-ZXBQ>].

251. Fountain & Finley, *Academic Majors in ACC Football Players*, *supra* note 225, at 5.

of 30%.²⁵² On one team, more than 73% of football players clustered in one major, while six colleges had more than one-third of their players clustered in one major.²⁵³ Notably, four of the ACC football programs had 62% or more of their players concentrated in a single major.²⁵⁴

Like the 1984 study, the 2009 study confirmed that clustering was more prevalent among Black than White football players.²⁵⁵ According to the authors, “[t]he fact that Minority players not only are clustering into one major, but that a tremendous percentage of players can be accounted for within only two majors, is absolutely striking.”²⁵⁶ The study also debunked the explanation that players gravitate toward certain majors that allow for greater flexibility in scheduling and offering a broader range of times. “[I]f flexibility of scheduling were the driving force behind academic clustering, a large percent of players, both White and minorities would select the same majors as opposed to the significant divisions between White and Minority players.”²⁵⁷

A 2010 study of Big 12 Conference football teams affirmed the presence of clustering.²⁵⁸ Researchers reported that in 2006, 41% of Texas A&M football players who participated in the study, majored in agricultural leadership and development even though only 2% of Texas A&M undergraduates selected that as their major.²⁵⁹ For the same year, 69% of University of Texas’s football players in the study majored in liberal arts, while only 5.8% of undergraduates enrolled in that major.²⁶⁰ The study also established a correlation between the extent of clustering of players in select majors and the strength of a football team.²⁶¹

A 2011 longitudinal study of a single football program confirmed these scholars’ research. Examining the majors of football players over ten years, the study concluded that “clustering of football players, especially minority players, into a limited number of academic programs is prevalent.”²⁶² The authors stated:

The impact of academic clustering on minority players continues to raise concern and deserves more academic and media attention. Mi-

252. *Id.* at 7.

253. *Id.* at 6.

254. *Id.*

255. *Id.* at 8.

256. *Id.* at 10.

257. *Id.* at 11.

258. Ray G. Schneider, Sally R. Ross & Morgan Fisher, *Academic Clustering and Major Selection of Intercollegiate Student-Athletes*, 44 *COLL. STUDENT J.* 64, 67–68 (2010).

259. *Id.*

260. *Id.*

261. *Id.* at 68.

262. Fountain & Finley, *Academic Clustering: A Longitudinal Analysis*, *supra* note 249, at 38.

nority players at this particular institution were twice as likely as their white counterparts to list University Studies in their first media guide appearance. . . . The minorities who began in University Studies were highly likely either to leave the program early or migrate into the clustered [Apparel, Housing, and Resource Management] major.²⁶³

A study published in 2017 reported that “[a]cross all FBS [automatic qualifying] conferences, evidence of academic clustering is prevalent and found among non-white football players at a higher rate than white football players.”²⁶⁴ A study of players on football programs in the SEC and Pac-10 Conference found the prevalence of clustering and a disjunction between players’ academic majors and career goals.²⁶⁵

Academic clustering also occurs in the majors of Division I men’s basketball players. Between 2004 and 2012, 61% of the 43 basketball players who indicated a major in the University of Kansas’s official media guide (a type of press kit containing information about a team’s players, including their backgrounds, academic majors, and statistics, which is distributed to media personnel) were enrolled in one of three majors.²⁶⁶ More than half (7 out of 11 players) on the University of Iowa’s men’s basketball team were enrolled in a single major.²⁶⁷ 37% of the players on the Texas A&M men’s basketball and football teams were enrolled in a single major, Agricultural and Leadership Development, compared to the 1% of the student body enrolled in the major.²⁶⁸ Research also confirms that clustering has not abated and has expanded to include women’s sports,²⁶⁹ NCAA Division I Football

263. *Id.* at 38–39. Similarly, in the fall of 2014, 37% of Black male athletes at Auburn University were enrolled in the same major. During the same semester, only two of Auburn’s 581 non-athlete Black males were enrolled in the major. Jack Stripling, *Inside Auburn’s Secret Effort to Advance an Athlete-Friendly Curriculum*, CHRON. HIGHER EDUC. (Feb. 16, 2018), <https://www.chronicle.com/article/inside-auburns-secret-effort-to-advance-an-athlete-friendly-curriculum/> [<https://perma.cc/9PSZ-NXBT>].

264. Derek A. Houston & Lorenzo D. Baber, *Academic Clustering Among Football Student-Athletes and Exploring its Relationship to Institutional Characteristics*, 11 J. FOR STUDY SPORTS & ATHLETES EDUC. 66, 66 (2017).

265. Amanda L. Paule-Koba, *Identifying Athlete’s Majors and Career Aspirations: The Next Step in Clustering Research*, 1 J. ATHLETE DEV. & EXPERIENCE 8, 9 (2019) [hereinafter Paule-Koba, *Identifying Athlete’s Majors and Career Aspirations*].

266. Shaun Hittle, *Athletes’ Tendencies to ‘Cluster’ in Certain Academic Fields Problematic, Some Say*, LAWRENCE J.-WORLD, (June 15, 2012, 12:00 AM), <https://www2.ljworld.com/news/2012/jun/15/athletes-tendencies-cluster-certain-academic-field/> [<https://perma.cc/SJ5G-PDH2>].

267. *Id.*

268. *Id.*

269. Paule-Koba, *Identifying Athlete’s Majors and Career Aspirations*, *supra* note 265, at 11–12; *see also* Love et al., *supra* note 249, at 4 (reviewing the literature and concluding that clustering is widespread between genders).

Championship Subdivision (FCS) football,²⁷⁰ and NCAA Division III athletics programs.²⁷¹

ii. Factors Contributing to Clustering

Clustering is systemic.²⁷² Nevertheless, the factors that determine the extent to which clustering will occur must be examined within the context of each institution's culture, climate, strength of its academic offerings, and student body demographics.²⁷³ These variables converge with the individual personal motivations to give rise to athletes gravitating to certain majors.²⁷⁴ Notwithstanding this caveat, certain factors have been repeatedly identified as fostering clustering.

Clustering is an unintended consequence of NCAA academic reforms requiring athletes to meet certain benchmarks (e.g., progress-toward-degree requirements) and concomitant efforts by institutions to achieve high GSRs and meet APR standards.²⁷⁵ When combined with the competitive pressures of competing in NCAA revenue-producing sports, coaches and athletic department staff are motivated to field successful teams with highly talented athletes.²⁷⁶ Consequently, coaches and athletic academic advisors (typically housed within athletic departments)²⁷⁷ channel student-athletes into majors that increase the likelihood that athletes will retain their eligibility, meet APR standards, and graduate.²⁷⁸ Thus, competitive pressure combines

270. Amanda L. Paule-Koba, *Not Just a Power 5 Problem: An Examination of Academic Clustering in FCS Football Programs*, 14 J. CONTEMP. ATHLETICS 147, 151 (2020) [hereinafter Paule-Koba, *Not Just a Power 5 Problem*].

271. See C.G. Brock Pennington & K. McEntyre, "It's Bound to Happen. . .": *Academic Clustering at a Division III College*, 2 J. STUDENT-ATHLETE EDUC. DEV. & SUCCESS, 151 (2020) (finding that over half of examined Division III teams displayed clustering).

272. *Id.* at 151.

273. *Id.*

274. *Id.*

275. Sayvon J.L. Foster & Matt R. Huml, *The Relationship Between Athletic Identity and Academic Major Chosen by Student-Athletes*, 10 INT'L. J. EXERCISE SCI. 915, 916 (2017) (noting the student academic experiences have been harmed by the pressure on athletes and athletic departments to maintain high GSRs and APRs).

276. *Id.*; Robert Case et al., *An Examination of the Nature and Scope of Academic Clustering in College Athletic Programs*, 11 J. CONTEMP. ATHLETICS 47, 48 (2017) [hereinafter Case et al., *Nature and Scope of Academic Clustering*] (discussing the pressure placed on coaching as a result of the tremendous amount of money at stake).

277. Case et al., *Academic Clustering in Athletics*, *supra* note 247, at 52–53; see Schneider et al., *supra* note 258, at 64–65 (noting that research has documented the influence of athlete academic advisors on athlete major selection). A survey of athletic academic advisors found that some clustering exists in Division I sports. Case et al., *Academic Clustering in Athletics*, *supra* note 247, at 52. Additionally, 75% reported being pressured to maintain athletes' eligibility. Case et al., *Nature and Scope of Academic Clustering*, *supra* note 276, at 53; see also Drake Group Position Statement, *supra* note 9, at 41 (noting that impostor syndrome and stereotyping makes Black athletes particularly susceptible to the influence of athlete academic advisors).

278. Pennington & McEntyre, *supra* note 271, at 151 ("[S]tudent-athletes are externally channeled into clustered majors by coaches, athletic department staff, academic

with stereotypic notions of Black athletic superiority yet intellectual inferiority to result in the marginalization of the academic interests of Black athletes.

Clustering has been described as a link in the chain that begins with the special admissions (which has been characterized as the original sin) of athletically gifted but academically challenged athletes:

[S]pecial admissions for athlete is considered the “original sin” leading to academic fraud because it is the first domino that falls in the five- or six-year higher education career of an athlete who never has the time to remediate reading, writing, math, or other deficiencies and therefore is unable to compete in the classroom versus more academically prepared classmates. . . . These athletes are counseled to select the least demanding academic majors, register for the least demanding academic courses, sign up for courses conducted by professors with lax grading reputations, or register for independent study courses with professors who require minimal work product.²⁷⁹

Other factors contributing to clustering include (1) athletes' time commitments to their sports causing them to select majors perceived or identified as easier;²⁸⁰ (2) class availability;²⁸¹ (3) the influence of teammates and parents;²⁸² and (4) the sense of comfort derived from being in classes with fellow athletes.²⁸³

iii. The Detrimental Effects of Clustering

The majority of studies suggest that the detrimental effects of clustering outweigh its positive effects.²⁸⁴ The most serious concern relating to clustering is that “student-athletes are earning degrees more equipped to help student-athletes maintain eligibility rather than educationally preparing them for a post-college society.”²⁸⁵ Thus, cluster-

advisors, family, and peers.”) (citations omitted); Alvin D. Logan, Jr. & Louis Harrison, Jr., *4 Years a Football Player: The (Un)Democratic Practices in the Education of Black College Football Players*, 24 RACE, GENDER & CLASS 65, 76 (2017) (noting that clustering boosts athletes grade point averages and allows athletes to remain academically eligible to play intercollegiate sports). Athletes report dissatisfaction with the advice offered by athletic academic advisors and would prefer to receive academic advice from those external to athletics. Love et al., *supra* note 249, at 3.

279. Drake Group Position Statement, *supra* note 9, at 30–31.

280. Fountain & Finley, *Academic Clustering: A Longitudinal Analysis*, *supra* note 265, at 28–30. Clustering is also more pronounced as athletes progress in their college careers. *Id.* at 29. This is likely a consequence of the increased time commitments of sports on athletes as they assumed more significant roles on their teams, as well as the influence of coaches and athletic academic advisors. *Id.* at 28.

281. See Schneider et al., *supra* note 238, at 65.

282. *Id.* at 68; Pennington & McEntyre, *supra* note 271, at 151.

283. Schneider, *supra* note 259, at 65.

284. See generally Case et al., *Academic Clustering in Athletics*, *supra* note 247; Fountain & Finley, *Academic Clustering: A Longitudinal Analysis*, *supra* note 225; Paule-Koba, *Identifying Athlete's Majors and Career Aspirations*, *supra* note 265; Paule-Koba, *Not Just a Power 5 Problem*, *supra* note 270.

285. Pennington & McEntyre, *supra* note 271, at 151 (citations omitted).

ing channels student-athletes into majors that are incongruent with their career aspirations.²⁸⁶ Relatedly, the value of athletes' college education is diminished when they enroll in majors that fail properly to equip them for life after college.²⁸⁷ The effects of such practices are not lost on college athletes who believe that they have little choice in the selection of their majors.²⁸⁸ It is common for Black college football players to "recognize that they were underserved and unprepared for a career based on a set of classes that led to a major they had no desire to work in post college."²⁸⁹ In its 2021 Report, the Knight Commission identified clustering as an institutional practice that creates impediments to athletes receiving a quality education and proved "detrimental to students' academic and career trajectories and effectively disregards the interests and goals of college athletes."²⁹⁰

Clustering and the related over emphasis of athletics "create a psychosocial divide between [athletes'] academic and athletic identities."²⁹¹ The more students identify as athletes the greater the likelihood that they will devote less time to academics.²⁹² A stronger athletic identity also results in students devoting less time to career development for their post-college lives, including their "not choosing [a] major aligning with their career goals."²⁹³ Decisions focused on the short term lead to the underdevelopment of "skills necessary to their career achievement,"²⁹⁴ adversely impacting "academic and career satisfaction."²⁹⁵

c. *Clustering and Athlete Isolation*

Athletes frequently experience isolation from their academic communities.²⁹⁶ Isolation is a consequence of athlete-only workout centers, lounges, and practice facilities often away from or on the periphery of campus.²⁹⁷ Isolation is also a product of athletic academic centers that house academic service personnel, including athlete aca-

286. See Foster & Huml, *supra* note 275, at 917 (proposing that clustering is detrimental to athletes' "academic and career trajectories").

287. See Paule-Koba, *Identifying Athlete's Majors and Career Aspirations*, *supra* note 265, at 14.

288. See Paule-Koba, *Not Just a Power 5 Problem*, *supra* note 270, at 154; Logan & Harrison, *supra* note 278, at 72 (commenting on the lack of choice Black college football players have in selecting their classes and majors).

289. Logan & Harrison, *supra* note 278, at 72.

290. KNIGHT COMM'N REPORT, *supra* note 113, at 7.

291. Foster & Huml, *supra* note 275, at 917.

292. *Id.*

293. *Id.* at 917, 922.

294. *Id.* at 917.

295. *Id.* at 923.

296. Nathan Boninger, *Antitrust and the NCAA: Sexual Equality in Collegiate Athletics as a Procompetitive Justification for NCAA Compensation Restrictions*, 65 UCLA L. REV. 754, 789 (2018).

297. *Id.*

demic advisors, tutors, and class checkers.²⁹⁸ Clustering exacerbates the isolation that erodes the quality of the educational experience for many athletes, particularly Black athletes.²⁹⁹

Two researchers postulate that “[black college football players] are some of the most isolated people on campus. They experience geographic/academic isolation due to the location of the athletic village and its one-stop-shop nature, social isolation from peers, faculty, and administration, and cultural isolation through the cultural barriers between students.”³⁰⁰ This is particularly harmful given that alienation and isolation were strong predictors of adverse outcomes for Black athletes given that it inhibits intellectual development and academic success.³⁰¹ Athlete participation in various activities, including interactions with faculty, non-athlete peers, and collaborative assignments fosters learning.³⁰² In short, for many athletes, particularly Black FBS football players and Division I men’s basketball players, clustering coalesces with isolation further to diminish their educational experience.

3. The Caste-System Mindset and Academic Marginalization

It is unlikely that a conscious desire to harm Black FBS football and Division I men’s basketball players results in systemic clustering³⁰³ and practices producing athlete isolation.³⁰⁴ Yet those who control college sports—college presidents, coaches, athletic administrators—are fully aware of the harmful academic policies and practices that disproportionately and adversely impact Black athletes in the revenue sports.³⁰⁵ They know of the gaps in the graduation rates of Black ath-

298. Paule-Koba, *Not Just a Power 5 Problem*, *supra* note 270, at 154.

299. See Paule-Koba, *Identifying Athlete’s Majors and Career Aspirations*, *supra* note 265, at 8 (arguing that clustering and practices related to it undermine one of the NCAA’s core values—academic excellence). Predominantly White institutions within the most powerful athletic conferences enroll high numbers of Blacks athletes for their FBS football and men’s basketball teams and low numbers of nonathlete Black students. HARPER, *supra* note 186, at 3. This gap between Black athletes and nonathletes is not benign. It contributes to Black athletes voluntarily alienating and isolating themselves on predominantly White campuses. HAWKINS, *supra* note 44, at 38.

300. Logan & Harrison, *supra* note 277, at 73 (citations omitted).

301. HAWKINS, *supra* note 44, at 37–38.

302. Eddie Comeaux et al., *Undergraduate Experiences of Division I Athlete Science, Technology, Engineering, and Mathematics (STEM) Graduates*, 26 J. SCI. EDUC. TECH. 24, 30 (2017); see also Logan & Harrison, *supra* note 278, at 75 (stating that educational outcomes are impacted by student-athletes’ full integration into the university environment).

303. See Fountain & Finley, *Academic Clustering: A Longitudinal Analysis*, *supra* note 265, at 38 (finding that clustering can be a gradual and “systemic process that occurs over many years”).

304. Logan & Harrison, *supra* note 278, at 73.

305. Drake Group Position Statement, *supra* note 9, at 14; Fountain & Finley, *Academic Majors in ACC Football Players*, *supra* note 265, at 11 (stating clustering reflects the broader issue of the academic integrity and fairness relating to Black athletes).

letes compared to White athletes and other students.³⁰⁶ College sport leaders are aware of the greater isolation and depression that Black athletes experience when compared to other athletes.³⁰⁷ Given leaders' awareness, the question that emerges is why they have been complicit in such practices, let alone not taken steps to bring them to an end.

Conflicts of interest related to the commercialization of intercollegiate athletics converge with the caste-system mindset to result in the "predominantly White community of higher education administrators, athletic department administrators, coaches[,] and staff [to] turn[] a blind eye to the racism underlying the economic, education[,] and other forms of exploitation harming college athletes."³⁰⁸ Such practices are likely a consequence of internalized beliefs including the stereotypic beliefs of the "innate [physical] superiority" but intellectually inferiority of Black men.³⁰⁹ These internalized beliefs, which arise from a caste-system mindset, influence those in positions of power to acquiesce in the continued marginalization of the academic interests of Black athletes in the revenue-producing sports. Moreover, the disproportionate number of Black athletes in the revenue-producing sports who perform before predominantly white audiences³¹⁰ conform to the caste-system mindset of Blacks as performers who are placed on the field or court to provide entertainment for Whites without the audience necessarily or particularly interested in fully recognizing their humanity.³¹¹ The impact of this convergence of insidious beliefs and assumptions is the devaluation of the educational experiences of Black athletes.

Thus, when "notions of Blacks' athletic superiority are coupled with the belief in intellectual inferiority of Blacks, it becomes apparent that Black athletes are not likely to be taken seriously as students."³¹² Consequently, the caste mindset assumes that Black athletes should not be vocal and proactive in making decisions relating to their academic future.³¹³ Because none of us, even members of the subordinate caste, escape the embedded beliefs of the caste-system mindset, Black athletes are socialized at an early age to believe in their innate physical superiority which leads many of them to prioritize athletics over academics.³¹⁴

The caste-system mindset also manifests in the patronizing and unconvincing rationalizations offered for the complicity of college sport

306. See Drake Group Position Statement, *supra* note 9, at 14.

307. *Id.* at 50–51.

308. *Id.* at iii.

309. HARPER, *supra* note 187, at 4.

310. *Id.* at 14.

311. See CASTE, *supra* note 11, at 63–64.

312. HAWKINS, *supra* note 44, at 59, 66.

313. *Id.* at 72.

314. HARPER, *supra* note 187, at 4; HAWKINS, *supra* note 11, at 59.

leaders and belies the exploitation that is occurring. One view expressed is “[e]ven if they don’t graduate, they’ve rubbed elbows with powerful and respected folks who can help them in the future.”³¹⁵ Another is: “We’re making a difference in their lives. If they weren’t here, they would be stuck in an environment of poverty with far fewer possibilities.”³¹⁶

In short, the forgoing dynamics deprive many Black FBS football and Division I men’s basketball players of an adequate return on their investment. These inequities are starker because college sport leaders permit the perpetuation of practices that deprive these athletes of a “meaningful educational experience resulting in a functional degree and employable skills.”³¹⁷

a. *Addressing the Economic Exploitation and Academic Marginalization*

i. Litigation

As it relates to the academic exploitation of Black college athletes, litigation may not provide a viable means of holding colleges and universities accountable. A scholarship athlete’s contract with her or his college imposes numerous express obligations on athletes but only one on colleges—the provision of financial aid.³¹⁸ Athletes have argued that the essence of the parties’ contractual obligation also imposes an implied contractual obligation on colleges to provide athletes with an opportunity to take advantage of the educational opportunities that colleges afford.³¹⁹ Courts have been unpersuaded.³²⁰

The seminal case is *Ross v. Creighton University*,³²¹ in which a scholarship basketball player left Creighton University with the language skills of a fourth grader and the reading skills of a seventh grader.³²²

315. Drake Group Position Statement, *supra* note 9, at 31.

316. *Id.*

317. HAWKINS, *supra* note 44, at 23.

318. *See, e.g.,* McAdoo v. Univ. of N.C. at Chapel Hill, 736 S.E.2d 811, 821 (N.C. Ct. App. 2013) (stating that in the financial aid agreement, the university promised to pay for tuition and board in exchange for the athlete conducting himself “in accordance with all [University of North Carolina], ACC, and NCAA regulations”); Jackson v. Drake Univ., 778 F. Supp. 1490, 1493 (S.D. Iowa 1991) (analyzing a student-athlete’s breach of contract claim solely based on the explicit obligations laid out in the financial aid agreement); Begley v. Corp. of Mercer Univ., 367 F. Supp. 908, 909–10 (E.D. Tenn. 1973) (discussing the obligations under the contract entitled “Student Aid Contract For Athletes”); *see also* Timothy Davis, An Absence of Good Faith: Defining a University’s Educational Obligation to Student-Athletes, 28 HOUS. L. REV. 743, 772 (1991) (concluding the university specific obligation is its financial aid obligation).

319. *Ross v. Creighton Univ.*, 957 F.2d 410, 412 (7th Cir. 1992); *Jackson*, 778 F. Supp. at 1493.

320. *See, e.g.,* *Ross*, 957 F.2d at 416–17; *Jackson*, 778 F. Supp. at 1493.

321. *Ross*, 957 F.2d 410.

322. *Id.* at 412.

Relying on policy reasons, the Seventh Circuit rejected Ross's educational malpractice tort claim.³²³ The court relied on these policies in rejecting Ross's contracts claim that the university had an implied contractual obligation to provide him with a "real opportunity to participate in and benefit from the University's academic program."³²⁴ The court found that Ross failed to allege a breach of contract action to the extent he wanted the court to intervene to assess the quality of the education he was afforded.³²⁵ It determined, however, that Ross's contract claim could move forward only if he could identify a specific promise that the university failed to honor.³²⁶

Subsequent cases have adhered to the *Ross* precedent. In *Jackson v. Drake University*,³²⁷ a district court refused to recognize an obligation on the university to provide a scholarship athlete with an educational opportunity.³²⁸ In another case arising out of the University of North Carolina at Chapel Hill's academic scandal involving classes with little academic merit that had a disproportionate enrollment of athletes, the court ruled that the NCAA assumed neither a duty of reasonable care to safeguard student-athletes' educational opportunity nor a fiduciary duty to protect student-athletes' access to educational opportunities.³²⁹

Although college athletes have effectively used litigation or the threat of antitrust litigation to circumscribe NCAA's bylaws that limited the educational benefits that universities can provide to their intercollegiate athletics,³³⁰ uncertainty surrounds whether courts will invalidate NCAA rules prohibiting colleges from compensating athletes directly for playing their sport. In *National Collegiate Athletic Association v. Alston*, the Court stated that NCAA limits on non-education related compensation was not before it for determination.³³¹ It noted that the lower courts specifically upheld those rules.³³² In his

323. The court articulated the following four policies: (1) the difficulty inherent in devising an appropriate standard of care to evaluate the quality of the education provided, (2) the difficulty of determining causation and calculating damages, (3) the burdens imposed on educational institutions arising from the numerous claims that are likely to be asserted, and (4) courts should abstain from becoming involved in overseeing the day-to-day operation of schools and avoid the implications on academic freedom and autonomy likely to arise from their doing so. *Id.* at 414–15. For a detailed analysis of *Ross*, see Davis, *supra* note 318.

324. *Ross*, 957 F.2d at 416.

325. *Id.* at 417.

326. *Id.*

327. *Jackson v. Drake Univ.*, 778 F. Supp. 1490 (S.D. Iowa 1991).

328. *Id.* at 1493.

329. *McCants v. Nat'l Collegiate Athletic Ass'n*, 201 F. Supp. 3d 732, 733, 745–46 (M.D.N.C. 2016) (holding the NCAA possessed "no duty to protect the education and educational opportunities of student-athletes").

330. *See, e.g., Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021); *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015).

331. *Alston*, 141 S.Ct. at 2147.

332. *Id.* at 2153–54.

concurring opinion, however, Justice Kavanaugh seemingly encourages college athletes to challenge the NCAA's prohibition on colleges directly compensating athletes for playing their sport.³³³ Justice Kavanaugh stated:

[T]here are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny . . . The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. . . . [I]t is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes. And if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules.³³⁴

Notwithstanding Justice Kavanaugh's signal to prospective plaintiffs, it remains unclear whether a majority of justices would invalidate all NCAA compensation limitations. Given this uncertainty, I now explore non-litigation strategies to ameliorate the impact of the NCAA's economic model on FBS football and Division I men's basketball.

ii. Non-Litigation Strategies

One way to address the wealth transfer under the NCAA's current economic model would be for colleges and universities to pay athletes directly for playing their sports. Such suggestions generate considerable opposition. Opponents point to the efforts to enhance college athlete well-being over the past several years. In *Alston*, the Court discussed changes to NCAA rules that have resulted in an enhancement of the benefits available to athletes including: permitting schools to award athletics scholarships for the full cost of attendance and multi-year scholarships; the NCAA making substantial funds available through the Student Activities and Academic Enhancement Funds that cover athlete expenses in excess of the full cost-of-attendance scholarship; and making funds available for loss-of-value insurance and other noneducational-related benefits.³³⁵

Opponents also argue that colleges and universities directly compensating their athletes would: transform the athlete/school relationship into an employer/employee relationship that "could undermine the primacy of educational purpose;"³³⁶ increase the distance between

333. *Id.* at 2166–67 (Kavanaugh, J., concurring).

334. *Id.* at 2167–68.

335. *Id.* at 2150.

336. Press Release, Donna A. Lopiano, Drake Group, *Moran Legislation Is Another NCAA Reform Proposal That Deserves a Closer Look* (Mar. 11, 2021), <https://>

athletes and other students; cause coaches to feel entitled to make further demands on college athletes because of payment;³³⁷ and violate Title IX given that male athletes in the revenue-producing sports will most likely be those compensated.³³⁸ Much of this opposition, however, is premised on the assumption that athletes, including Black athletes, in the revenue-generating sports have a reasonable opportunity to obtain a meaningful education and, therefore, receive a fair exchange for their athletic services.³³⁹ As discussed, *supra*, the research undermines this premise. In addition, the isolation that many Black athletes in the revenue-producing sports experience refutes the idea that compensation would increase the distance between athletes receiving pay and other students.³⁴⁰ As it relates to Title IX, a credible model for compensating both women and men college athletes has been proposed and is worthy of consideration.³⁴¹

Opponents to colleges directly paying athletes view allowing third parties to compensate college athletes for their name, image, and likeness (“NIL”) as the panacea for the exploitation of Black FBS football players and Division I men’s basketball players.³⁴² Their perspective has no doubt been buoyed by state legislation granting college athletes the right to receive compensation for their NIL³⁴³ and the NCAA’s decision to permit such compensation.³⁴⁴ It is undoubt-

www.thedrakegroup.org/wp-content/uploads/2021/03/Moran-Bill-is-Another-NCAA-Reform-Bill-that-Deserves-a-Closer-Look.pdf [https://perma.cc/76HV-ALRT].

337. See *Position Statement: The Drake Group Praises Proposed College Athletes Bill of Rights: But Notes Significant Flaw in Massive Sorely Needed Reform Bill*, DRAKE GRP. 5 (Dec. 22, 2020), <https://www.thedrakegroup.org/wp-content/uploads/2020/12/Dec.22-Drake-Position-on-Athletes-Rights-Bill-FINAL.pdf> [https://perma.cc/2SQP-AU9N].

338. *Id.*

339. See generally Ray Yasser & Carter Fox, *Third-Party Payments: A Reasonable Solution to the Legal Quandary Surrounding Paying College Athletes*, 12 HARV. J. SPORTS & ENT. L. 175 (2021); Meyer & Zimbalist, *supra* note 200.

340. See discussion *supra* Section IV.B.3.

341. See Neal Newman, *Let’s Get Serious—The Clear Case for Compensating the Student Athlete—By the Numbers*, 51 N.M. L. REV. 37, 46–47, 69 (2021) (concluding the arguments against paying athletes ring hollow and proposing a compensation model that would allow compensation for female college athletes). See generally David A. Grenardo, *The Duke Model: A Performance-Based Solution for Compensating College Athletes*, 83 BROOK. L. REV. 157 (2018) (addressing arguments against compensating athletes and proposing a compensation model that would compensate female college athletes).

342. See generally Yasser & Fox, *supra* note 139; Meyer & Zimbalist, *supra* note 209.

343. Dan Murphy, *Everything You Need to Know About the NCAA’s NIL Debate*, ESPN (Sept. 1, 2021), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate [https://perma.cc/QGD5-PXYD] (listing states that have enacted NIL legislation).

344. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NAT’L COLLEGIATE ATHLETIC ASS’N (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy> [https://perma.cc/U2MP-KNKU].

edly true that athletes in both revenue- and non-revenue-generating sports will derive income from their NILs.³⁴⁵ Nevertheless, permitting third parties to compensate athletes for their NIL does not address the imbalance in the relationships between student-athletes in revenue sports and their institutions.

Although I do not unequivocally endorse institutions directly compensating athletes for their athletic performance, it should be an option given that “[h]igher education has not been fulfilling its end of the bargain—the promise of providing a bona fide education . . . , guarding a student’s freedom of speech . . . , and encouraging, rather than preventing, students from utilizing their skills and talents to explore outside employment.”³⁴⁶ Initiatives that could improve educational outcomes for Black athletes include (1) requiring that academic counseling and tutoring be administered independently of athletic departments;³⁴⁷ (2) prohibiting the athletic department from interfering with or retaliating against an athlete who selects a major or course of study that interferes with athletic activities;³⁴⁸ (3) restricting the ability of institutions from interfering with athletes’ participation in extracurricular activities;³⁴⁹ (4) requiring institutions to make mandatory financial literacy and life skills development available to athletes;³⁵⁰ (5) requiring institutions to report the number of mandatory and voluntary activities that athletes devote to athletics;³⁵¹ (6) enacting policies to strictly control clustering;³⁵² and (7) establishing of a commission to oversee intercollegiate athletics.³⁵³

Such measures could positively impact educational outcomes for Black FBS football players and Division I men’s basketball players. Absent legislation, however, the history of the NCAA initiating major reforms only in the face of ongoing litigation or the threat of litigation³⁵⁴ casts doubt on the willingness of college presidents and athletic administrators voluntarily to adopt these and other sensible

345. Chris Morris, *Alabama QB Bryce Young Already Nearly \$1 Million in Likeness Deals*, FORTUNE (July 21, 2021, 11:07 AM), <https://fortune.com/2021/07/21/bryce-young-nil-deals-endorsements-name-image-likeness-ncaa-sponsors-nick-saban/> [<https://perma.cc/R6ZA-359E>]; Murphy, *supra* note 343.

346. *Position Statement: The Drake Group Praises Proposed College Athletes Bill of Rights: But Notes Significant Flaw in Massive Sorely Needed Reform Bill*, *supra* note 337, at 1.

347. S. 5062, 116th Cong. § 8 (2020).

348. *Id.*

349. *Id.*

350. *Id.* § 9.

351. *Id.*

352. See KNIGHT COMM’N REPORT, *supra* note 113, at 7.

353. S. 5062 § 11.

354. Meyer & Zimbalist, *supra* note 200, at 254 (stating changes in the NCAA’s evolving definition of amateurism, which resulted in enhanced benefits to student-athletes, were in response to charges of exploitation and antitrust lawsuits challenging NCAA amateurism regulations); Brown & Williams, *supra* note 122, at 57–59 (discussing the impact of litigation on NCAA reforms).

efforts. Therefore, Black college athletes and their supporters will likely need to resort to a multi-pronged approach including litigation and advocacy for federal and state legislation. In addition, Black athletes should engage in social activism that demands change and shines light on the inequities in colleges sports stemming from systemic racism. Athlete activism is more fully discussed in Section V.B.2, *infra*.³⁵⁵

V. DEHUMANIZATION OF BLACK ATHLETES

A. Dehumanizing Conduct

1. Racial Insults

The 2021 NBA playoffs and the return of fans to sports areas following the easing of COVID-19 restrictions were marked by unruly fan behavior directed toward Black players. These incidents included a fan spitting on a Black player, racist slurs directed toward an opposing Black player's family while they sat in the stands, and a fan dumping popcorn on a Black player.³⁵⁶ Commenting on these incidents, Black players recognized the inhumanity inherent in these incidents. A former NBA player remarked, "The fans are emboldened and lessen the value of these athletes as human beings when they engage with them in this way."³⁵⁷ A current NBA player stated that many of these incidents are a consequence of "underlying racism and just treating people like they're in a human zoo."³⁵⁸

The above examples illustrate the racialized indignities directed toward Black basketball players, but this reprehensible conduct occurs at all levels of sport. Other insults include White fans and broadcasters comparing Black athletes to apes,³⁵⁹ the use of the n-word and other racist slurs, symbols, and videos to taunt Black athletes,³⁶⁰ and racist slurs directed at a Black NHL player.³⁶¹ White coaches have allegedly

355. See discussion *infra* Section V.B.2.

356. Jonathan Abrams, *N.B.A. Fans Wanted a Show. They're Also Getting a Reckoning*, N.Y. TIMES (June 7, 2021), <https://www.nytimes.com/2021/06/07/sports/basketball/nba-fans-playoffs.html> [<https://perma.cc/2NBH-JVCY>].

357. *Id.*

358. *Id.*

359. Paul Steinbach, *Iowa Broadcaster Suspended for 'King Kong' Comment*, ATHLETIC BUS. (Feb. 24, 2019), <https://www.athleticbusiness.com/sports-media/iowa-broadcaster-suspended-for-king-kong-comment.html> [<https://perma.cc/8XUF-2PGZ>].

360. Alex Wigglesworth, *Racist Slurs Hurlled at San Clemente High Football Game, Investigation Confirms*, L.A. TIMES (Sept. 23, 2019, 9:10 AM), <https://www.latimes.com/california/story/2019-09-23/racist-slurs-san-clemente-high-football-game-investigation-confirms> [<https://perma.cc/KY5X-5WEH>]; Andy Berg, *Katy HS QB Faces Discipline After Racist Video Post*, ATHLETIC BUS. (Oct. 7, 2019), <https://www.athleticbusiness.com/sportsmanship/katy-hs-qb-faces-discipline-after-racist-video-post.html> [<https://perma.cc/725Y-RPS7>].

361. Erica L. Ayala, *A Black Hockey Player Faced Racial Taunts. Some Fans Aren't Surprised*, N.Y. TIMES, <https://www.nytimes.com/2020/04/17/sports/hockey/rangers-kandre-miller-zoom-racism.html> (Apr. 21, 2020) [<https://perma.cc/B72E-KV6S>]. The

used the n-word and other racist slurs in communicating with their players and failed to take action to stymie the racial harassment of their Black players.³⁶²

This behavior is likely intended to communicate to Black athletes their presumed place within American society and their membership in the subordinate caste.³⁶³ The message sent is that no matter how successful Black athletes may become, they are not deserving of the full range of respect and dignity to which those of the superior caste are entitled.³⁶⁴

2. The NFL and Race Norming

The prevalence of stereotypic beliefs about Black Americans was on display in a legal dispute regarding former Black NFL players. In 2013, the NFL entered into a \$1 billion settlement agreement with retired and then-current players regarding the adverse health effects of head trauma.³⁶⁵ A player's eligibility to receive payment for concussion-related dementia is based on a formula that assesses the player's degree of cognitive decline.³⁶⁶ The benchmarks used to make this determination adjusted for race with the average set at a lower level for Black players than for their White counterparts.³⁶⁷ Effectively, this race-based benchmark required a Black player to demonstrate a more significant cognitive decline in order to be eligible for compensation.³⁶⁸ For example, assume that White players' cognitive abilities are set at ten and that Black players' are set at seven. Also assume that to recover compensation, each player would have to demonstrate a decline of four in their cognitive abilities. A White player would be eligible for compensation if his cognitive abilities decreased to six. In contrast, a Black player would be eligible for compensation only if his cognitive abilities fell to three.

In August 2020, two retired Black players, Kevin Henry and Najeh Davenport, sued the NFL in federal court in Philadelphia alleging the league engaged in racial discrimination by using racial norming to

NFL denounced the taunts, which occurred after the league had enacted a zero-tolerance policy against abusive behavior including racial slurs. *Id.*

362. Drake Group Position Statement, *supra* note 9, at 44–47 (providing examples of White coaches' racially offensive language and other conduct directed at Black college athletes); Michael H. LeRoy, *Whitewashing Coaching Racism in NCAA Sports: Enforcing Civil Rights Through the Ku Klux Klan Act*, 10 ARIZ. ST. SPORTS & ENT. L.J. 53, 58–60 (2020) (discussing the racism of coaches and their failure to take constructive actions when Black athletes are subjected to racial harassment).

363. See HAWKINS, *supra* note 44, at 35–36.

364. See CASTE, *supra* note 11, at 137–38.

365. MITTEN ET AL., *supra* note 44, at 954.

366. Ken Belson, *Black Former N.F.L. Players Say Racial Bias Skews Concussion Payouts*, N.Y. TIMES, <https://www.nytimes.com/2020/08/25/sports/football/nfl-concussion-racial-bias.html> (Oct. 20, 2021) [<https://perma.cc/4PNU-PUKW>].

367. *Id.*

368. *Id.*

deny them compensation.³⁶⁹ The NFL argued that the lawsuit was unfounded and that racial norming is a scientifically acceptable practice.³⁷⁰ Critics challenged the acceptability of the practice and its particularly harmful effects when a subset (i.e., NFL African-American players) of the general population on which benchmarks are based have characteristics that differ from those of members of the general population. Experts have stated:

[U]sing race to estimate one's cognition is fraught because it does not account for factors like a person's health, education[,] or economic background. . . . N.F.L. players are also a unique group because almost all have attended at least three years of university. Comparing players to larger pools of [W]hite and Black Americans could be misleading. . . .³⁷¹

Critics also characterized race norming as representative of the legacy of slavery.³⁷²

In March 2021, a judge dismissed the players' lawsuit and ordered that the NFL and the lead lawyer representing all players, not just those representing Black players, to mediate.³⁷³ In June 2021, the NFL pledged to halt race norming and to reconsider the claims of players who had been denied benefits because race norming had been used in evaluating their eligibility for compensation.³⁷⁴ Apart from its potential illegality, the NFL's racial-norming practice perpetuated and supported race-based caste system notions that Black athletes are less intelligent than their White counterparts.³⁷⁵ Race norming was also emblematic of how a caste system operates—it assigns generalized characteristics to all members of their caste despite their individual abilities and attributes.³⁷⁶ The NFL's race-norming practice also reinforced the caste-system mindset that “Black people's bodies are inher-

369. *Id.*

370. *Id.*

371. N.Y. TIMES, *Black N.F.L. Players Want New Advocate in Concussion Settlement*, U.S. FIJI TIMES (Mar. 18, 2021), <https://www.usfijitimes.org/news/sports/black-nfl-players-want-new-advocate-in-concussion-settlement/> [<https://perma.cc/7HSA-QR2P>].

372. Tracie Canada & Chelsey R. Carter, *The NFL's Racist 'Race Norming' Is an Afterlife of Slavery*, SCI. AM. (Jul. 8, 2021) <https://www.scientificamerican.com/article/the-nfls-racist-race-norming-is-an-afterlife-of-slavery/> [<https://perma.cc/A83X-Q66F>].

373. Associated Press, *Judge Dismisses Lawsuit Over 'Race-Norming' in NFL Dementia Tests*, ESPN (Mar. 8, 2021), https://www.espn.com/nfl/story/_id/31027492/judge-dismisses-lawsuit-race-norming-nfl-dementia-tests [<https://perma.cc/YN9G-8DD5>].

374. Associated Press, *NFL Pledges to Stop 'Race-Norming,' Review Past Scores for Potential Race Bias*, NAT'L FOOTBALL LEAGUE (Jun. 2, 2021, 4:55 PM), <https://www.nfl.com/news/nfl-pledges-to-stop-race-norming-review-past-scores-for-potential-race-bias> [<https://perma.cc/EFK3-NBU6>].

375. See *supra* discussion accompanying notes 336–40 (illustrating how the NFL calculated compensation for Black and White players suffering from dementia).

376. See CASTE, *supra* note 11, at 142.

ently different from White people's bodies."³⁷⁷ The practice was representative of systemic racism, which occurs "when the system delivers unequal outcomes by race, even if no explicit racism was intended."³⁷⁸

Thus, the racialized mistreatment of Black athletes represents the manifestation of another pillar of America's race-based caste system—the dehumanization that is required to rationalize maintaining the caste system.³⁷⁹ According to Wilkerson, the "unspoken race-based caste [system] in the United States . . . relie[s] on stigmatizing those deemed inferior to justify the dehumanization necessary to keep the lowest-ranked people at the bottom and to rationalize the protocols of enforcement."³⁸⁰ Wilkerson states that dehumanization is a process that requires "energy and reinforcement to deny what is self-evident in another member of one's own species."³⁸¹ She adds:

Dehumanize the group, and you have quarantined them from the masses you choose to elevate and have programmed everyone, even some of the targets of dehumanization, to no longer believe what their eyes can see, to no longer trust their own thoughts. Dehumanization . . . makes slaves to group think of everyone in the hierarchy. A caste system relies on dehumanization to lock the marginalized outside of the norms of humanity so that any action against them is seen as reasonable."³⁸²

Therefore, the dehumanization of Black Americans profoundly impacts the mindsets of all despite where their group falls within a caste hierarchy.

The dehumanization of Black athletes also reflects cultural perceptions of Black men in American society, who are perceived as innately physically gifted, bigger, more formidable, more animal like, and more capable of harm than White men.³⁸³ Given the significance of sports as a cultural institution within the United States and how it permeates our society, these images take on added significance because of the degree to which Americans are exposed to these images of Black athletes, particularly in football and basketball.³⁸⁴ Thus, the centrality of

377. Canada & Carter, *supra* note 372.

378. Cara Letofsky, *Yes, the NFL's Race-Norming Is Bad – But It Is Not an Isolated Case*, AN INJUSTICE! (June 10, 2021), <https://aninjusticemag.com/yes-the-nfls-race-norming-is-bad-but-it-is-not-an-isolated-case-e7ea568f7f94> [<https://perma.cc/H3ZN-WB9Q>].

379. CASTE, *supra* note 11, at 25, 32; *see also* HAWKINS, *supra* note 44, at 71 ("The dehumanization of Black athletes takes place when [colleges and universities] value Blacks more as athletes than as students . . .").

380. CASTE, *supra* note 11, at 17.

381. *Id.* at 141.

382. *Id.* at 141–42.

383. Gregory S. Parks, "When They See Us" *The Great White Awakening to Black Humanity*, 21 U. MD. L.J. RACE RELIGION GENDER & CLASS 1, 8–9 (commenting on negative perceptions of Black men).

384. Brown & Williams, *supra* note 122, at 77.

sports in American culture,³⁸⁵ the overrepresentation of Black athletes in football and basketball,³⁸⁶ the paucity of Blacks in coaching and other leadership positions,³⁸⁷ and the media's portrayal of Black athletes signal to the American society the supposed innate physical superiority yet intellectual inferiority of Black men.³⁸⁸ Notwithstanding their supposed tendency for violence and aggression,³⁸⁹ however, the prevailing caste-system paradigm supports beliefs that Blacks, as members of the subordinate caste, are passive and should be subjugated to the domination of Whites, the dominant caste.³⁹⁰

3. Coaches' Conduct

Urban Meyer's hiring of Chris Doyle, discussed *supra*,³⁹¹ illustrates a prominent pillar in America's caste system—the lack of empathy that the dominant caste affords the subordinate caste.³⁹² Meyer's hiring decision was a statement that he was in charge and capable of exercising his authority notwithstanding the offensiveness of his action to the Black players.³⁹³ Meyer's decision also reflects the tendency of the members of the dominant caste not to extend empathy to members of the subordinate caste.³⁹⁴ As explained by Wilkerson, the lack of empathy “takes the form of the inability for dominant caste members to step outside of themselves and attempt to see how others are experiencing life.”³⁹⁵ Many in the dominant caste are unable to ask a very important question: What would it be like if I were in their position?

385. See, e.g., *id.* (quoting the NCAA, which stated that “[c]ollege football and basketball are part of the fabric of American life”—“[t]hese sports are wildly popular, enjoyed by millions”).

386. See *supra* discussion accompanying notes 59, 79 (detailing the percentage of Black athletes participating in the NFL and the NBA, respectively).

387. See *supra* section III.A.1–3 (detailing the percentages of Black people in leadership positions in the NFL, NBA, and Division I Intercollegiate Athletics as compared to their White counterparts).

388. See Brown & Williams, *supra* note 122, at 77.

389. *Id.* at 78; Parks, *supra* note 383, at 8–9.

390. See CASTE, *supra* note 11, at 181–84 (pointing to different points in American history where working-class Whites relied on being superior to Black Americans to maintain their social value); see also Brown & Williams, *supra* note 122, at 74 (commenting on the enduring historical perceptions of Black Americans).

391. See *supra* discussion accompanying notes 130–32.

392. See CASTE, *supra* note 11, at 141–50 (providing examples from American history, both pre- and post-Civil War, of Whites subjecting Blacks to dehumanizing behavior).

393. See *supra* discussion accompanying notes 130–32 (pointing out that Meyer hired a coach that had “mistreated [Black football players] and used racist language” and that the hire “reflect[ed] the *good ol' boy* network”).

394. *Id.*; see also CASTE, *supra* note 11, at 141–50 (providing examples from American history, both pre- and post-Civil War, of Whites subjecting Blacks to dehumanizing behavior).

395. CASTE, *supra* note 11, at 385–86.

Another example of the disregard of Black athletes by White coaches and college administrators occurred at the University of Texas ("UT"). As a part of the racial reckoning following George Floyd's death, UT's Black football players demanded that the "Eyes of Texas" no longer be played at the conclusion of games.³⁹⁶ The players contended the song degraded them and other Black students on campus.³⁹⁷ The song is controversial because it originated in minstrel shows in which White singers sang the song in blackface in the early 1900s.³⁹⁸ The university commissioned a study to contextualize the history of the song, but before a final report was issued, UT decided to continue to play the song but not to require athletes to remain on the field.³⁹⁹ "Alumni and donors appear to have influenced UT's decision by threatening to withdraw their financial support from the university if it discontinued playing the song."⁴⁰⁰ Black players reportedly received threats that they would not receive help in finding post-college jobs if they failed to sing along with the song.⁴⁰¹ Shortly after he arrived on campus to assume the position of head football coach, Steve Sarkisian announced, "[W]e're going to sing ['The Eyes of Texas']", proudly.⁴⁰² Sarkisian later appeared to back off of his statement.⁴⁰³

The UT controversy demonstrates the lack of empathy that many in the dominant caste extend to those in the subordinate caste.⁴⁰⁴ The UT controversy also evinces the failure of university administrators to create a safe place for all students, including Black football players who contribute toward generating the revenue and prestige that comes from a successful football program.⁴⁰⁵

The racial attacks directed at Black athletes reflects the notion that an appropriate role for Blacks is to entertain Whites (something that

396. Press Release, Donna A. Lopiano, Drake Group, *Eyes of Texas Is a "Yes, Coach" Moment*, DRAKE GRP. (Mar. 18, 2021), <https://www.thedrakegroup.org/wp-content/uploads/2021/03/Eyes-of-Texas-is-a-Yes-Coach-Moment.pdf> [<https://perma.cc/ZY8T-59PZ>].

397. *Id.*

398. *Id.*; EYES OF TEX. HIST. COMM., UNIV. OF TEX. AT AUSTIN, *THE EYES OF TEXAS HISTORY COMMITTEE REPORT 14–16* (2021), http://utw.10957.utweb.utexas.edu/eot-report/Eyes_of_Texas_Report_3.2021.pdf [<https://perma.cc/46T2-DKHK>].

399. See Lopiano, *supra* note 359.

400. *Id.*

401. Cole Thompson, 'Eyes of Texas' Controversy: Longhorns Coach Sark Reveals Thoughts, FANNATION: LONGHORN COUNTRY (Apr. 2, 2021), <https://www.si.com/college/texas/news/eyes-of-texas-controversy-longhorns-coach-sark-reveals-thoughts> [<https://perma.cc/YG57-QNDA>].

402. See Lopiano, *supra* note 396.

403. See Thompson, *supra* note 401. Sarkisian later stated he had been engaged in dialogue with players but did not indicate he would reverse his initial decision. *Id.*

404. See CASTE, *supra* note 11, at 141–50 (providing examples from American history, both pre- and post-Civil War, of Whites subjecting Blacks to dehumanizing behavior).

405. See Thompson, *supra* note 401; see also *supra* discussion accompanying notes 192–98.

is not lost on Black athletes)⁴⁰⁶ and accept any indignity foisted upon them while doing so.⁴⁰⁷ Wilkerson states that after Blacks converted their performance role into disproportionate prominence in entertainment (including sports), they were celebrated.⁴⁰⁸ The lingering question for Black entertainers, however, has always been how far beyond the stage or the playing field the celebration extends.⁴⁰⁹ Increasingly, we see for some Whites it appears that recognition of the humanity of Black athletes does not even extend even to the playing field.⁴¹⁰

B. *Addressing the Dehumanization of Black Athletes*

Effectively addressing conduct that encourages dehumanization of Black athletes will be difficult to overcome because it is the most direct outward manifestation of a caste-system mindset in sport. Ultimately, it will require conscious effort, particularly by those of the dominant caste, to develop the empathy required to examine every segment of society, including sports. This empathy will require efforts directed toward understanding the life experiences of members of the subordinate caste and actions that allow those of the dominant caste to move beyond presumed notions of entitlement and superiority.⁴¹¹

1. Institutional Initiatives

In the meantime, however, there are steps that can be taken to not only ameliorate the impact of the caste-system mindset in sport, but to elevate sport to a leadership position in changing narratives associated with America's caste system. In professional sports, leagues and teams can vigorously enforce policies that demonstrate their unwillingness to tolerate fans' racially motivated harassment and abuse of players.⁴¹² Professional teams and leagues can also exercise leadership in challenging the effects of the caste system. This includes implementing programs, such as those of the NBA, discussed *supra*, to increase understanding of the existence and impact of unconscious bias on hiring decisions and race-related aggression occurring within workspaces.⁴¹³

406. See David M. Hale, *'I Just Can't Be Silent Anymore': College Football Players Speak Out, and They Are Being Heard*, ESPN, https://www.espn.com/college-football/story/_/id/29267961/i-just-silent-anymore-college-football-players-speak-being-heard (June 8, 2021, 9:40 AM) [<https://perma.cc/7Q8D-JGJ9>] (quoting one Black athlete who noted that "[t]hey're using us players for their entertainment, so we deserve a seat at the table").

407. See CASTE, *supra* note 11, at 136–37.

408. *Id.* at 137.

409. See *id.* at 137–38.

410. See Brown & Williams, *supra* note 122, at 77.

411. See CASTE, *supra* note 11, at 386.

412. See, e.g., Associated Press, *NBA Enacting Zero-Tolerance Rules for Abusive, Hateful Behavior*, ESPN (Oct. 21, 2019), https://www.espn.com/nba/story/_/id/27893069/nba-enacting-zero-tolerance-rules-abusive-hateful-fan-behavior [<https://perma.cc/XY8W-8UV8>].

413. See *supra* discussion accompanying notes 174–78.

Moreover, Black players and their allies should forcefully denounce dehumanizing conduct whether it comes from fans, coaches, teammates, or team and league leadership.

Much that is said above is equally applicable to college sports. Additional measures, however, can be taken at this level. In their respective reports on race in college athletics, the Drake Group and the Knight Foundation Commission recommend several steps that can be taken to not only address harmful conduct directed toward Black athletes but also to enhance their overall experience at predominantly White institutions.⁴¹⁴ These include (1) athletic conferences and the NCAA working to adopt a coaches code of ethics that specifically addresses race-based discrimination towards Black players;⁴¹⁵ (2) providing coaches with mandatory training on cultural competency that includes addressing unconscious racial bias and its link to mental health;⁴¹⁶ (3) colleges and universities establishing processes whereby athletes report racially abusive behavior of coaches and other athletic administrators;⁴¹⁷ (4) colleges appointing an ombudsperson to represent the interest of Black athletes;⁴¹⁸ (5) encouraging all athletes to participate in cultural competency courses;⁴¹⁹ (6) workshops made available to first-year athletes of color that address imposter syndrome, mental health, and strategies to effectively address messaging that they do not belong on college campuses;⁴²⁰ (7) connecting Black athletes to Black student organizations on campus and Black organizations external to campus;⁴²¹ (8) connecting Black athletes to Black faculty and alumni to serve as mentors;⁴²² (9) increasing the number of campus mental health professionals of color, who would check in with Black athletes several times a year;⁴²³ and (10) colleges removing all symbols and other vestiges of their racist pasts.⁴²⁴

2. Athlete Social Activism

In 2020, ten former Black University of Iowa football players filed a lawsuit in federal district court alleging that coaches and University of Iowa administrators created and condoned a “racially hostile educational environment, retaliation, systemic discrimination, conspiracy,

414. See generally Drake Group Position Statement, *supra* note 9; KNIGHT COMM’N REPORT, *supra* note 113.

415. Drake Group Position Statement, *supra* note 9, at 50.

416. See *id.* at 47 (proposing a task force that trains coaches and staff on how racial bias manifests and impacts athletes); KNIGHT COMM’N REPORT, *supra* note 113, at 16 (recommending cultural competency programs for coaches).

417. Drake Group Position Statement, *supra* note 9, at 50.

418. KNIGHT COMM’N REPORT, *supra* note 113, at 18.

419. *Id.* at 16.

420. Drake Group Position Statement, *supra* note 9, at 42.

421. *Id.*

422. *Id.*

423. *Id.*; KNIGHT COMM’N REPORT, *supra* note 113, at 16.

424. Drake Group Position Statement, *supra* note 9, at 61.

civil rights violations, and breach of contract.”⁴²⁵ After the lawsuit was filed, Iowa hired a law firm to conduct an investigation.⁴²⁶ The firm “found the program’s rules ‘perpetuated racial and cultural biases and diminished the value of cultural diversity’ and allowed coaches to demean players without consequence.”⁴²⁷ In May 2021, a federal court dismissed certain claims but allowed the players to proceed on other claims.⁴²⁸ The lawsuit followed protests by then current and former Black Iowa football players.⁴²⁹ The Iowa protest was not a singular event. In 2015, 30 Black University of Missouri football players threatened not to play another game unless the University’s president resigned.⁴³⁰ The players joined other students in protesting what they perceived as the racially hostile environment at the University and the lack of racial diversity among faculty and students.⁴³¹

Activism by college athletes to challenge racism is not without precedent as historically Black athletes were at the forefront of calling attention to racial injustice within America’s colleges and universities.⁴³² The Missouri protest was particularly noteworthy because it occurred notwithstanding barriers that impede college athlete activism, including: athletes prioritizing their athletic identity over other identities; the limited impact their activism may have as well as structural barriers such as the isolation college athletes experience from the rest of the university community; and the fear that social activism may result in backlash from fans, coaches, teammates, and powerful alumni.⁴³³ Recognizing the risks of protest,⁴³⁴ one athlete stated: “I

425. Vanessa Miller, *University of Iowa Argues to Dismiss Former Player Lawsuit*, GAZETTE, <https://www.thegazette.com/hawkeye-football/university-of-iowa-argues-to-dismiss-former-football-player-lawsuit/> (Feb. 23, 2021, 5:17 PM) [<https://perma.cc/VGY3-ZRUE>].

426. *Court: Black Ex-Hawkeyes Can Proceed with Parts of Lawsuit*, ASSOCIATED PRESS (May 6, 2021), <https://apnews.com/article/football-iowa-hawkeyes-football-lawsuits-college-football-courts-a173906f3f9b5d3092fc8ff5c3bdf5f6> [<https://perma.cc/K2F8-UKAJ>].

427. *Id.*

428. *Id.*

429. Chris Werner, *Power to the Players: Hawkeyes Speak up, Kneel Down*, DAILY IOWAN (Nov. 12, 2020), <https://dailyiowan.com/2020/11/12/power-to-the-players-iowa-hawkeyes-speak-up-kneel-down/> [<https://perma.cc/DWJ9-6LFD>].

430. Alex Kirshner, *The Impact and Evolution of College Football Player Protest*, RINGER (June 30, 2020, 9:45 AM), <https://www.theringer.com/2020/6/30/21307518/college-football-player-protests-black-lives-matter-movement> [<https://perma.cc/X5T2-UDEC>].

431. Eyder Peralta, *Missouri Football Players Strike to Demand Ouster of University President*, NPR (Nov. 8, 2015, 12:32 PM), <https://www.npr.org/sections/thetwo-way/2015/11/08/455216375/missouri-football-players-strike-to-demand-ouster-of-university-president> [<https://perma.cc/BH3M-MSYQ>].

432. Andrew Mac Intosh et al., *To Act or Not to Act? Student-Athlete Perceptions of Social Justice Activism*, 51 PSYCH. SPORT & EXERCISE 1, 2 (2020); Kirshner, *supra* note 430; James N. Druckman et al., *Political Protesting, Race, and College Athletics: Why Diversity Among Coaches Matters*, 100 SOC. SCI. Q. 1009, 1011 (2019).

433. Intosh et al., *supra* note 432, at 2; *see also* Cheryl Cooky, “We Cannot Stand Idly By”: A Necessary Call for a Public Sociology of Sport, 34 SOCIO. SPORT J. 1, 4

already feel like campus is an unlivable space. . . . So it's worth sacrificing something of this grave amount, because I'm already not wanted here. I'm already not treated like I'm a human."⁴³⁵

Black athletes' willingness to protest racial inequities impacting them also reflects their growing appreciation of the leverage derived from acting jointly and of their value to football teams—the major revenue generating sports.⁴³⁶ Players' willingness to engage in social activism also displays an appreciation for using their platforms to influence public opinion.⁴³⁷ This comes in part from athletes' growing proficiency in using social media to effectively frame their anti-racist initiatives in terms of equity and fairness and mobilize their supporters.⁴³⁸

VI. CONCLUSION

This Article has sought to demonstrate that although caste may not be the sole reason for racial inequities in sport, the caste-systems mindset reverberates throughout many of the policies and practices that negatively impact Blacks in sport. Because of caste's undeniable centrality in producing such inequities, overcoming them will not be easy. This Article has attempted to offer specific recommendations on addressing the negative manifestations of America's race-based caste system. As Wilkerson states: "The caste system in America is [400] years old and will not be dismantled by a single law or any one person, no matter how powerful."⁴³⁹ A first step in achieving greater racial equity in sports must begin with acknowledgement by Whites, who are in positions of power within sport, of the role that caste plays in creating the assumptions that underlie the policies and practices that result in denying full participation and opportunities for Blacks in college and professional sports. Recognition and doing the hard work required to overcome the caste mindset will set the stage for developing

(2017) (observing that "the era of the 'apolitical' athletes appears" to have come to an end); Hale, *supra* note 406 (stating the response of fans to Black athletes protest regarding race is "vocal, angry, and often racist" and that athletic departments often seek to appease donors and fans).

434. Kirshner, *supra* note 430; *see also* Drake Group Position Statement, *supra* note 9.

435. Peralta, *supra* note 431.

436. Kirshner, *supra* note 430.

437. *Id.*

438. *Id.*; *see also* Druckman et al., *supra* note 432, at 1019 (stating athletes are in a unique position to garner attention to their protests); Ethan Joyce, *For College Athletes, Social Justice and Social Media Go Hand in Hand*, WINSTON-SALEM J. (Oct. 2, 2020) (commenting on the role of social media in athlete protests) https://news.lee.net/sports/college/football/for-college-athletes-social-justice-and-social-media-go-hand-in-hand/collection_f3f15302-041f-11eb-9864-137c04265727.html [<https://perma.cc/CUM5-LZ3R>]; Marie-Amélie George, *Framing Trans Rights*, 114 Nw. U. L. REV. 555, 619 (2019) (discussing the importance to social movements of framing issues so that their message will resonate with audiences).

439. CASTE, *supra* note 11, at 380.

the knowledge and empathy that will lead to policies and practices that will produce greater racial equity in sport.

Diminishing the impact of caste in sports could reverberate beyond sport. Because of its high visibility in American society, sport can model ways to eradicate the stereotypic assumptions embedded with the caste-system mindset. At the same time, it is important that Black athletes use their platforms to denounce race-based practices in sport and to call for racial equity. Wilkerson reminds us that historically individuals have taken the steps to overcome the effects of the caste mindset. “From the start of the caste system in America, people who were lowest caste but who had managed somehow to rise above their station have been the shock troops on the front lines of the hierarchy. People who appear in places or positions where they are not expected can become foot soldiers in an ongoing quest for respect and legitimacy in a fight they had hoped was long over.”⁴⁴⁰

440. *Id.* at 293.