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**The Gray Problem:
Should Athletes Be Punished For Their Social Media Posts?**

*Garry A. Gabison**

Abstract

This article discusses athletes' use of social media and how their parent organizations have dealt with their social media activities. This article argues that sports associations may not need to regulate athletes' use of social media. Athletes have their own private incentives: they want to maximize their financial gains and career opportunities provide stronger deterrent to post detrimental social media posts. Sports associations who punish athletes for their speech could also deter socially beneficial speeches. This article discusses how sports leagues have face antitrust challenges and how a similar antitrust challenge could potentially force leagues to revise their social media policy. It also argues that contract law limits how leagues should punish athletes for their social media activities. Finally, this article argues that policymakers have a role to play. They can encourage sports leagues – and employers in general – to adopt a clear social media policy instead of retrofitting vague and overbroad “best interest of the sports” standards.

I. Introduction

Andre Gray wrote on January 9, 2012 on Twitter: “Is it me or are the gays everywhere? #Burn #Die #MakesMeSick.”¹ In 2016, he became a soccer player in the English Premier League, the highest division in English football, after his team (Burnley) gained promotion. Gray was charged² and then punished by the Football Association (FA),³ the body that regulates association football in England.

In the last few years, the FA has punished dozens of players⁴ (and referees⁵) for comments they made on social media. For example, the FA fined Mario Ballotelli in 2014 for a racist anti-Semitic Instagram post⁶ and it fined Rio Ferdinand in 2012 for a racist Twitter comment⁷ and in 2014 for a sexist Twitter comment.⁸ As an institution, the FA attempts to encourage inclusion. Regulating footballer social media posts are part of these efforts.⁹

Sports organizations perform due diligence on the players they wish to contract. As part of this due diligence, they investigate athletes’ backgrounds and their social media

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¹ Louise Taylor, *Andre Gray charged with misconduct by FA over homophobic tweets from 2012*, GUARDIAN (Aug. 23, 2016) <https://www.theguardian.com/football/2016/aug/23/andre-gray-charged-misconduct-homophobic-tweets> (last visited Nov. 15, 2016).

² *Id.*

³ Press Association, *Burnley striker Andre Gray handed four-match ban for Twitter posts*, GUARDIAN (Sep. 23, 2016) <https://www.theguardian.com/football/2016/sep/23/burnley-andre-gray-four-match-ban-twitter> (last visited Nov. 15, 2016).

⁴ David Hytner, *Think before you tweet: FA has made £350,000 in Twitter fines since 2011*, GUARDIAN (Oct. 30, 2014) <https://www.theguardian.com/football/2014/oct/30/fa-fines-rio-ferdinand-twitter> (last visited Nov. 15, 2016).

⁵ David Conn, *FA fines and suspends referee for posting offensive Hillsborough tweet*, GUARDIAN (June 2, 2015) <https://www.theguardian.com/football/2015/jun/02/fa-fines-and-suspends-referee-for-posting-offensive-hillsborough-tweet> (last visited Nov. 15, 2016).

⁶ BBC, *Mario Balotelli: Liverpool striker banned for one game and fined*, BBC (Dec. 18, 2014) <http://www.bbc.com/sport/football/30541432> (last visited Nov. 15, 2016).

⁷ BBC, *Rio Ferdinand fined for Ashley Cole 'choc ice' tweet*, BBC <http://www.bbc.com/sport/football/18847477> (Aug. 17, 2012) (last visited Nov. 15, 2016).

⁸ BBC, *Rio Ferdinand 'baffled' by £25,000 Twitter fine and suspension*, BBC <http://www.bbc.com/sport/football/29855638> (Oct. 31, 2014) (last visited Nov. 15, 2016).

⁹ Football Association, *English Football's Inclusion and Anti-Discrimination Action Plan*, Football Association <http://www.thefa.com/~media/files/pdf/the%20fa%202014-15/english-footballs-inclusion-and-anti-discrimination-action-plan.ashx> (last visited Nov. 15, 2016)

communications.¹⁰ Hiring employers investigate the social media presence and posting of potential hires.¹¹ But, the method for filtering and selecting a candidate has been restricted in a number of states¹² and countries.¹³

Sports organizations monitor athletes and punish them for what they construe as misconduct. Monitoring employees during their off-hours opens the door to privacy violations. Punishing athletes and employees for their social media posts raises questions of free speech because it amounts to censoring. These methods are also widespread outside of sports. Once hired, traditional employers also use social media to monitor and track their employees.¹⁴ Employers want to monitor their employees' social media activities because they worry employees might damage the employer's reputation. It also opens the door to employment discrimination if an employer takes action based on his monitoring.

Employees should have a right to their private life. Athletes, like most employees, have opinions; unlike most employees, their social media content is scrutinized and they are more likely to attract media attention. Athletes are rarely let go for their social media indiscretions. Instead, they are fined. In a sense, athletes get more latitude than traditional employees. However, because of their social status, they have also been given less leeway in expressing their opinion.

¹⁰ Batty, *supra* note 55.

¹¹ A 2016 CareerBuilder survey of hiring managers and human resource professionals found that 60% of them use social media to research (and potential screen) candidates. http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?sd=4/28/2016&siteid=cbpr&sc_cmp1=cb_pr945_&id=pr945&ed=12/31/2016 (last visited Nov. 15, 2016)

¹² Lily M. Strumwasser, *Phishing on Facebook: do you ask job applicants for their social media passwords?*, 31 COMPUTER & INTERNET LAWYER 6 (2014)(discussing restrictions on the use of social media in the US).

¹³ Erika C. Collins & Suzanne Horne, *Social Media and International Employment*, THE EMPLOYMENT LAW REVIEW (Ed. 7 2014)(discussing countries like France and Germany among other where employers are not allowed to use social media posting for hiring purposes).

¹⁴ Helen Lam, *Social media dilemmas in the employment context*, 38 EMPLOYEE RELATIONS 420 (2016)(discussing the ways employers use social media).

This article investigates how sports organizations in the US and Europe have monitored athletes' social media use, how the organizations have punished athletes for indiscretion, and whether athlete's punishments should be challenged. Most athletes have no bargaining power against sports organizations and some can find themselves at the wrong end of punishment. The first section discusses reasons why sports organizations may not need to regulate athlete's social media posts because athletes have their own private incentive to behave properly on social media. The second section discusses antitrust and contractual limitation to the way sports organizations have regulated athlete online speech. Finally, the third section discusses how policymakers can address how sports organizations have treated online speech to create a better and more predictable environment for athletes.

II. Unnecessary Censoring and Restraint on the Right to Speak

Some sports organizations have prohibited the athletes' use of social media during games and practice based upon the theory that it decreases the broadcasting value.¹⁵ However, leagues have not entirely censored their athletes beyond their working hours. Instead, athletes can take part in social media; however, they face the risk of publishing content contrary to league policy.

Some sports organizations and leagues punish athletes for their social media activities using broad policies. For example, these organizations use criterion such as prohibiting speech that goes against the value or interest of the sport, club, or association.¹⁶ Other sports organizations use more targeted guidelines about their athletes' use of social media. For

¹⁵ Michelle R. Hull, *Sports leagues' new social media policies: Enforcement under copyright law and state law*, 34 COLUM. JL & ARTS 457, 663-65 (2010).

¹⁶ See e.g. Press Association, *Aldershot suspend striker Marvin Morgan over 'irresponsible' tweet*, GUARDIAN (Jan. 5, 2011)(citing the dismissal of a player because his social media comments "were completely irresponsible and contrary to the values of [the] Club" and even though the "club are satisfied that the player meant no malice with his comments") <https://www.theguardian.com/football/2011/jan/05/aldershot-marvin-morgan-twitter-tweet> (last visited Nov. 15, 2016).

example, a number of universities have explicit social media policy with which they regulate their student-athletes.¹⁷

This section discusses whether monitoring and censoring athletes on social media is necessary. It argues that athletes have financial and career incentive to sanitize their social media. It also argues that athlete social media presence is beneficial to the league – and should not be fully discouraged.

A. Athletes Are Already Incentivized to Censor Their Own Speech

Punishing athletes for their speech may not be necessary. Social mechanisms, market mechanisms, and financial incentives already ensure that athletes sanitize their social media presence.

First, social mechanisms impact athletes more than normal employees. If an athlete expresses controversial views, the media and fans will question his statements. Fans have been vocal when they do not agree with the athletes. Their response to the athletes' statement can deter these athletes from speaking out in the first place. For example, Gerard Piqué, a soccer player for Barcelona FC and the Spanish national team, has recently felt the backlash of his statements.¹⁸ The footballer has in the past advocated for a Catalan independence referendum. He actively uses social media and already has been asked by his parent club to moderate his social media use.¹⁹ In response to his political statements, Spanish fans have jeered

¹⁷ Timothy Liam Epstein, *Regulation of Student Athletes' Social Media Use: A Guide to Avoiding NCAA Sanctions and Related Litigation*, 1 MISSISSIPPI SPORTS L. J. 1 (2012)(discussing university social media policy and what students-athletes are authorized to do on social media).

¹⁸ Alan Smith, *Can Gerard Piqué really be blamed for quitting Spain after the 2018 World Cup?*, GUARDIAN (Oct. 11, 2016) <https://www.theguardian.com/football/blog/2016/oct/11/gerard-pique-spain-world-cup-2018-retirement> (last visited Nov. 15, 2016).

¹⁹ ESPN Staff, *Barcelona ask Gerard Pique to use Periscope in moderation, reports say*, ESPN FC (Mar. 2016) <http://www.espnfc.com/barcelona/story/2826443/barcelona-ask-gerard-pique-to-use-periscope-in-moderation> (last visited Dec. 9, 2016).

him whenever he has played.²⁰ He recently chose to leave the national team in response to the criticisms and the attacks he received on social media.²¹

Second, athletes must also consider their career and the limited opportunities at their disposal to become professional. Athletes have their own private incentive to sanitize their social media in order to further their careers. Mistakes on social media have wider consequences than simple fines from the league. Mistakes can cost athletes their career. For example, a college athlete in the US was seen on social media smoking marijuana and subsequently dropped in the draft.²² While a drop in the draft amounts to a substantial reduction in his salary, he may have missed out entirely on being drafted if he had not started from so high up. If he did not understand the consequences of his social media activities, his indiscretion will deter future athletes. Other student-athletes have lost their scholarship opportunities.²³

Third, athletes have financial incentives to sanitize their social media publications. In some jurisdictions, athletes enjoy image rights. Image rights are a form of personality rights or right of publicity.²⁴ Thanks to image rights, athletes can decide how to exploit commercially their image. Therefore, athletes will want to limit their offensive social media comments to protect their commercial value and goodwill.

²⁰ Associated Press, *Gerard Piqué to retire from Spain duty in 2018: 'Some don't think it's OK for me to be here'*, GUARDIAN (Oct. 11, 2016) <https://www.theguardian.com/football/2016/oct/10/gerard-pique-retire-spain-2018-catalonia> (last visited Nov. 15, 2016).

²¹ *Id.*

²² Ken Belson, Mark Leibovich & Ben Shpigel, *For Laremy Tunsil and N.F.L., Combustion When a Bong and Social Media Mix*, NY TIMES (Apr. 29, 2016) <http://www.nytimes.com/2016/04/30/sports/football/laremy-tunsil-at-nfl-draft-combustion-when-a-bong-a-gas-mask-and-social-media-mix.html> (last visited Nov. 15, 2016).

²³ Associated Press, *Bad behavior on social media can cost student athletes*, CBS NEWS (Aug. 11, 2014) <http://www.cbsnews.com/news/bad-behavior-on-social-media-can-cost-student-athletes/> (last visited Dec. 1, 2016).

²⁴ See e.g. T.M.C. Asser Instituut/Asser International Sports Law Centre & Institute for Information Law – University of Amsterdam, *Study on sports organisers' rights in the European Union*, EUROPEAN UNION, EAC/18/2012, 43 (2014)(discussing image and personality rights in the EU); Alex Wyman, *Defining the Modern Right of Publicity*, 15 TEX. REV. ENT. & SPORTS L. 167 (2013)(discussing personality rights in the US).

B. Fans Can Dissociate Athlete's, Club's, and League's Speeches on Social Media

Clubs and leagues underestimate fans' capacity to dissociate the player's speech from the club's or the league's.

In other contexts, courts have trusted, the average individual to understand whether an organization endorses a message. The US Constitution states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."²⁵ In establishment clause cases, the Supreme Court established the reasonable observer standard.²⁶ This standard relies on the judgment of juries to decide whether a reasonable observer would perceive the challenged action as a governmental action.²⁷

Courts trust juries to dissociate when the government speaks. Sport entities should trust reasonable observers like fans to dissociate when athletes speak and the entities speak.

The task of dissociation is made easier for the reasonable observer on social media. On social media, athletes' statements are attributable. Social media platforms, like Twitter, Facebook, and Instagram, offer verification services for well-known figures including athletes.²⁸ As such, anyone who reads messages on social media platforms should be able to differentiate the senders and distinguish between athletes, clubs, and leagues speech.

Leagues may, however, worry that children may not be able to distinguish this speech. Most social media like Twitter and Facebook require that their users be at least 13 years of age.²⁹ If children of that age cannot distinguish between league speech and athlete speech, they should

²⁵ U.S. Const. art. I.

²⁶ See e.g. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring); *Joki v. Board of Educ. of Schuylerville Central Sch. Dist.*, 745 F. Supp. 823, 827, 829 (N.D. N.Y. 1990).

²⁷ *Salazar v. Buono*, 559 U.S. 700, 721 (2010) (quoting *Van Orden v. Perry*, 545 U.S. 677, 700 (2005)); *Lee v. Weisman*, 505 U.S. 577, 597 (1992).

²⁸ See e.g. Instagram https://help.instagram.com/733907830039577?helpref=faq_content

²⁹ See e.g. Observer editorial, *The Observer view on cyberbullying*, GUARDIAN (Nov. 12, 2016) <https://www.theguardian.com/commentisfree/2016/nov/13/observer-view-on-cyberbullying> (last visited Nov. 15, 2016).

arguably not access social media.³⁰ Thirteen-year-old children are considered able to distinguish reality from fiction in other contexts.³¹ So, it should be expected that children should be able to distinguish league and athlete speech.

Leagues may believe that by punishing athletes, they show young fans that actions (and words) have consequences – even for superstar athletes. However, sports organizations could also hurt impressionable young fans through their censoring. Young fans might be lead to believe that every time they express an unpopular opinion they will be punished or reprimanded by the authorities. As such, sports organizations punishing their athletes for expressing an opinion could indirectly stifle creative young fans.

C. The Negative Externalities of Censoring Athletes' Speech

Some sports organizations see social media as a means to engage younger viewers and fans.³² For example, one sports league in the UK has selected athletes from each club as their digital ambassadors:³³ these athletes are selected by the league to help raise the league's profile. However, the league's preference may not align with the fans' preference for players to follow. Thus, the sports league should encourage its athletes to use social media, instead of trying to

³⁰ If a child does not have the cognition to distinguish between league speech and athlete speech, it probably should not have access to social media because of the dangers associated with cyberbullying (*Id.*) and breach of privacy *For Children, a Lie on Facebook Has Consequences, Study Finds*, NY TIMES (Nov. 28, 2012) <http://bits.blogs.nytimes.com/2012/11/28/for-children-a-lie-on-facebook-has-consequences-study-finds> (last visited Nov. 15, 2016).

³¹ Motion Picture Association of America, Film Rating <http://www.mpaa.org/film-ratings/> (last visited Nov. 15, 2016).

³² The International Olympic Committee president has said that “Through our digital platforms, the IOC wants to reach out to young people using their own language and channels of communication [...] I am thrilled to see how many people are embracing the spirit of Olympic Day and sharing their sporting moments with us. This is what the IOC has always strived to achieve: to get people active regardless of their age, gender or athletic ability. Thanks to our initiatives in social media, we are reaching out to an even greater number of people around the world and spreading the values of sport.” *Social Media Activating People on Olympic Day*, OLYMPIC GAMES (JUN. 23, 2011) <https://www.olympic.org/news/social-media-activating-people-on-olympic-day> (last visited Dec. 6, 2016).

³³ BBC Football, *Women's Super League launches Twitter kit initiative to raise profile*, BBC (Apr. 4, 2012) <http://www.bbc.com/sport/football/17608531> (last visited Dec. 6, 2016).

control and encourage specific athletes to use these outlets. Athlete social media use could help increase television ratings and benefit sports organizations in the end.

Leagues can punish athletes for their social media use if it goes against their economic interests. After all, they have punished athletes for their speech if it goes against the league's economic interest.³⁴

Stifling the privately unwanted speech could deter socially beneficial speech. Athletes have the power to move people, and they can bring attention to different causes that may not have received a lot of publicity. Athletes on social media can help increase awareness for good causes. For instance, the disease amyotrophic lateral sclerosis received a lot of media attention and social support through viral social media posts.³⁵ These posts all started with a former college athlete, Pete Frates.³⁶ Athletes including basketball player LeBron James helped propagate the idea by taking the ice bucket challenge.³⁷ The social media phenomenon helped raised \$115 million, which was used to advance research and led to breakthrough discoveries.³⁸

Leagues could hypothetically stifle the positive externalities of athletes' social media activities. For example, the league could have another recognized non-league charity and decide to sanction all athletes that participated in the non-league recognized charity. If the league were to regulate social media for unofficial charities, it could decrease awareness for good causes and

³⁴ Stuart Roach, *Guerrilla marketing: Bendtner's 'underpants' ambush UEFA at Euro 2012*, CNN (Jun. 19, 2012)(discussing how the speech of a player was sanctioned because it amounted to advertisement, which went against the interest of the sport) <http://edition.cnn.com/2012/06/19/sport/football/nicklas-bendtner-underpants-fine-reaction/> (last visited Nov. 15, 2016).

³⁵ Emily Steel, *'Ice Bucket Challenge' Has Raised Millions for ALS Association*, NY TIMES (Aug. 17 2014) <http://www.nytimes.com/2014/08/18/business/ice-bucket-challenge-has-raised-millions-for-als-association.html> (last visited Nov. 15, 2016).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Katie Rogers, *The 'Ice Bucket Challenge' Helped Scientists Discover a New Gene Tied to A.L.S.*, NY TIMES (Jul. 27, 2016) <http://www.nytimes.com/2016/07/28/health/the-ice-bucket-challenge-helped-scientists-discover-a-new-gene-tied-to-als.html> (last visited Nov. 15, 2016).

harm society at large. Fans may, in turn, blame the league policy. This regulation could indirectly damage its image.

Athletes can also generate media attention and have the opportunity to start important social debates. For example, Colin Kaepernick used his notoriety to start a national debate around the Black Lives Matter movement. Kaepernick is a professional American football player for the San Francisco 49ers in the National Football League (NFL).³⁹ Since August 2016, Kaepernick has remained seated or kneeling during the pre-game national anthem.⁴⁰ He did so as a sign of protest against the system of oppression that he has seen embodied by the government.⁴¹ Donald Trump, the republican presidential candidate, heavily criticized his actions.⁴² Justice Ruth Bader Ginsburg called his actions “dumb,”⁴³ but later apologized because she made the comments without understanding the context.⁴⁴ President Obama, however, saw him as exercising his constitutional right to free speech.⁴⁵ His actions were later reproduced by athletes around the nation⁴⁶ – including high school students.⁴⁷ His actions forced

³⁹ He is famous for leading his team to Super Bowl 47 before losing to the Baltimore Ravens. Colin Kaepernick, NFL Profile, <http://www.nfl.com/player/colinkaepernick/2495186/profile> (last visited Nov. 15, 2016).

⁴⁰ Christine Hauser, *Why Colin Kaepernick Didn't Stand for the National Anthem*, NY TIMES (Aug. 27, 2016) <http://www.nytimes.com/2016/08/28/sports/football/colin-kaepernick-national-anthem-49ers-stand.html> (last visited Nov. 15, 2016).

⁴¹ *Id.*

⁴² See e.g. Charlotte Wilder, *Donald Trump says Colin Kaepernick should find a new country*, USA TODAY (Aug. 30, 2016) <http://ftw.usatoday.com/2016/08/donald-trump-colin-kaepernick-new-country-national-anthem-protest-response> (last visited Nov. 15, 2016).

⁴³ Christine Hauser, *Ruth Bader Ginsburg Calls Colin Kaepernick's National Anthem Protest 'Dumb'*, NY TIMES (Oct. 11, 2016) <http://www.nytimes.com/2016/10/12/us/ruth-bader-ginsburg-calls-colin-kaepernicks-national-anthem-protest-dumb.html> (last visited Nov. 15, 2016).

⁴⁴ Adam Liptak, *Ruth Bader Ginsburg Regrets Speaking Out on Colin Kaepernick*, NY TIMES, (Oct. 14, 2016) <http://www.nytimes.com/2016/10/15/us/ruth-bader-ginsburg-colin-kaepernick-national-anthem.html> (last visited Nov. 15, 2016).

⁴⁵ Daniel Victor, *Obama Says Colin Kaepernick Is 'Exercising His Constitutional Right'*, NY TIMES (Sep. 5, 2016) <http://www.nytimes.com/2016/09/06/sports/obama-colin-kaepernick-national-anthem.html> (last visited Nov. 15, 2016).

⁴⁶ John Eligon & Scott Cacciola, *As Colin Kaepernick's Gesture Spreads, a Spirit Long Dormant Is Revived*, NY TIMES (Sep. 12, 2016) <http://www.nytimes.com/2016/09/13/sports/colin-kaepernick-athlete-protests.html> (last visited Nov. 15, 2016).

people like Supreme Court justices and presidential candidates to acknowledge his stance and reflect on the issue.

Sports organizations have attempted to control political statements made during sports competitions, even if it can hardly control these statements outside of competition. For example, the Olympics have been at the center of a numerous athlete statements – some more politically imbedded than others. During the 1968 Olympic games, gold medalist Tommie Smith and bronze medalist John Carlos raised their black-gloved fist during the US national anthem played during the medal ceremony.⁴⁸ They were suspended by the US team, expelled by the International Olympic Committee, and sent home.⁴⁹ They were in violation of the spirit of the games and the rule against political demonstration.⁵⁰

Questions remain about the extent to which sports organizations can control athletes' speech – even during sporting events. In some jurisdictions, political statements receive more protection than other (social media) comments.⁵¹ As such, it could become quite difficult to assess the type of speech that a sports organization can censor.

This section has argued that leagues may be over-regulating. Athletes have their own private incentive to regulate their social media use. Social media connections should be able to distinguish what is attributable to the athletes as compared to the club or league through the

⁴⁷ Julie Turkewitz, *Protest Started by Colin Kaepernick Spreads to High School Students*, NY TIMES (Oct. 3, 2016) <http://www.nytimes.com/2016/10/04/us/national-anthem-protests-high-schools.html> (last visited Nov. 15, 2016).

⁴⁸ Ben Cosgrove, *The Black Power Salute That Rocked the 1968 Olympics*, TIME (Sep. 27, 2014) <http://time.com/3880999/black-power-salute-tommie-smith-and-john-carlos-at-the-1968-olympics/> (last visited Dec. 6, 2016).

⁴⁹ *Id.*

⁵⁰ Rule 50 of the Olympic Charter on Advertising, demonstrations, propaganda: “No kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas.” International Olympic Committee, OLYMPIC CHARTER, 93 (2015) https://stillmed.olympic.org/Documents/olympic_charter_en.pdf.

⁵¹ Frédérique Faut, *The prohibition of political statements by athletes and its consistency with Article 10 of the European Convention on Human Rights: speech is silver, silence is gold?*, 14 International Sports L. J. 253 (2014)(discussing the human right to free speech implication linked to athletes political statements).

current social media verification system. And regulation may stifle beneficial messages. The next section discusses how athletes could challenge how sports organizations fine them for their social media use.

III. Legal Issues With Controlling Employee Speech

Most sports organizations would survive challenges to their policies restraining free speech because they are private institutions.⁵² Thus, athletes will need to bring other theories to challenge these organizations' restraint of their right to free speech.

The lack of vertical integration between leagues and clubs opens the door to antitrust scrutiny. This section argues that antitrust laws could provide a valid avenue to challenge some sports league for their actions against athletes for their use of social media. This section argues that current contractual law would also discourage regulating social media use the way leagues currently do. Yet, no athletes have challenged the fines they have received.

A. The Treatment of Athletes Raises Some Monopoly Issues

Athletes' use of social media has been a headache for their employers, who at times, had to take action.⁵³ Clubs encourage their athletes to use common sense⁵⁴ and in some occasions, offer social media training.⁵⁵

⁵² Epstein, *supra* note 17, notes within the context of college athletics that: "The predicates for a First Amendment challenge to an NCAA member institutions' social media policy for student-athletes are twofold: (1) the institution implementing the restriction must be a public university, and (2) the restriction on use must not be the product of a contractual agreement between the student-athlete and the institution." at 11. The analysis can be broadened to other sports organizations.

⁵³ Press Association, *PSG suspend Serge Aurier for comments on Laurent Blanc and team-mates*, GUARDIAN (Feb. 14, 2016) <https://www.theguardian.com/football/2016/feb/14/paris-saint-germain-suspend-serge-aurier-comments-laurent-blanc-champions-league-chelsea> (last visited Nov. 15, 2016).

⁵⁴ BBC, *Arsene Wenger: On Twitter, Walcott, the title race and more*, BBC (Oct. 31, 2014) <http://www.bbc.com/sport/football/29846750> (last visited Nov. 15, 2016)(discussing the concerns of a club for its players' use of social media.

⁵⁵ David Batty, *Football clubs trawl social media for gaffes by transfer targets*, GUARDIAN (Apr. 16, 2016) <https://www.theguardian.com/media/2016/apr/16/footballers-social-media-vetting-transfers> (last visited Nov. 15, 2016).

When leagues or sports associations regulate other entities and punish them from deviating, they resemble cartel punishing cheating members. Sport leagues sell a product: the league. They want to maintain a good image to maximize the league's profit potential. Arguably, this image is linked to their athletes' reputation. Thus, leagues would need athletes to cooperate to increase the league's image and clubs to coordinate to punish athletes that tarnish the league's image.

However, clubs face an agency problem.⁵⁶ While they benefit from the league having a good image through higher broadcasting revenues, they do not internalize all the benefits of the league succeeding. The league wants to maximize the league's value whereas each member club may want to field a player because it helps them to win matches. More matches mean more exposure, attracting more fans, and more revenues.

The promotion and relegation system can further misalign club and league interests. European sports clubs (e.g. soccer, basketball, etc.) are not permanently in the league. Clubs are promoted and demoted every year.⁵⁷ To get promoted or avoid relegation, clubs must win. Promotion and relegation can be costly. For example, in the English Premier League, a club avoiding relegation earns almost 25% more than a relegated club;⁵⁸ and the following year it would earn 300% more than the relegated club.⁵⁹ This monetary gap incentivizes clubs to field

⁵⁶ Eugene F. Fama and Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L. & ECON. 301 (1983)(discussing the issues of separating control and ownership of businesses).

⁵⁷ J.S., *Why is there no promotion and relegation in the United States?*, ECONOMIST (Nov. 23, 2016) <http://www.economist.com/blogs/gametheory/2016/11/football-pyramid-america> (last visited Dec. 11, 2016).

⁵⁸ Deloitte estimates that a club avoiding relegation gets about £108 million; the average relegated club from the top soccer league made £83 million and the average club in the second tier of English soccer made £32 million (with parachute). Therefore, clubs stand lose £50 million in revenues by being relegated in 2016. This figure will increase in 2017 when the guaranteed money increases in the topflight soccer to £100 million. Sam Boor, Matthew Green, Chris Hanson, Andy Shaffer, Alexander Thorpe and Christopher Winn, *Annual Review of Football Finance 2016*, DELOITTE SPORTS BUSINESS GROUP (June 2016) <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/sports-business-group/deloitte-uk-annual-review-of-football-finance-2016.pdf> (last visited Dec. 11, 2016)

⁵⁹ *Id.*

players who might have had indiscretions. In the Gray case, the player remained an employee of the club. Yet, the Football Association regulated the player's comments at the first opportunity. His employer, the club, did not punish him when he made the comment because fining or suspending one of its most valuable assets would hurt the club.

The league acts like the cartel's enforcer. They may decide to regulate player comments because the club's incentive may not be fully aligned with the league. If clubs fully internalized the benefit of the league's goodwill, they would punish the player. However, their private interests mean that cheating remains the best strategy.

Leagues have avoided antitrust regulation imposed on cartels through exemptions. In the US, Congress enacted the Sports Broadcasting Act of 1961,⁶⁰ which granted an antitrust exemption for some sports leagues negotiating broadcasting rights together. In 1980, the Supreme Court established that sport leagues are joint ventures – instead of cartel of teams – that can require its forming members to cooperate. In *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*,⁶¹ the Court ruled that different colleges had horizontally cooperated, which would open the door to antitrust enforcement.⁶² Even though schools are cooperating competitors, their cooperation is necessary to create a new product: the college football league. League participants must agree on the size of the field, the number of players, etc.⁶³

The Court recognized that antitrust protection goes beyond broadcasting rights but it also stated that these joint ventures are not beyond antitrust scrutiny. The Court limited how these

⁶⁰ See 15 U.S.C. § 1291.

⁶¹ 468 U.S. 85 (1984).

⁶² *Id.* at 94.

⁶³ *Id.* at 101.

competitors could cooperate to the essential aspects necessary to create this new product.⁶⁴ In this case, television rights were not exempted from antitrust scrutiny.⁶⁵

Concerted actions to advance the league's image could also fall under antitrust scrutiny – including limiting athletes' ability to speak freely. In *American Needle, Inc. v. National Football League*,⁶⁶ the Supreme Court reinforced that leagues do not have a carte blanche to agree on everything. In this case, the National Football League teams marketed its intellectual property together. The Court found that “[t]he NFL teams do not possess either the unitary decision making quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business.”⁶⁷

The Court left open what actions constitute anti-competitive behavior. It, however, promulgated a rule of reason approach. The Court stated that NFL teams should not be treated “as a single entity for §1 purposes when it comes to the marketing of the teams' individually owned intellectual property.”⁶⁸

Athletes have challenged league rules based on antitrust law. However, courts found that because the rules challenged came from negotiations between players' union and the league, the agreement fell under antitrust union exemption.⁶⁹ However, some doubts remain about the negotiation and how the rules challenged were even appended to the negotiations.⁷⁰

⁶⁴ *Id.* at 110 (ruling that the colleges did not need to agree on price and output to create a league).

⁶⁵ The NCAA was not part of the sports leagues exempted under the Sports Broadcasting Act of 1961.

⁶⁶ 560 U.S. 183 (2010).

⁶⁷ *Am. Needle Inc.*, 130 S. Ct. at 2212.

⁶⁸ *Id.* at 2217.

⁶⁹ See *Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004), cert. denied, 125 S. Ct. 1728 (2005).

⁷⁰ Michael Scheinkman, *Running Out of Bounds: Over-Extending the Labor Antitrust Exemption in Clarett v. National Football League*, 79 *John's L. Rev.* 733, 737 (2005).

Teams could also mount their own antitrust challenge for the treatment of athletes. Whether teams can coordinate on how to treat athletes' use of social media or whether leagues have a right to punish athletes may well fall within a gray area. Hypothetically, a team could want to have a "rebellious" image within the league to differentiate their team and product.⁷¹ This team could hire players because of their controversies; but the league could restrain the team's hiring decision.

In Europe, the European Commission took the view that leagues restrained competition between participating clubs offering their product when selling television rights together.⁷² In 2003, the European Commission decided that the restriction imposed by the "joint selling arrangement leads to the improvement of production and distribution by creating a quality branded league focused product sold via a single point of sale."⁷³ The restriction was considered indispensable and hence, the Directorate General for Competition, the antitrust enforcer, granted the sports association an antitrust exemption for broadcasting rights. The Directorate General for

⁷¹ This hypothetical has some ground in reality. Teams like the Oakland Raiders thrive on this renegade image. See e.g. Bruce Weber, *Al Davis, the Controversial and Combative Raiders Owner, Dies at 82*, NY TIMES (Oct. 8, 2011)(discussing the life of former owner whose built "a franchise that garnered a reputation for outlaw personalities and a kind of counterculture sensibility.") <http://www.nytimes.com/2011/10/09/sports/football/al-davis-owner-of-raiders-dies-at-82.html> (last visited Dec. 11, 2016).

⁷² The European Court of Justice (ECJ) has treated leagues as collective entities and has investigated collective dominance. For example when investigated collective dominance, the ECJ focuses on three criteria: "first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy; second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market; thirdly, the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardise the results expected from the common policy (Case T 342/99 *Airtours v Commission* [2002] ECR II 2585, paragraph 62, and Case T 374/00 *Verband der freien Rohrwerke and Others v Commission* [2003] ECR II-0000, paragraph 121)." *Piau v Commission of the European Communities, Fédération Internationale de Football Association (FIFA) Players' Agents Regulations*. Case T-193/02 ¶ 111 (2005). The ECJ found that the Fédération internationale de football association (FIFA), an association of football federations, satisfied these criteria. *Id.* at ¶ 115.

⁷³ Case COMP/C.2-37.398 – UEFA Champions League, Comm'n Decision, 2003 O.J. (L 291) 25, ¶ 201.

Competition later confirmed this standpoint in two decisions not to prosecute and granted antitrust exemptions to three leagues.⁷⁴

Much like in the US, exempted joint ventures remain limited and so is the scope of their exemption. The European Commission requires that the joint venture created restrictions be indispensable.⁷⁵ The European Commission also limited the duration of the exemption and the broadcast licensing arrangements were exempted in two three-year contract cycles.⁷⁶ It also demanded that the leagues do not completely eliminate competition.⁷⁷

The European Commission and its judicial arm, the European Court of Justice (ECJ), worry that leagues might abuse their dominant position. The ECJ had the opportunity to decide whether leagues abused their dominance and “restrict[ed] competition between themselves for players.”⁷⁸ However, the ECJ avoided the question and ruled on different grounds.⁷⁹

Antitrust offers an avenue to challenge league rule; however, it may remain a second-best option. The next section discusses how leagues have avoided some antitrust scrutiny by building the right to punish players within their contracts.

B. Controlling Speech Through Contracts

Leagues have a dominant bargaining position. If an athlete goes against the league, the league may revoke its league privileges. An athlete could challenge the association’s decision

⁷⁴ Case COMP/C-2/37.214 – Joint selling media rights to the German Bundesliga, Comm’n Decision, 2005 O.J. (L 134) 46. ; Case COMP/38.173 – Joint selling media rights to the FA Premier League, Comm’n Decision, 2008 O.J. (C 7) 16.

⁷⁵ Within the meaning of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement.

⁷⁶ Case COMP/C.2-37.398 – UEFA Champions League, *supra* note 74, at ¶ 200.

⁷⁷ *Id.* at ¶ 198-99.

⁷⁸ Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations Européennes de football (UEFA) v Jean-Marc Bosman, Case C-415/93, [1995] E.C.R. I-04921, ¶ 46.

⁷⁹ *Id.* at ¶ 138.

but they likely would not succeed. In the past, Courts have sided with athletic associations who acted in the best interests of the sport.

For example, in *Muhammad Ali v. Division of State Athletic Commission of New York*,⁸⁰ Muhammad Ali, a boxer and civil rights movement figure, opposed the war and refused to enter the draft based on religious grounds. In 1967, his boxing license was suspended because he received a felony conviction for evading the draft.⁸¹ He sued the sports association in order to have his license reinstated. The District Court sided with the Athletic Commission and found that the “Commission may in its discretion deny a boxing license to an applicant because of his conviction of a felony or military offense.” In its 1970 appeal,⁸² the Second Circuit Court found that the Commission violated Ali’s Equal Protection Rights. The Supreme Court later overturned his conviction⁸³ but, in the meantime, no state would grant him a boxing license, which prevented him from boxing for almost four years.⁸⁴

The Commission was a public entity and hence, the athletes had more ways to challenge its seemingly arbitrary decision. Most sports leagues are private and thus can evade Equal Protection Right violation allegations.

Furthermore, leagues and clubs have strong bargaining positions because athletes need the financial backing of the league more than leagues need athletes. Thus, they can use this strong bargaining position to write advantageous contracts. Most players’ contracts include clauses that require them to abide by Club and league rules. These rules may be ambiguous or more specific. For example, many player contracts require players to abide by the league rules

⁸⁰ *Ali v. Division of State Athletic Commission et al.*, 308 F. Supp. 11 (S.D.N.Y.1969).

⁸¹ *Muhammad Ali v. Div. of State Athletic Com. etc.*, 316 F. Supp. 1246, 1247 (S.D.N.Y. 1970).

⁸² *Id.* at 1253.

⁸³ *Clay v. United States*, 403 US 698 (1971).

⁸⁴ Christopher J. McKinny, *Professional Sports Leagues and the First Amendment: A Closed Marketplace*, 13 MARQ. SPORTS L. REV. 223, 242 (2003).

and state that they should not “knowingly or recklessly do write or say anything or omit to do anything which is likely to bring the Club or the game of football into disrepute cause the Player or the Club to be in breach of the Rules or cause damage to the Club or its officers or employees or any match official.”⁸⁵ What brings disrepute to game remains vague.⁸⁶

These clauses could be used by clubs to terminate players and hide their motive. A US National Team player’s contract was terminated for calling the opposition a “bunch of cowards” following a defeat.⁸⁷ The parent association asserted that it wants to encourage “fair play and respect”⁸⁸ and that the remarks were unsportsmanlike. However, the termination could be construed as retaliation. This player had previously sued the parent association for wage discrimination.⁸⁹ While these remarks were not held on social media, it exemplifies how parent associations can react to innocuous remarks.

Furthermore, fines awarded for athletes making disparaging comments on social media seem punitive and with the intention to deter other athletes. Contractual punitive damages are generally reserved to compensate the victim.⁹⁰ In this instance, fines seem to punish athletes and

⁸⁵ A published contract for Michele Colucci contracted with the Chelsea Football Club in 2008 specifies that the players should not harm the Club or the game through public statements. Clause 3.2.5 https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/Agent%20Contracts%20Between%20Players%20&%20Their%20Agents/6_PREMIER%20LEAGUE%20PLAYERS%20CONTRACT.pdf (last visited Nov. 15, 2016)

⁸⁶ Some NFL contracts have similar clauses. Ethan Yale Bordman, *Freedom of Speech and Expression in Sports: The Balance Between the Rights of the Individual and the Best Interests of Sport*, 86 MICHIGAN BAR J. 36, 37 (2007).

⁸⁷ Andrew Das, *U.S. Soccer Suspends Hope Solo and Terminates Her Contract*, NY TIMES (Aug. 24, 2016) <http://www.nytimes.com/2016/08/25/sports/hope-solo-suspended-for-six-months-by-us-soccer.html> (last visited Nov. 15, 2016).

⁸⁸ *Hope Solo Suspended from U.S. WNT for Six Months*, US Soccer (Aug. 24 2016) <http://www.nytimes.com/2016/08/25/sports/hope-solo-suspended-for-six-months-by-us-soccer.html> (last visited Nov. 15, 2016).

⁸⁹ Associated Press, *USA's Hope Solo given six-month ban for calling Sweden 'a bunch of cowards'*, GUARDIAN (Aug. 24, 2016) <https://www.theguardian.com/football/2016/aug/24/hope-solo-suspended-us-womens-soccer-rio-olympics-loss> (last visited Nov. 15, 2016).

⁹⁰ RESTATEMENT OF CONTRACT (2D) § 355 Punitive Damages. “Punitive damages **are not recoverable** for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.”

attempt to discourage future breaches. Courts would usually do not award punitive damages for contract breach or deterrence.⁹¹ As such, fines as punitive damages for making disparaging comments on social media do not seem to be fully supported in contract law.

Arguably, punitive damages could be awarded for defamatory statements against the league. However, in the defamation cases, the organization would need to show that some harm was done to its reputation or goodwill by the athlete's social media activities.⁹² While defendants may carry the burden of proof,⁹³ athletes have been punished for a broad range of statements, which do not harm the functioning or goodwill of the sports organizations.

Instead, sports organizations take the position of investigator, prosecutor, judge, and jury. While disparaging,⁹⁴ Gray's homophobic statements can hardly be harming the FA. They were made prior to his association with the FA – before he was under their rules and jurisdiction of the FA.⁹⁵ In addition, because social media platforms identify the senders, the athlete's speech cannot be confused for the association's speech. In other words, courts would not likely grant damages for defamation to a sports organization in cases like Gray's.⁹⁶

⁹¹ The comment specifies: "The purposes of awarding contract damages is to compensate the injured party... For this reason, courts in contract cases **do not award damages to punish the party in breach or to serve as an example** to others unless the conduct constituting the breach is also **a tort for which punitive damages are recoverable**." *Id.* (emphasis added).

⁹² RESTATEMENT OF TORTS (2D) § 559 Defamatory Communication Defined. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

⁹³ Jeremy Cohen, Diana Mutz, Vincent Price & Albert Gunther, *Perceived impact of defamation an experiment on third-person effects*, 52 PUBLIC OPINION QUARTERLY 161, 163 (1988).

⁹⁴ His homophobic tweet could also be interpreted as inciting violence and be punishable under criminal law in the UK. He was never investigated by the police for two possible reasons. First, homosexuals are not a protected group under Public Order Act 1986 Part III Section 17. This section addresses hate speech but the protected groups are groups of people defined by "colour, race, nationality (including citizenship) or ethnic or national origins." Second, a tweet may not elevate to a written sign, which would be punishable under Public Order Act 1986 Part I Section 5.

⁹⁵ Taylor, *supra* note 1.

⁹⁶ He later apologized for his comments, blaming his immaturity – he was 21 at the time; but the suspension remained. Observer Sport, *Andre Gray sorry for homophobic tweet calling for gay people to 'burn and die'*, GUARDIAN (Aug. 20, 2016) <https://www.theguardian.com/football/2016/aug/20/andre-gray-apologises-homophobic-tweet-gay> (last visited Nov. 15, 2016).

In most jurisdictions,⁹⁷ it would be unthinkable to be found guilty of a crime in one jurisdiction for something committed in another where such a crime is not punishable. A slim argument could be made that because of the permanency of the Internet, his comments also are made in the present. But, this argument opens the door to a wave of retrospective punishments for indiscretion committed on the Internet that were not reprimanded when they occurred.

The clauses used to fine players could open the door to future punishment for future social media comments. Athletes use social media to build their personal brand and gain sponsorships.⁹⁸ They can also use this branding to influence future endeavors. A number of athletes turn pundit or commentator after their playing careers. Leagues could use these clauses to prevent athletes with whom they may disagree from obtaining a broadcasting position for comments made after their playing career. In other professions, courts have found some employment contracts unconscionable because they included clauses that unduly restraint future opportunities.⁹⁹ If ever challenged, post-contract punishments for social media comments could be found unconscionable and against public policy.

Some athletes have challenged the contracts they signed for restraining their livelihood ability. In the US, courts have been reluctant to address contracts and their limitations for athletes. Courts defer to the bargained-for agreement between the players' union and the sports organizations.¹⁰⁰ Courts assume that players have implicitly agreed to the sports organizations

⁹⁷ See e.g. U.S. Const. art. I, § 9 (stating that “No Bill of Attainder or ex post facto Law shall be passed” and hence prohibiting ex post facto laws).

⁹⁸ Khalid Ballouli & Michael Hutchinson, *Digital-branding and social-media strategies for professional athletes, sports teams, and leagues: An interview with Digital Royalty's Amy Martin*, 3 INTERNATIONAL J. SPORT COMMUNICATION 395, 397-99 (2010)(discussing with a digital-branding agency how athletes use social media for personal branding and how a basketball player built his fan base via Twitter).

⁹⁹ Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 286 (1998).

¹⁰⁰ See e.g. *NFL Management Council v. NFL Players Ass'n*, 820 F.3d 527, 532 (2d. Cir. 2016)(discussing whether the Commission acted without authority and found that he “was authorized to impose discipline for, among other

restraining their free speech.¹⁰¹ However, it remains unclear whether players understand the consequences of their social media use.¹⁰² The next section investigates how policymakers can encourage sports to enhance athletes' use of social media.

In Europe, the ECJ has addressed some contract clauses and could in the future address punishment for social media activities.¹⁰³ In *Union royale belge des sociétés de football association ASBL v. Bosman*,¹⁰⁴ a football player complained that the contract he signed restrained the unjustifiably post-contract movement of workers within the European Union Member States.¹⁰⁵ The athlete's contract did not contain the restraining clause; instead, the contract referred to league rules and these league rules specified that upon expiration of the contract, a player could only move clubs if his new club "has paid to the former [club] a transfer, training or development fee."¹⁰⁶ The European Court of Justice found that the league rules unjustifiably restrained the free movement of workers and that individuals could use public policy arguments to strike down these privately negotiated contracts.¹⁰⁷ This ruling transformed the transfer system in Europe by allowing free transfers.¹⁰⁸

things, 'conduct detrimental to the integrity of, or public confidence, in the game of professional football' and as such acted within 'the regime bargained for and agreed upon by the parties, which we can only presume they determined was mutually satisfactory'").

¹⁰¹ Zolan V Kanno-Youngs, *NFL players walk tricky line because of blurry rules on social media*, USA TODAY (Jul. 9, 2015) <http://www.usatoday.com/story/sports/nfl/2015/07/08/social-media-policy-twitter-facebook/29477163/> (last visited Dec. 2, 2016).

¹⁰² *Id.*

¹⁰³ The European Court of Human Rights (ECHR) could also review these cases because freedom of expression is both a fundamental right fundamental and human. See European Union, *Charter of Fundamental Rights of the European Union*, October 26, 2012, 2012/C 326/02, Art. 11. ; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, November 4, 1950, ETS 5, Art. 10. The ECJ has jurisdiction over the Charter of Fundamental Rights of the European Union cases and the ECHR has jurisdiction over the European Convention on Human Rights cases.

¹⁰⁴ *Bosman*, [1995] E.C.R. I-04921.

¹⁰⁵ *Id.* ¶¶ 44-5.

¹⁰⁶ *Id.* at ¶ 68.

¹⁰⁷ *Id.* ¶¶ 86, 92-104.

¹⁰⁸ Matt Slater, *Bosman ruling: 20 years on since ex-RFC Liege player's victory*, BBC SPORTS (Dec. 15, 2015) <http://www.bbc.com/sport/football/35097223> (last visited Dec. 1, 2016).

IV. Free Speech Leaves Room for Policymaking in the Sport

Free speech is a constitutional right in the US¹⁰⁹ and a fundamental¹¹⁰ and human¹¹¹ right in the EU. No athletes have yet challenged the fines and suspensions they have received for comments made on social media.

In the past, the few athletes that have challenged leagues and sports organizations lost considerable earning potential because their careers were stalled during the legal process. Ali could not box for four years¹¹² and Bosman once a bright prospect for Belgium battled in court for five years and stopped playing altogether.¹¹³

The few times that rules have been challenged, courts have been reluctant to get involved with leagues' decisions to dismiss athletes for their actions (or words against) the best interest of the sport.¹¹⁴ Instead, they have deferred to league officials to assess what is in the best interest of the sport. The resulting effect is that athletes are not properly deterred because they are not properly informed about their freedom of speech limitations.

These examples deter athletes from challenging most sports organizations. They show why policy intervention can address the uneven bargaining position caused by inefficient social media policy. Since these athletes are deterred to challenge these rules, the rules are never given clarification.

¹⁰⁹ U.S. Const. art. I.

¹¹⁰ European Union, *Charter of Fundamental Rights of the European Union*, October 26, 2012, 2012/C 326/02, Art. 11.

¹¹¹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, November 4, 1950, ETS 5, Art. 10.

¹¹² McKinny, *supra* note 84.

¹¹³ Slater, *supra* note 108.

¹¹⁴ See e.g. *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F. 2d 527, 539 (7th Cir. 1978)(concluding that “the Commissioner ‘acted in good faith, after investigation, consultation and deliberation, in a manner which he determined to be in the best interests of baseball’ and that ‘[w]hether he was right or wrong is beyond the competence and the jurisdiction of this court to decide,’ after the league commissioner refused to sanction player trades); McKinny, *supra* note 84, at 235-6(discussing best interest of the sport in the four major professional sports league in the US and its broad application).

Policymakers have an opportunity to get involved and help facilitate the betterment of sports league social media policy. Policymakers have already gotten involved with social media. First, policymakers have acted to prohibit and penalize employers from requiring applicants or their employees to grant their access to their social media before gaining employment.¹¹⁵ These policies stem from a privacy concern.¹¹⁶ Policymakers fear that employers would discriminate against individuals based on their private life.

These policies attempt to balance the uneven bargaining position between employers and employees. Employers have the stronger bargaining position as they make the hiring offer: employers can hire from a large pool of candidates whereas candidates face a smaller pool of employers. Once an employer hires an individual, it cannot request the employee's password or cannot require access to their social media.¹¹⁷

Policymakers worry about employers meddling in the private life of employees by monitoring said employees.¹¹⁸ Courts have disagreed on whether posts on private social media accounts constitute public speaking and whether disparaging comments could be ground for firing. In France, the Court de Cassation, the highest civil court, ruled that defamatory

¹¹⁵ A number of states and countries have laws prohibiting employers from requiring the employees to grant access their applicant's personal Internet account or disclose passwords to allow employers to gain access. See e.g. Maryland Code Labor and Employment § 3-712, Mich. Comp. Laws. § 37.273, Wisc. Legislature § 995.55(2)(a). etc. Others have broad prohibition regulating what information the employer can gather about candidates. See e.g. Art. L1121-1 C. trav. (France – prohibiting anyone restraining individual rights and individual and collective freedoms if these restrictions are not justified by the nature of the task to be performed nor proportionate to the aim sought)(author's translation)

¹¹⁶ For example, the Bill Title in Maryland (House Bill 964 & Senate Bill 433) was entitled Labor and Employment - User Name and Password Privacy Protection and Exclusions. See S. 433, 2012 Gen. Assem. (Md. 2012) ; HR. 964, 2012 Gen. Assem. (Md. 2012).

¹¹⁷ *Id.*

¹¹⁸ For example, in 2015, the Commission Nationale de l'Informatique et des Libertés, the French regulatory body dealing with data privacy, reported that of 7908 complaints 16% were work related – including the monitoring of employees' emails and other online activities. Commission Nationale de l'Informatique et des Libertés, *Rapport d'Activité 2015*, La Documentation française (2016) https://www.cnil.fr/sites/default/files/atoms/files/cnil-36e_rapport_annuel_2015_0.pdf (last visited Dec. 2, 2016).

statements on Facebook were not published because Facebook constituted a private forum.¹¹⁹ In the disputed case, the profile was private and had few connections.¹²⁰ In Germany, the Hamm Appeals Court held that Facebook comments were not private and the employee should have no expectation of privacy, particularly since some of his connections on the site were co-workers.¹²¹ In the US, the National Labor Relations Board (NLRB) has taken the position that some social media activities are protected within limits.¹²² In essence, the US policy falls closer to Germany than France.

Second, policymakers have also gotten involved with sports leagues. Their involvement includes vetting sports organizations to host international events like the Olympic games¹²³ or the World Cup¹²⁴ and to become home to a sport franchise.¹²⁵ Policymakers vet for these “mega sport events” and sports franchises because they can have some positive externalities¹²⁶ and economic benefits.¹²⁷ However, this vetting and the subsequent inter-city/state competition have become so intense that US policymakers have attempted to curb inefficient competition through legislation. In 1999, US Senate introduced a bill increasing the antitrust exemption currently

¹¹⁹ *Mme Catherine X; et autre v. Mme Maria-Rosa Y*, Arrêt n° 344 du 10 avril 2013 (11-19.530) - Cour de cassation - Première chambre civile - ECLI:FR:CCASS:2013:C100344

¹²⁰ *Id.*

¹²¹ *LAG Hamm, Urteil vom 16 Sa 763/12* (2013).

¹²² National Labor Relations Board, *The NLRB and Social Media*, NLRB.GOV <https://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> (last visited Dec. 2, 2016).

¹²³ Jane Perlez, *U.S. Won't Block China's Bid for Olympics*, NY TIMES (Jul. 11, 2001)(discussing the geo-political implications of Beijing, China hosting the 2008 Olympic games) <http://www.nytimes.com/2001/07/11/world/us-won-t-block-china-s-bid-for-olympics.html> (last visited Dec. 5, 2016).

¹²⁴ Owen Gibson, *Michel Platini admits politics played part in Qatar 2022 World Cup win*, GUARDIAN (Sep. 20, 2013)(discussing how World Cup voting was influenced by foreign policy and possibly how sitting president influenced the voting) <https://www.theguardian.com/football/2013/sep/20/michel-platini-politics-qatar-2022-world-cup> (last visited Dec. 5, 2016).

¹²⁵ Leslie Wayne, *Picking Up the Tab For Fields of Dreams; Taxpayers Build Stadiums; Owners Cash in*, NY TIMES (Jul. 27, 1996)(discussing stadium financing and how policymakers have attempted to keep or attract sports franchises) <http://www.nytimes.com/1996/07/27/business/picking-up-the-tab-for-fields-of-dreams-taxpayers-build-stadiums-owners-cash-in.html> (last visited Dec. 5, 2016).

¹²⁶ Andrew K. Rose & Mark M. Spiegel, *The olympic effect*, 121 ECON. J. 652 (2011)(finding that hosting a mega event has a positive and statistically significant effect on exports).

¹²⁷ Nola Agha, *The economic impact of stadia and teams: The case of Minor League Baseball*, 14 J. SPORTS ECON. 227 (2013)(discussing the positive economic impact of minor league stadiums)

enjoyed by sports leagues in exchange for their greater involvement with stadium financing.¹²⁸ This bill aimed at decreasing the rat race and the taxpayers' financial burden.¹²⁹

Policymakers' interest in sports goes beyond these political and economic considerations. For example, policymakers have considered the negative side effects of playing sports. In 2009-10, Congress considered legislation to address concussions in football.¹³⁰ This interest was recently revived.¹³¹ Following multiple hearings, Congress found that the league's treatment and concussion policy was unsatisfactory.¹³² In this case, the combination of athlete class action and policymakers' involvement has led to the league revisiting its concussion policy.

Their involvement can help address the bargaining issue between players and sports associations by lending the weight of the government's power. Arguably, Congressional policymakers may be less interested about freedom of speech of athletes than their wellbeing; nonetheless, policymakers have a role to play to enhance the way sports leagues function. In particular, NLRB has shown interest in employers' social media policy. NLRB enforces the National Labor Relations Act of 1935.¹³³ It oversees the labor laws dealing with collective bargaining agreements. These collective bargaining agreements have been used to support a number of organization imposed sanctions for social media indiscretion.

¹²⁸ Stadium Financing and Franchise Relocation Act of 1999, S. 952, 106th Cong. (1999). "A bill to expand an antitrust exemption applicable to professional sports leagues and to require, as a condition of such an exemption, participation by professional football and major league baseball sports leagues in the financing of certain stadium construction activities, and for other purposes."

¹²⁹ Marc D. Oram, *The Stadium Financing and Franchise Relocation Act of 1999*, 2 Va. J. Sports & L. 184, 196-98 (2000).

¹³⁰ Concussion Treatment and Care Tools Act of 2010, H.R. 1347, 111th Cong. (2009); Protecting Student Athletes from Concussions Act, H.R. 6172, 111th Cong. (2010).

¹³¹ Protecting Student Athletes from Concussions Act of 2015, S. 988, 114th Cong. (2015).

¹³² Ken Belson and Alan Schwarz, *N.F.L. Shifts on Concussions, and Game May Never Be the Same*, NY TIMES (Mar. 5, 2016) <http://www.nytimes.com/2016/03/16/sports/nfl-concussions-cte-football-jeff-miller.html> (last visited Dec. 7, 2016).

¹³³ 49 Stat. 449 (codified as 29 U.S.C. § 151-169).

Specifically, sports organizations and clubs often face the same problems as traditional employees. For example, they wonder whether they should monitor their athletes/employees.¹³⁴ However, sports organizations find different solutions. Because of the athletes' unique skill sets, they often do not resolve to fire them.¹³⁵ Instead, they suspend them from participating in club activities or fine them.¹³⁶

In most cases investigated by the NLRB, the employer-written social media policies are overbroad.¹³⁷ The policies used to control athletes are even less specific and retrofitted from an era where the league focused on crimes of moral turpitude.¹³⁸ A number of leagues use the *best interest of the sport* standard. Policymakers should encourage leagues to review company social media policy. These policies should make clear what constitutes inappropriate speech in order to remove doubts about discriminatory fines and dismissals.¹³⁹

¹³⁴ Michelle Brutlag Hosick, *Social networks pose monitoring challenge for NCAA schools*, NCAA (Feb. 14, 2013) <http://www.ncaa.org/about/resources/media-center/news/social-networks-pose-monitoring-challenge-ncaa-schools> (last visited Dec. 2, 2016).

¹³⁵ A few athletes have been dismissed from their team because of their social media indiscretions; however, it seems to remain the minority of sanctions. See e.g. Cindy Boren, *Offensive tweet about Mo'ne Davis gets college baseball player kicked off team*, WASHINGTON POST (Mar. 23, 2015) <https://www.washingtonpost.com/news/early-lead/wp/2015/03/22/offensive-tweet-about-mone-davis-gets-college-baseball-player-kicked-off-team/> (last visited Dec. 2, 2016).

¹³⁶ See e. g. Bob Nightengale, *Mariners suspend Steve Clevenger without pay for remainder of the season*, USA TODAY (Sep. 23, 2016)(discussing the suspension of a baseball player following his social media use) <http://www.usatoday.com/story/sports/mlb/2016/09/23/steve-clevenger-suspended-racist-charlotte-tweets-seattle-mariners/90908618/> (last visited Dec. 5, 2016); Maria Burns Ortiz, *Social media: Fines become commonplace*, ESPN (Dec. 12, 2012)(discussing the wide spread use of fine for social media missteps) http://www.espn.com/blog/playbook/trending/post/_/id/12233/social-media-fines-become-commonplace (last visited Dec. 2, 2016).

¹³⁷ Anne Purcell, Associate General Counsel, *Report of the Acting General Counsel Concerning Social Media Cases*, National Labor Relations Board OM 12-59 (May 30, 2012); Anne Purcell, Associate General Counsel, *Report of the Acting General Counsel Concerning Social Media Cases*, National Labor Relations Board OM 12-31 (Jan. 24, 2012).

¹³⁸ *Charles O. Finley & Co., Inc. v. Kuhn*, *supra* note 114 (discussing the history of the best interest of the sport standard and how it started with punishment when players committed crimes of moral turpitude but move away from this standard and given the baseball Commissioner broader powers).

¹³⁹ Kanno-Youngs, *supra* note 101.

Instead, most fines seem arbitrary.¹⁴⁰ Some leagues do not have an explicit description of offenses and corresponding fines whereas other leagues have clear rules for rule violations. For example, the NFL substance abuse policy specifies the fine amount and the suspension duration for each substance abuse.¹⁴¹

Sports organizations should make fines and their grading scale explicit. This scale should describe the amount for each type of indiscretion: fines for racist, xenophobic, or homophobic comments; fines for speaking against his/her parent club/association/officiating, etc. It should also describe the amount for each occurrence: first offense, second offenses, etc.

From a public policy standpoint, arbitrary punishments lead to inefficient deterrence. Since potential wrongdoers do not know what punishment to expect,¹⁴² they cannot estimate the expected consequences of their social media activities. They cannot make an educated decision to know whether posting on social media will be considered private. For example, an athlete could want to speak out against a league rule. He may believe that the social media post could spark a national debate. However, since he does not know whether his post would lead to a fine or a suspension, his desirable socially beneficial activity may never occur.

In Gray's case, the comments were made before he was under the league rules. He may never have been regulated if his team was not promoted. This created great uncertainty about the punishment he would face for his homophobic statement.

¹⁴⁰ See e.g. Hytner, *supra* note 4.

¹⁴¹ National Football League, *Policy and Program on Substances of Abuse 2015 as agreed by National Football League Players Association and the National Football League Management Council*, NATIONAL FOOTBALL LEAGUE, 16 (2015) (discussing the disciplinary measures for first violation and second violation following a rehabilitation program e.g. a fine of four-seventeenths of the amount in the player's contract and four game suspension for a first violation post rehabilitation). <https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Player%20Development/2015%20Policy%20and%20Program%20on%20Substances%20of%20Abuse.pdf>.

¹⁴² Kanno-Youngs, *supra* note 101.

V. Conclusion

Some employees have seen their freedom of speech more protected against their employers' actions than others. For example, academics usually enjoy a greater freedom of speech and receive some protection even if their opinions do not align with their employers'.¹⁴³

Athletes do not enjoy such protection. They are paid to compete and not to express their opinion. Their parent associations have used broad policies to financially punish them for exercising their freedom of speech.

Andre Gray's case highlights some deficiencies about the fine system. He received a retroactive punishment and was not properly deterred. He was never offered guidelines about what constituted "going against the interest of the sport."

Fines and suspensions without clear and transparent guidelines are detrimental to all the parties involved. Sports organizations cannot properly deter athletes from misbehaving since athletes do not know what constitutes misbehavior.

The NLRB has a part to play in ensuring that sanctions linked to athletes using social media are not discriminatorily used. It can ensure that sports organizations do not go beyond its granted authority under the collective bargaining agreements. It can also encourage sports organizations to create the guidelines athletes have been demanding.¹⁴⁴

¹⁴³ Richard E. Levy, *The Tweet Hereafter: Social Media and the Free Speech Rights of Kansas Public University Employees*, 24 Kan. J. L. & Pub. Pol'y 78 (2014)(discussing the similarities between freedom of speech and academic freedom and arguing that the academics should enjoy more freedom).

¹⁴⁴ Kanno-Youngs, *supra* note 101.