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Disclaimer:

The following article contains racist language used during congressional hearings for the Ku Klux Klan Act of 1871, and more recently by coaches in NCAA athletics. Some readers will find this language offensive. The author believes, however, that quoting such language within these historical and current contexts conveys the injurious effects these slurs and epithets have had on some NCAA athletes. Therefore, the Editors of this Journal have acceded to the author's wishes to convey the authenticity of these injurious verbal experiences.

**WHITEWASHING COACHING RACISM IN NCAA SPORTS:
ENFORCING CIVIL RIGHTS THROUGH THE KU KLUX
KLAN ACT**

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ABSTRACT

Coaching racism in college sports may be facilitated by NCAA transfer waivers silencing players who complain about racial harassment. Athletic directors and other school officials may have conspired with the NCAA to resolve racism complaints by using nondisclosure agreements and liability releases while avoiding independent investigations and lawsuits. Public information shows an athletic director and the NCAA may have conspired to deter a complaining Black player from seeking legal redress by granting him a transfer waiver on the condition he remain silent while depriving his Black teammates, who transferred with no waiver, equal protection of the laws.

If these suppositions are correct, players could claim their civil rights were violated under the Ku Klux Klan Act of 1871, codified in 42 U.S.C. §1985. The player who received a waiver to play without sitting out a season could state a claim under Section 1985(2) (clause ii), which prohibits conspiracies defeating justice. In *Kush v. Rutledge*, the Supreme Court ruled a player stated such a claim when his abusive coach and athletic director conspired to intimidate witnesses in his lawsuit. In a second scenario, Section 1985(3) could apply to other players who transferred in the spring to escape racial harassment while their school delayed its investigation until the fall semester. Forced by a transfer restriction in the NCAA's Article 14.5.5.1 to sit out the following season, these players could state a claim as a "class of persons" who were denied equal protection.

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I rely on congressional accounts from 1871, showing the Ku Klux Klan's terror campaign extended to schools for Blacks. The law was passed to protect education for Blacks like it protected their suffrage and participation in court proceedings. This history applies to coaching racism. Lawmakers' school terror accounts included the Klan using racial epithets to show how verbal degradation enforced a racial caste. This history is relevant in gyms and locker rooms where college coaches use racial slurs.

My research offers a new blueprint for attorneys and courts in Section 1985(2)(ii) and 1985(3) lawsuits exposing conspiracies to silence Black players. These actions have potential to hold athletic directors, school officials, and NCAA administrators personally liable for damages from these civil rights violations. My research has implications for sexual assault cases in which college athletes were harmed because athletic directors and other school officials ignored their complaints and protected the perpetrators. If Section 1985 liability were personally imposed on athletic directors and other college officials, schools would aggressively extirpate coaching racism.

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“They are bitterly hostile to teachers because the illiterate freedmen look for instruction to the school house. Therefore, they warn away such citizens, and if the warning be disregarded they scourge or kill them.”¹

Rep. Job. Stevenson (R.-Ohio) (1871)

“There are honkies and white people, and there are niggers and black people. Dunigan is a good black kid. There’s no nigger in him.”²

Larry Cochell, Head Baseball Coach
University of Oklahoma (2005)

¹ CONG. GLOBE, 42d Cong., 1st Sess. 287 app. (1871).

² Larry Cochell, University of Oklahoma baseball coach, resigned after he used a racial slur to describe one of his African American players during off-camera interviews with ESPN. Eric Stephens, *Details of Cochell’s Use of Racial Slur Disclosed*, L.A. TIMES (May 3, 2005), <https://www.latimes.com/archives/la-xpm-2005-may-03-sp-cochell3-story.html>.

INTRODUCTION

A. COACHING RACISM IN NCAA SPORTS

In support of the Ku Klux Klan Act of 1871 (“Act”), Representative Job Stevenson spoke about the Klan’s terror tactics aimed at teachers, students, and schools for black people. In 2005, Larry Cochell, the University of Oklahoma baseball coach, repeated the racist slur the Klan used after the Civil War to terrorize black Americans to a reporter. I explore how universities and colleges (hereafter, schools) appear to collude with the NCAA to exploit a player transfer restriction in Article 14.5.5.1 after a player complains about racism.³ My research offers a blueprint for attorneys and courts to use the Act to hold athletic directors and other university officials legally responsible for covering up racist treatment by coaches.

Schools often ignore coaching racism until it is publicly exposed. A women’s basketball coach threatened her players “a loss would lead to nooses.”⁴ A men’s basketball coach used “nigger” in a talk to his players.⁵ A football coach sent a text message with a racial slur.⁶ Many more examples have recently

³ NAT’L COLLEGIATE ATHLETIC ASS’N, 2020-21 NCAA DIVISION I MANUAL, art. 14.5.5 (2020). Four-Year College Transfers, at art. 14.5.5.1 General Rule, stating: “A transfer student from a four-year institution shall not be eligible for intercollegiate competition at a member institution until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full quarters) at the certifying institution.” Residence Requirement Waivers, specifies reasons such as health, recruiting violations, a school’s probationary status, and a school’s postseason competition restrictions as grounds for waivers of the one-year in residence rule but does not mention relief from discriminatory treatment. *Id.* at 14.7.2 (a)—(d).

⁴ Marc Tracy & Alan Blinder, *Sylvia Hatchell Is Out at U.N.C. After Inquiry Supports Team’s Complaints*, N.Y. TIMES (April 19, 2019), <https://www.nytimes.com/2019/04/19/sports/basketball/north-carolina-sylvia-hatchell.html> (coach fired over racial insensitivity, including warning Black players that a loss would “lead to nooses”).

⁵ *Dambrot v. Central Michigan University*, 839 F. Supp. 477 (E.D. Mich. 1993) (coach was fired for using “nigger” in a talk he gave to the players and coaching staff).

⁶ The Associated Press, *Clemson Assistant Pearman Apologizes for Using Racial Slur*, N.Y. TIMES (June 2, 2020) (Clemson assistant

surfaced.⁷ Coaching racism in college sports can be facilitated by an NCAA transfer rule deployed to silence players who complain

coach Danny Pearman said he made a “grave mistake” when he repeated a racial slur to ex-Tigers tight end D.J. Greenlee at practice three years ago).

⁷ Dan Bernstein, *Oklahoma State Players Allege Racism from Coach Mike Gundy As They Rally Around Teammate*, SPORTING NEWS (June 16, 2020), <https://www.sportingnews.com/us/ncaa-football/news/oklahoma-state-players-allege-racism-from-mike-gundy/b9vaqvqs2mj17do5jc66pzp> (Coach Mike Gundy accused of series of racist comments); Cindy Boren, *TCU Football Coach Apologizes for Using Racial Slur ‘That Is, In Any Context, Unacceptable,’* WASH. POST (Aug. 4, 2020), <https://www.washingtonpost.com/sports/2020/08/04/tcu-football-coach-apologizes-using-racial-slur-that-is-any-context-unacceptable/> (coach accused of using slur); Jeff Borzello & Myron Medcalf, *Texas State Coach Danny Kaspar Made Many Racist Remarks, Former Players Say*, ESPN (June 5, 2020), https://www.espn.com/mens-college-basketball/story/_/id/29269697/texas-state-coach-danny-kaspar-used-many-racist-remarks-former-players-say; Jane Coaston, *College Football Players are Taking a Stand Against Racism—and Taking a Big Risk*, VOX (June 17, 2020), <https://www.vox.com/2020/6/17/21284501/college-football-race-iowa-george-floyd> (Black players in the Iowa football program have reported racist bullying they received from coaching staff staff); Erin Jordan, *Leaked Report Shows Concerns About Racism in Hawkeye Football Were Known by Officials in 2019*, THE GAZETTE (July 30, 2020), <https://www.thegazette.com/subject/sports/hawkeyes/iowa-football/leaked-report-diversity-racism-bullying-gary-barta-20200730> (Black players complained that they were repeatedly denigrated and belittled in racial terms by coaches); Myron Medcalf, *Erik Helland Resigns as Badgers Coach, Says He Used Racial Slur While Telling Story*, ESPN (Feb. 6, 2020), https://www.espn.com/mens-college-basketball/story/_/id/28649010/erik-helland-resigns-badgers-coach-says-used-racial-slur-telling-story (racial epithet was used in the presence of several Wisconsin men’s basketball players); Mark Schlabach, *Utah Suspends DC Morgan Scalley for Texting Racial Slur in 2013*, ESPN (June 5, 2020), https://www.espn.com/college-football/story/_/id/29272833/utah-suspends-dc-morgan-scalley-texting-racial-slur-2013 (investigation launched into a 2013 text message in which the coach used a racial slur); Audra Streetman, *CSU Pauses Football Activities Amid Allegations Of Racism & Verbal Abuse*, CBSDENVER (Aug. 7, 2020), <https://denver.cbslocal.com/2020/08/07/fort-collins-csu-football-investigation-racism-verbal-abuse/> (Colorado State president called for investigation into allegations of racism and verbal abuse in football program).

about racial harassment. Athletic directors and school officials may conspire with the NCAA to use nondisclosure agreements and liability releases to resolve these complaints while avoiding lawsuits and independent investigations.

Using public information,⁸ I hypothesize a Big Ten school's athletic director and the NCAA may have conspired to deter a complaining Black player from seeking legal redress by granting him a transfer waiver, provided he remain silent and sign a liability release. This agreement could deprive Black teammates, who transferred without waiving Article 14.5.5.1, equal protection of the laws. If these suppositions are correct, players could claim their civil rights were violated under the Act, codified in 42 U.S.C. §1985.⁹ The player who was granted a waiver to play immediately could have a possible claim under Section 1985(2)(ii), which prohibits conspiracies defeating the "due course of justice in any State."¹⁰ In *Kush v. Rutledge*,¹¹ the Supreme Court ruled a player stated such a claim when he alleged an abusive college football coach and athletic director conspired to intimidate witnesses in his lawsuit.¹² Section 1985(3) could also possibly apply to teammates who transferred between March and June¹³ to escape racial harassment while their school delayed¹⁴ investigating racial harassment until the fall semester.¹⁵ Forced by the NCAA's Article 14.5.5.1 to sit the next year,¹⁶ they could state a claim as a "class of persons."¹⁷

My thesis draws from congressional accounts in 1871 showing the Klan's terror campaign extended to schools for Black students.¹⁸ The law was passed to protect education for Black

⁸ See, e.g., Univ. of Ill. Div. of Intercollegiate Athletics, *Executive Summary of Events Involving Illinois Men's Basketball Program*, archived at The-Mark-Smith-Report, <http://illinireport.info/wp-content/uploads/2019/04/The-Mark-Smith-Report.pdf>.

⁹ 42 U.S.C. § 1985(3) (1871) (known as the Enforcement Act of 1871, Civil Rights Act of 1871, or the Ku Klux Klan Act of 1871).

¹⁰ 42 U.S.C. § 1985(2).

¹¹ 460 U.S. 719 (1983).

¹² *Id.*

¹³ *Infra* Table 2 (Timeline of Investigation of Illinois Men's Basketball Coach).

¹⁴ *Infra* Table 2.

¹⁵ *Infra* note 164.

¹⁶ *Supra* note 7.

¹⁷ *Supra* note 9.

¹⁸ *Infra* notes 92—107.

people in the same way it more directly aimed to protect Black suffrage¹⁹ and participation in legal proceedings.²⁰ This history applies to NCAA coaching racism. Klan attacks on teachers and schools were part of a larger pattern to disperse rising Blacks to preserve white superiority.²¹ Lawmakers' school terror accounts included the Klan using "nigger"²² to show how it enforced a racial caste. This history is relevant for players whose coaches use racial slurs.

My research offers a new blueprint for attorneys and courts for Sections 1985(2)(ii) and 1985(3) lawsuits aiming to expose conspiracies to silence Black players. These actions have potential to hold athletic directors, other school officials, and the NCAA liable for damages from these civil rights violations. My research also has implications for sexual assault cases where coaches, athletic directors, and other school officials conspired to

¹⁹ See Brian J. Gaj, *Section 1985(2) Clause One and Its Scope*, 70 CORNELL L. REV. 756, 758 (1985) ("Klan controlled elections by murdering leading Republicans and by intimidating Republican supporters").

²⁰ See Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light in State Action and the Fourteenth Amendment*, 11 ST. LOUIS U. L.J. 331, 335 (1967), quoting Rep. George Hoar, CONG. GLOBE, 42d Cong., 1st Sess. 334 app. (1871), stating:

If the jurors of South Carolina constantly and as a rule refuse to do justice between man and man where the rights of a particular class of its citizens are concerned, and that State affords by its legislation no remedy, that is as much a denial to that class of citizens of the equal protection of the laws as if the State itself put on its statute-book a statute enacting that no verdict should be rendered in the courts of that State in favor of this class of citizens.

²¹ See Rep. Luke Poland, stating:

A large number of men had lived in idleness, and the fruits of idleness had ripened. The country was full of dissipated horse-racing, cock-fighting, roystering fellows, many of whom by the war had become desperate and dangerous men. The liberation of the slaves had deprived them of their means of living, and they were reduced to the desperate and disagreeable duty of earning it for themselves. That this class, under the circumstances, could tolerate equal rights, civil and political, in a negro could hardly be expected.

Cong. Globe, 42d Cong., 2d. Sess. 493 app. (1871).

²² *Infra* notes 98—99, 106-107, 109.

ignore complaints and protected perpetrators.²³ If Section 1985 liability were personally imputed to athletic directors and other collegiate sports officials,²⁴ they would aggressively curb coaching racism.

B. ARTICLE OVERVIEW

Part I frames the theoretical perspectives for my study.²⁵ Conspiratorially silencing players draws from research relating to nondisclosure agreements and liability releases (Part I.A),²⁶ the NCAA as a racially exploitative institution (Part I.B),²⁷ and institutional racism as a more generalized phenomenon (Part I.C).²⁸

Part II delves into congressional reports in 1871 of racially motivated attacks on Black schools and their teachers and students.²⁹ Part II.A explores testimony from hearings on the Ku Klux Klan Act of 1871.³⁰ In Part II.B, I explain how courts allowed this law to lay dormant for nearly a century but applied it more recently to conspiracies directed at racial and class groups.³¹

Part III applies the Act to conspiracies to silence players' coaching racism complaints.³² Part III.A presents a conspiracy model between NCAA officials and a school aiming to silence a

²³ Dan Barry et al., *As F.B.I. Took a Year to Pursue the Nassar Case, Dozens Say They Were Molested*, N.Y. TIMES (Feb. 4, 2018), at A1 (Larry Nassar, former U.S. Gymnastics national team doctor and Michigan State University employee sentenced for sexually abusing female athletes); Joe Drape, *Sandusky Guilty of Sexual Abuse of 10 Young Boys*, N.Y. TIMES (June 22, 2012) (Penn State football coach convicted of sexually assaulting minors); Mike Householder (AP), *U. of Michigan Reaching Out to Ex-Athletes about Late Doctor*, WASH. POST (April 7, 2020) (university contacted 6,800 former male student-athletes to investigate complaints of sex abuse committed by a university physician).

²⁴ Under Section 1985, a private conspirator can be liable in compensatory and punitive damages. *See Griffin, infra* note 127.

²⁵ *Infra* notes 47—82.

²⁶ *Infra* notes 47—54.

²⁷ *Infra* notes 55—60.

²⁸ *Infra* notes 61—82.

²⁹ *Infra* notes 83—143.

³⁰ *Infra* notes 86—116.

³¹ *Infra* notes 117—143.

³² *Infra* notes 144—173.

player complaining about his coach's alleged racial harassment.³³ Part III.B specifies how the model could work in a conspiracy aimed to defeat a player's attempt to seek redress under Section 1985(2) (clause ii).³⁴

In Part IV, I apply this model to a possible conspiracy between a Big Ten school and the NCAA.³⁵ Part IV.A hypothesizes an approach for a player to assert a plausible claim under Section 1985(2)(ii), assuming his waiver to play at a rival school the next season without losing eligibility resulted from confidentiality and liability release agreements.³⁶ Part IV.B hypothesizes an approach for a Section 1985(3) claim for other players who may have unresolved complaints about coaching racism but were not included in the school's investigation into racial harassment, which was delayed until they left the campus.³⁷

My study concludes by relating theoretical perspectives to these hypothetical case analyses.³⁸ This section relates how theories about confidentiality and liability release agreements, NCAA exploiting players, and institutional racism apply to NCAA coaching racism.³⁹ Further, it connects the Ku Klux Act of 1871's legislative history to current examples.⁴⁰ My study concludes this civil rights law offers redress to players by holding athletic directors, other schools, and NCAA officials liable for covering-up this serious problem.

C. CAVEATS

My analysis draws from published reports of player complaints, university responses and actions, and the NCAA administering its transfer restriction. Nonetheless, I do not have definitive evidence that the University of Illinois at Urbana-Champaign, its coaches and its officers, the NCAA and its officers, and the University of Missouri and its coaches and officers engaged in wrongdoing. My analysis attempts to connect

³³ *Infra* notes 144—145.

³⁴ *Infra* notes 146—173.

³⁵ *Infra* notes 174—220.

³⁶ *Infra* notes 174—190.

³⁷ *Infra* notes 191—220.

³⁸ *Infra* notes 221—231.

³⁹ *Infra* notes 221—231.

⁴⁰ *Infra* notes 232—236.

publicly sourced information that suggests, without proving, the existence of a conspiracy to deprive players of their civil rights.

I have weighed these informational shortcomings against evidence of odd and suspicious actions. This evidence implies a coordinated plan to cover up complaints about a coach who racially harassed his players. I also weighed the shortcomings of my knowledge against the potential significance of my research question. In addition to cover-ups of coaching racism,⁴¹ NCAA schools have covered-up sexual assaults committed under the supervision of their athletic departments.⁴² Athletic directors and senior university officials have perpetrated these cover-ups.⁴³ As a result, athletes have been traumatized.⁴⁴ Recently, Black athletes

⁴¹ *Infra* notes 223—225, 227—228.

⁴² Mark Johnson & Megan Banta, *MSU Finds 8 People Who Failed to Report Larry Nassar or Former Dean William Strampel*, LANSING STATE J. (Sept. 1, 2020), <https://www.lansingstatejournal.com/story/news/2020/09/01/msu-larry-nassar-william-strampel-university-advisory-council-sexual-misconduct/5678418002/> (discovering that 1, 2020) (an MSU coach knew as early as 1997 of possible sex abuse after having conversations with two gymnasts); Jennifer Smola, *Ohio State Trustees Move Toward Settling Strauss Lawsuits*, COLUMBUS POST-DISPATCH (Feb. 27, 2020), <https://www.dispatch.com/news/20200227/ohio-state-trustees-move-toward-settling-strauss-lawsuits> (finding that OSU's Dr. that OSU's Dr. Strauss sexually abused at least 177 students between 1979 and his retirement in 1998 and that university personnel repeatedly failed to act); Kim Kozlowski, *Former University of Michigan Team Doctor Investigated for Multiple Sex Abuse Complaints*, THE DETROIT NEWS (Feb. 19, 2020), <https://www.detroitnews.com/story/news/local/michigan/2020/02/19/university-michigan-investigates-sex-complaints-against-former-football-doctor/4712724002/>.

⁴³ Rick Maese, *Iconic Michigan Coach and Others Knew of Doctor's Abuse for Years, New Lawsuit claims*, WASH. POST (July 30, 2020), <https://www.washingtonpost.com/sports/2020/07/30/iconic-michigan-coach-others-knew-doctors-abuse-years-new-lawsuit-claims/> (reporting that hundreds of Michigan students and athletes say a school doctor sexually abused them. A lawsuit against the school claims that school officials and coaches, including the athletic director, Don Canham and coach Bo Schembechler, failed to act on numerous complaints).

⁴⁴ *See, e.g.*, Corky Siemaszko, *University of Michigan Wrestler Says He Was Booted Off Team for Reporting Abusive Doctor*, NBC NEWS (Feb. 27, 2020), <https://www.nbcnews.com/news/us-news/university-michigan-wrestler-says-he-was-booted-team-reporting-abusive-n114427627>, 2020) (former wrestler said that he was

have become more vocal in describing coaching racism at their schools, and their complaints have indicated obstacles in making their voices heard.⁴⁵ This picture of futility is unfortunate insofar as federal civil rights law applies specifically to federally funded schools.⁴⁶ The underenforcement of race discrimination laws in NCAA athletics reflects a scarcity of legal theories for these amateur players' lawsuits. For example, employment laws prohibiting race discrimination do not apply because they are amateur athletes.⁴⁷ My research offers attorneys and courts a new legal blueprint to hold athletic directors, high-level university officials, and NCAA administrators responsible for violating players' civil rights.

punished for reporting in a nine-page letter on Dr. Robert Anderson's abuse of him).

⁴⁵ Josh Newman, *Utes Football Players Join Pac-12 Boycott If Demands for Racial Justice, Pay and COVID-19 Safety are Not Met*, THE SALT LAKE TRIB. (Aug. 3, 2020), <https://www.sltrib.com/sports/utah-utes/2020/08/02/pac-players-threaten/>.3, 2020).

⁴⁶ Race discrimination against students in federal funded schools is prohibited. See Title VI of the 1964 Civil Rights Act, called "Nondiscrimination in Federally Assisted Programs," applies to all public schools, and other federally funded education programs and activities. Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 255 (codified as amended at Title VI, 42 U.S.C. § 2000d et seq.) (2018) ("No person in the United States shall, on the ground of race . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); In an empirical study of NCAA player, only one case among sixty reported decisions filed a claim under Title VI for race discrimination. See Michael H. LeRoy, *Harassment, Abuse, and Mistreatment in College Sports: Protecting Players through Employment Laws*, 42 BERKELEY J. OF LAB. & EMP. LAW tbl. 1 (forthcoming, Fall 2020).

⁴⁷ See, e.g., *Shepard v. Loyola Marymount Univ.*, No. BC228705, 2001 WL 35914726 (Cal. Super. Ct. Feb. 23, 2001) (coach created racially discriminatory and hostile environment).

I. THEORY OF A CONSPIRACY BETWEEN UNIVERSITY OFFICIALS AND THE NCAA TO SILENCE COMPLAINTS OF COACHING RACISM

This Article explicates a theory of conspiracy involving school officials and the NCAA to use a transfer rule to silence players who experience racist coaching. In Part I.A, I develop a theory of conspiratorial silencing by drawing from three research streams: (a) confidential settlements, nondisclosure agreements, and liability waivers, (b) the NCAA as a racially exploitative institution embedded in schools, and (c) institutional racism.

A. SILENCING COMPLAINTS THROUGH CONFIDENTIALITY AND NONDISCLOSURE AGREEMENTS, AND LIABILITY RELEASES

Disputes are often resolved through coercive settlements.⁴⁸ The growing prevalence of nondisclosure agreements confirms this analysis.⁴⁹ There is a “vast ocean of imposed silence policed by the threat of judicially enforceable nondisclosure agreements (NDAs) that often include confidential arbitration clauses that effectively seal the silencing process from public view.”⁵⁰ This is true in sports. Athletic teams often use

⁴⁸ Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075, (1984), stating:

Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.

Id. at 1076.

⁴⁹ *Id.*

⁵⁰ Burt Neuborne, *Limiting the Right to Buy Silence: A Hearing-Centered Approach*, 90 U. COLO. L. REV. 411, 416 (2019); see generally Nicole Taylor, *Black Employees, Don't Sign Away Your Right to Speak Out*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/opinion/nda-racism-separation-agreements.html> (“[N]ot caving in to a ‘hush your mouth’ document makes it better for the next black person. You can leave the door cracked with a detailed note.”).

NDAs.⁵¹ In college and amateur sports, secret agreements have “come to light” in lawsuits.⁵² In a recent case, the “NCAA argued that its bylaws require it to keep its investigations strictly confidential. NCAA investigators rely on confidential sources for a lot of information they gather, and promise confidentiality to witnesses to obtain needed facts.”⁵³ Since the COVID-19 pandemic began, NCAA football programs have used controversial liability waivers.⁵⁴ Experts question whether these waivers are enforceable.⁵⁵ Players have no legal representation to advise them and NCAA schools use these waivers to deflect their legal responsibility for players’ wellbeing.

⁵¹ Lara Grow & Nathaniel Grow, *Protecting Big Data in the Big Leagues*, 74 WASH. & LEE L. REV. 1567, 1604 tbl.1 (2017) (displaying empirical research of 19 teams in four major league sports (MLB, NFL, NHL, and NBA) had only 20% of teams without NDAs).

⁵² David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 166 (2019) (discussing how McKayla Maroney, American gold-medal gymnast, settled her lawsuit against USA Gymnastics (USAG) for alleging that the sports federation enabled Dr. Larry Nassar to abuse her. Her settlement required that she refrain from further speech about her ordeal or pay a \$125,000 liquidated damages fee, plus the costs and fees of enforcement).

⁵³ Joey Kaufman, *NCAA Says Schools Cannot Require COVID Liability Waivers*, THE COLUMBUS DISPATCH (Aug. 5, 2020), <https://www.buckeyextra.com/sports/20200805/ncaa-says-schools-cannot-require-covid-liability-waiver> (reporting football programs in June required players to sign COVID-liability waivers; however, in August the NCAA implemented a policy prohibiting these waivers).

⁵⁴ Tim Sullivan, *Attorneys: U of L's 'Binding' COVID-19 Liability Waivers for Athletes May Not Be Enforceable*, LOUISVILLE COURIER J. (Aug. 3, 2020), <https://www.courier-journal.com/story/sports/college/louisville/2020/08/03/louisville-football-athletes-required-sign-covid-19-waivers/5570004002/>.

⁵⁵ *Id.* (statement of attorney Steve Romines) (“Liability waivers are generally not worth much anyway. The lack of bargaining power on behalf of the athletes make them almost worthless in this situation in my opinion.”).

B. THE NCAA AS A RACIALLY EXPLOITATIVE INSTITUTION

My second perspective draws from research criticizing the NCAA and schools for exploiting student athletes.⁵⁶ In Division I football and basketball, the NCAA's amateur athlete model is derided as outdated.⁵⁷ The NCAA profits from its market-fixing rules.⁵⁸ Critics advocate a pay-for-play model.⁵⁹ As the NCAA markets football and basketball like professional sports leagues, players have tried unsuccessfully to unionize.⁶⁰ Recently,

⁵⁶ A pioneering article is Stephen Horn, *Intercollegiate Athletics: Waning Professionalism and Rising Professionalism*, 5 J. COLL. & U. L. 97, 98 (1977), noting:

Too often the jockeying for power within the NCAA has reflected the economic positions between institutions rather than concerns about what should be the basic purpose of the organization: the protection of student-athletes from unscrupulous actions by those who would exploit them for their own purposes.

⁵⁷ Daniel Lazaroff, *The NCAA In Its Second Century: Defender of Amateurism or Antitrust Recidivist*, 86 OR. L. REV. 329, 330 (2007); see Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 97-108 (2006).

⁵⁸ Jeffrey J.R. Sundram, Comment, *The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense*, 85 TUL. L. REV. 543 (2010); see Lazaroff, *supra* note 56, at 348.

⁵⁹ See Comment, Richard Smith, *The Perfect Play: Why the Fair Labor Standards Act Applies to Division I Men's basketball and Football Players*, 67 CATH. U. L. REV. 549 (2018); Sam C. Ehrlich, *The FLSA and the NCAA's Potential Terrible, Horrible, No Good, Very Bad Day*, 39 LOY. L.A. ENT. L. REV. 77 (2018); Marc Edelman, *From Student-Athletes to Employee-Athletes: Why a "Pay for Play" Model of College Sports Would Not Necessarily Make Educational Scholarships Taxable*, 58 B.C. L. REV. 1137 (2017); and Richard Karcher, *Big-Time College Athletes' Status as Employees*, 33 ABA J. LAB. & EMP. L. 31 (2017).

⁶⁰ Northwestern University and College Athletes Players Association (CAPA), Petitioner. Case 13-RC-121359 (August 17, 2015). Also see Jay D. Lonick, *Bargaining With the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135 (2015). The NLRB ruled that player votes cannot be counted in a representation election because the Board cannot invoke its jurisdiction in this matter.

players have begun to organize themselves to achieve pay-for-play.⁶¹

C. INSTITUTIONAL RACISM

My third perspective draws from institutional racism. Ian F. Haney López provides a model with conceptual rigor and clarity.⁶² Institutional racism is “status-enforcement undertaken in reliance on racial institutions.”⁶³ The idea, “undertaken in reliance,”⁶⁴ relates to “the relationship between cognitive processes and racial institutions.”⁶⁵ The term “racial status-enforcement”⁶⁶ relates to “action that has the effect of enforcing a racial status hierarchy.”⁶⁷

López’s model fits NCAA athletics. As children, Black students are socialized to play sports as a path to higher education.⁶⁸ Colleges reinforce this message. Coaches prioritize athletics over academics for Black players compared to white players and are more likely to discourage Black players from participating in activities outside their sport.⁶⁹ White student-

⁶¹ Newman, *supra* note 45.

⁶² Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1723 (2000).

⁶³ *Id.* at 1809.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 1810.

⁶⁷ *Id.*

⁶⁸ Krystal Beamon & Patricia A. Bell, *Academics Versus Athletics: An Examination of the Effects of Background and Socialization on African American Male Student Athletes*, 43 SOCIAL SCIENCE J. 393 (2006); Kirsten F. Benson, *Constructing Academic Inadequacy: African American Athletes’ Stories of Schooling*, 71 J. OF HIGHER ED. 223 (2000). Male athletes in basketball and football and basketball also have lower academic achievement, stronger expectations for a professional sports career, and are socialized more intensely toward sports than their White counterparts. See Tamara McNulty Eitle & David Eitle, *Race, Cultural Capital, and the Educational Effects of Participation in Sports*, 75 SOCIOLOGY OF ED. 123—146 (2002); John Hoberman, *The Price of Black Dominance*, 37 SOCIETY 49 (2000).

⁶⁹ Brandon Martin et al., *“It Takes a Village” for African American Male Scholar-Athletes: Mentorship by Parents, Faculty, and*

athletes spend more time than Black student-athletes with professors out-of-class.⁷⁰ Black and White male student-athletes do not benefit equally from faculty interactions.⁷¹ These empirical studies demonstrate status-enforcement relying on racial institutions.⁷²

Relating cognitive processes to racial institutions also has empirical support. The NCAA's testing rules and curriculum standards adversely affect Black students.⁷³ Once on campus, Black athletes live in an environment that is premised on their intellectual inferiority.⁷⁴ Black athletes' lower GPAs correlate with lower motivation to succeed in academics.⁷⁵ Environmental influences play a role in unequal aspirations. Student-athletes who are "failure acceptors" are more committed to playing their sport than success-oriented students.⁷⁶ Another empirical study shows

Coaches, 4 J. FOR THE STUDY OF SPORTS AND ATHLETES IN EDUC. 277, 288 (2010).

⁷⁰ Eddie Comeaux et al., *Purposeful Engagement of First-Year Division I Student-Athletes*, 23 J. OF THE FIRST-YEAR EXPERIENCE & STUDENTS IN TRANSITION 35, 45 (2011).

⁷¹ Eddie Comeaux & C. Keith Harrison, *Faculty and Male Student Athletes: Racial Differences in the Environmental Predictors of Academic Achievement*, 10 RACE ETHNICITY AND EDUC. 99, 199 (2007) (sample of 1031 White and 739 Black football and basketball players attending predominantly White institutions shows that benefits of player interactions with faculty differed by race).

⁷² Grow & Grow, *supra* note 51.

⁷³ Akuoma C. Nwadike et al., *Institutional Racism in the NCAA and the Racial Implications of the "2.3 Or Take a Knee" Legislation*, 26 MARQ. SPORTS L. REV. 523, 535—539 (2016).

⁷⁴ Harry Edwards, *The Black 'Dumb Jock': An American Sports Tragedy*, 131 THE COLLEGE BOARD REV. 8 (1984), stating:

But Black student-athletes are burdened also with the insidiously racist implications of the myth of "innate Black athletic superiority," and the more blatantly racist stereotype of the "dumb Negro" condemned by racial heritage to intellectual inferiority.

Id. at 8.

⁷⁵ Joy Gaston-Gayles, *Examining Academic and Athletic Motivation Among Student Athletes at a Division I University*, 45 J. OF COLLEGE STUDENT DEV. 75, 81 (2004) (finding that ethnicity and academic motivation explained an additional 9% of the variance in college GPAs, apart from all other measured factors).

⁷⁶ Herbert D. Simons et al., *Academic Motivation and the Student Athlete*, 40 J. OF COLLEGE STUDENT DEV. 151, 159 (1999); *see*

stereotype threat theory explains differences in outcomes between Black and White people, such as whether a task is framed as sports intelligence or natural athletic ability.⁷⁷ NCAA athletics' racial character is reflected in Black students' lower graduation rates at many schools, which is lower than graduation rates for nonathlete Black students at the same schools.⁷⁸

Finally, the NCAA's status-enforcement supports a racial status hierarchy.⁷⁹ Major NCAA programs are likened to colonial plantations because many White coaches and administrators profit

also Albert Y. Bimper Jr., *Game Changers: The Role Athletic Identity and Racial Identity Play on Academic Performance*, 55 J. OF COLLEGE STUDENT DEVELOPMENT 795, 803 (2014).

⁷⁷ Jeff Stone et al., *Stereotype Threat Effects on Black and White Athletic Performance*, 77 J. OF PERSONALITY AND SOCIAL PSYCHOL. 1213, 1215 (1999).

⁷⁸ SHAUN R. HARPER, BLACK MALE STUDENT-ATHLETES AND RACIAL INEQUITIES IN NCAA DIVISION I COLLEGE SPORTS (2018). Harper collected national graduation data for NCAA athletes who entered college in 2007, 2008, 2009, and 2010 and graduated in 2013, 2014, 2015, and 2016. He reported results by conferences. In the Big Ten, for example, only two schools registered high overall graduation rates for Black men with little differences between Black athletes and all Black men on their campus: Northwestern University (graduation rate of 88%, compared to 90% [-2%]; University of Michigan 67 73 [-6%]). Purdue University, had a higher graduation for athletes than for the overall population, but its graduation rates were not high (graduation rate of 61% compared to 57% [4%]). Similarly, at the University of Minnesota, athletes had a 57% graduation rate, compared to the overall rate of 55% [2%]. At Indiana University, Black athletes graduated at the same rate of overall Black men, 58%. Penn State was similar, with a slightly lower graduation rate for Black athletes (59% compared to 63% [-4%]). The University of Wisconsin graduated athletes at 58%, compared to 66% for the overall group [-8%]. Michigan State University had a Black athlete graduation rate of 46% compared to an overall Black male rate of 55% [-9%]. Five schools trailed the others, with double-digit percentage point gaps in the graduation rate compounded by having modest graduation rates for the overall group: University of Iowa (40% compared to 52% [-12%]); University of Maryland (55% compared to 72% [-17%]); University of Nebraska (56% compared to 46% [-10%]); Rutgers University (49% compared to 66% [-17%]); University of Illinois (48% compared to 67% [-19%]); and Ohio State University (41% compared to 66% [-25%]).

⁷⁹ López, *supra* note 62.

handsomely off Black players' wage-free labor.⁸⁰ Exploiting Black athletes produces athletic surplus-value and marginal revenue for schools through an inequitable financial exchange.⁸¹ Players lack representation while they generate great wealth for their schools. As such, Black players leave school feeling disillusioned.⁸²

II. THE KU KLUX KLAN ACT AND ITS RELATIONSHIP TO SCHOOLS, TEACHERS, AND STUDENTS

My research offers a new approach to applying the Ku Klux Klan Act to conspiracies between school and NCAA officials to silence racism complaints. Part II.A is an original analysis of this law's legislative history. Lawmakers in 1871 were primarily concerned with the Klan's efforts to intimidate Black voters and their supporters,⁸³ and Klan violence against Black schools, teachers, and students. Part II.B explains the Act's

⁸⁰ BILLY HAWKINS, *THE NEW PLANTATION: BLACK ATHLETES, COLLEGE SPORTS, AND PREDOMINANTLY WHITE NCAA INSTITUTIONS* (2013).

⁸¹ Derek Van Rheenen, *Exploitation in College Sports: Race, Revenue, and Educational Reward*, 48 INT'L REV. FOR THE SOC. OF SPORT 550, 563 (2012); see also Garthwaite, *infra* note 243.

⁸² Stanley Eitzen, *FAIR AND FOUL: BEYOND THE MYTHS AND PARADOXES OF SPORT* (2009); Krystal K. Beamon, "*Used Goods*": *Former African American College Student-Athletes' Perception of Exploitation by Division I Universities*, 77 THE J. OF NEGRO EDUC. 352, 352 (2008).

⁸³ Gaj, *supra* note 19. Congress took testimony from victims of election violence:

John Thomas, colored, testified:

Question: State whether or not you were molested or otherwise ill-treated on or about or before the election of President and members of Congress on the 3d of November 1868; if so, tell all about it, from the beginning to the end.

Answer: I was whipped one time. They gave me a certificate, ticket, I mean, to vote; the Ku Klux whipped me. They told me if I did not vote the ticket there would be bad times afterward. I took and voted it; that is all; the ticket was Seymour and Blair. It was against my sentiment to vote that way.

Cong. Globe, 42d, 1st Sess. 287 (1871), <https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=100/llcg100.db&recNum=640>.

jurisprudential evolution.⁸⁴ This discussion includes the Supreme Court's *Kush v. Rutledge* ruling,⁸⁵ applying this law to a football player who sued the head football coach and athletic director at Arizona State University over witness intimidation in his lawsuit.

A. LEGISLATIVE HEARINGS FOR THE KU KLUX KLAN ACT OF 1871: THE KU KLUX KLAN'S TERROR CAMPAIGN AGAINST SCHOOLS FOR BLACKS

President Ulysses Grant urged Congress to crush the Ku Klux Klan's terror campaign by enacting a comprehensive law to enforce Reconstruction-era civil rights.⁸⁶ Republicans viewed the Klan's terror activities as a direct threat to the Fourteenth Amendment's civil liberties promise.⁸⁷ Klan groups, allied with the Democratic party, interfered with elections.⁸⁸ Congressional

⁸⁴ *Supra* note 9.

⁸⁵ *Supra* note 11.

⁸⁶ A detailed account appears in Avins, *supra* note 19, at 332, n.10, quoting Pres. Grant's message to Congress:

A condition of affairs now exists in some of the States of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate.... Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States..

⁸⁷ See Rep. Stevenson, stating: "The Ku Klux Klan endanger liberty, equal rights, and impartial suffrage." Cong. Globe, 42d, 1st Sess. 299 (1872), <https://memory.loc.gov/cgi-bin/ampage?collId=llcg&file Name=100/llcg100.db&recNum=652>.

⁸⁸ See Herbert Shapiro, *The Ku Klux Klan During Reconstruction: The South Carolina Episode*, 49 THE J. OF NEGRO HIST. 34 (1964), at 37—38:

The violence of the 1868 campaign reached a peak on Election Day. Extensive use was made of force to keep Negroes away from the polls. At White Hall and Greenwood, in Abbeville County, groups of armed whites drove Negroes away from the polls. Two Negroes were killed at White Hall. Testimony was offered that at Santuck in Union County a mob permitted only those with Democratic tickets to vote. In Laurens County Democrats lined up before the Court House poll and excluded Republican voters. At Rock Hill in York County some fifty Republican voters were forced from the poll. At some places economic

Republicans were alarmed by the suppression of freedom for Black people.⁸⁹

My analysis explores legislative accounts of the Klan's intimidation and terror directed at schools for Black students. These racially motivated attacks interfered with education for Black students by forcing teachers to move,⁹⁰ or by burning schools.⁹¹ This research is significant because it shows the Act was passed to protect education for Black students in the same way it secured their suffrage and participation in legal proceedings.

Legislative accounts were scattered over months of hearings.⁹² During this time, perhaps the worst Klan attack occurred in Louisiana: the St. Landry massacre.⁹³ It began when the Knights of the White Camelia, a Klan branch, savagely attacked a Black school. General Oliver O. Howard recounted:

pressure, either along with or instead of force, was used. Typical was the poll in Anderson County where the president of the local Democratic club took down the names of Republican voters for the purpose of giving preference in the renting of land to Negro Democrats.

Despite Republican outcries, the intimidation and violence of the 1868 campaign were not without political effect. The number of Negro voters dropped considerably. At White Hall precinct in Abbeville, according to Democratic and Republican witnesses, of 156 votes cast, four were by Negroes. At Due West precinct in the same county, of more than ninety voters, four again were Negroes. In the county as a whole, out of 4,200 enrolled Negro voters, only 800 were able to cast their ballots. In Laurens County 1,174 Negroes voted although 2,500 were registered. In Anderson between seven and eight hundred out of 1,400 voted.

⁸⁹ See Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 60 (2007) (“The framers of the Fourteenth Amendment viewed the Black Codes immediately after the Civil War as an attempt to return slavery by other methods and by another name.”).

⁹⁰ *Infra* note 100.

⁹¹ Cong. Globe, 42d Cong., 2d Sess. 395 (1872); Cong. Globe, 42d Cong., 1st Sess. 276 (1871).

⁹² *Id.*

⁹³ Lorraine Boissoneault, *The Deadliest Massacre in Reconstruction-Era Louisiana Happened 150 Years Ago*, Smithsonian Mag. (Sep. 28, 2018), <https://www.smithsonianmag.com/history/story-deadliest-massacre-reconstruction-era-louisiana-180970420/>.

The riot grew out of an assault of Emerson Bentley, an Ohio boy from Columbiana county, who was teaching school in Opelousas and editing a Republican paper. He was attacked in his school room among the children, revolvers were leveled on him while he was brutally beaten and warned away. The Ku Klux, apprehending resistance by the negroes, dispatched couriers to all parts of the parish and gathered their klans, who rallied to Opelousas, killing as they came.⁹⁴

In a different incident, Congress heard from a teacher, John Dunlap. The Klan kidnaped and whipped him for teaching Black students.

Question: Are you now, and at the time you were beaten, teaching in a school; and if so, was it in a public school?

Answer: I am now teaching the public school in this place for colored youth, and it was at this time I was beaten by the Ku Klux.⁹⁵

Dunlap testified the Klan came to his home in Shelbyville, Tennessee on July 4, 1868, surrounded it, and shot through the windows.⁹⁶ They took him hostage along with James Franklin, a “colored man” whose home in the same town was rampaged.⁹⁷ The Klan rode their hostages out of town on horseback, had them strip, and whipped them repeatedly.⁹⁸ Dunlap said the attack led to “cutting and bruising me in many places.”⁹⁹ He said the Klan terrorized him again after he moved from his small community to Nashville, Tennessee: “I was not disturbed again until the first Saturday night in January 1869 when about sixty disguised men, armed and mounted, rode into the public square, hallooming they wanted Dunlap and fried nigger meat.”¹⁰⁰

Rep. Luke Poland reported a similar school attack of a young teacher in Mississippi school for Black students:

⁹⁴ Cong. Globe, 42d Cong., 1st Sess. 296 (1871).

⁹⁵ *Id.* at 288.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Cong. Globe, 42d Cong., 1st Sess. 288 (1871); *see id.*

While thus quietly pursuing his duties the house where he lived was one night surrounded by a large body of armed and disguised men; he was taken by them from his bed in his night-clothes, and in that condition to a swamp at some distance and terribly beaten. He succeeded in escaping with his life. I asked him what they said to him and what reason, if any, they gave for the act. His answer was, ‘All they said to me was that they ‘would learn me not to come to Mississippi to make niggers as good as white folks.’¹⁰¹

Representative Job Stevenson reported several instances of racial terror in Black schools. He noted the Klan was “bitterly hostile to teachers because the illiterate look for instruction to the school house. They therefore warn away such citizens, and if the new warning be disregarded they scourge or kill them.”¹⁰²

In one account, William S. Halley, a teacher at a “colored school,” received a threatening letter at his house on July 8, 1868, from the Klan of Vengeance:

Villain, away. Ere another moon wanes, unless you are gone from the place thy foul form desecrates, thy unhallowed soul will be reveling in the hell thy acts here hath made hot for thee. William, eat heartily, and make glad thy carcass, for verily Pale Riders will help on thy digestion! . . . The secret serpent has hissed the last time! Beware! K.K.K.”¹⁰³

Representative Stevens also spoke of the Black teacher’s plight:

Malinda Gregory (colored) says— ‘That she has been teaching school until June 18, when the Ku Klux came and threatened her life if she did not quit teaching; that she, finding out that they really meant to execute their threat, left the country and came to Nashville.’¹⁰⁴

He also recounted successful resistance:

¹⁰¹ Cong. Globe, 42d Cong., 2d Sess. 494 (1872); *see id.*

¹⁰² Cong. Globe, 42d Cong., 1st Sess. 287 (1871).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

The masked Ku Klux has thus far shown himself to be a coward. The evidence discloses many example . . . A school-master with a half a dozen brave freedmen resisted fifty masks and drove them away.¹⁰⁵

Senator John Sherman addressed the Senate about what he observed in North Carolina:

Mr. President, is this not a specimen of barbarity which cannot be equaled in the records of any other nation now on the face of the world, where a harmless man teaching a school is taken at the dead hour of the night from his own home, from his wife, carried off a mile and a half in the woods, and there whipped and scoured and insulted in this way?¹⁰⁶

Klan violence against schools was part of a larger campaign to undermine racial equality in the South by destroying Black institutions. Senator Aldebert Ames of Mississippi informed his Senate colleagues: “Thirty churches and school-houses burned during Alcorn’s administration.”¹⁰⁷ Representative Charles Porter attributed the Klan’s racial terror to uneducated White people who feared a rising population of educated Black individuals.¹⁰⁸ By including a semiliterate letter from a Klan leader, Porter appeared to suggest white supremacists were motivated by the insecurity that Blacks would surpass them in education. The lawmaker put a violent letter into the legislative record.¹⁰⁹ It bore a cross-like heading, “Confederit + Roads”:

There can be no doubt ez to where the blame should rest. The niggers hev got an insane idea into them that they are reely citizens by virtoo uv the fifteenth amendment, notwithstanding the fact that every justice uv the peace in Kentucky has declared it unconstooshnol, and

¹⁰⁵ *Id.* at 299.

¹⁰⁶ *Id.* at 276.

¹⁰⁷ Cong. Globe, 42d Cong., 2d Sess. 395 (1872).

¹⁰⁸ *Id.*

¹⁰⁹ Cong. Globe, 42d, 1st Sess. 276 (1872),

<https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=100/llcg100.db&recNum=629>.

consekently void and uv no effect. They bleev they hev rights as citizens, and they won't be managed as they yoosed to be. They insist on bein paid for labor, which alluz irritates the southern mind, and they insist upon continyooaly insultin us by offerin their votes, wich aint to be tolerated for a minit.¹¹⁰

The letter documented burning a school for Black students:

The Corners hez bin agitatid recently at the report . . . that a committee was agoin to visit us for the purpose uv investigatin the trifflin matter uv the killin uv a few niggers and northern men in this part of Kentucky . . . Last Toosday I summoned the leedin citizens uv the Corners afore me in the back room of Bascom's and put em thro the most searchin cross examination. Captain Hugh McPelter wuz the first man examined. I swore the witness on a spellin-book, wich we capehered from the last nigger school-house wich was burnt last year.¹¹¹

Representative Stevenson described how affluent White people supported poor, aimless, and violent youth as racial allies to keep Black people down:

The masked and sheeted Ku Klux are executioners who volunteer or are assigned to execute the decrees of the Klan. They are the idle, wild young men who abound at the South, a class bred by slavery and fostered in rebellion. They are supported by better men, whose ends they serve.¹¹²

In a summarizing critique, Representative Maynard explained the Klan used racist slurs to maintain a rigid caste:

If any of you will take the trouble to examine the southern press, you will find it day after day and week after week,

¹¹⁰ *Id.*

¹¹¹ *Id.*, stating, "Seldom do they attack man until they disarm him . . . They cannot afford to be killed, wounded, or captured. Exposure would follow, trial, conviction, punishment; secrecy and mystery would be gone; and the whole conspiracy exploded."

¹¹² *Id.* at 299; *See also* Rep. Stevenson, stating that the "Ku Klux Klan endanger liberty, equal rights, and impartial suffrage."

reiterating and reverberating with the same sentiment, denouncing the colored man, the “nigger,” who is to every defeated rebel a standing monument of humiliation, denouncing him as governed by the very worst counsel, and acting under the very vilest passions, known to the human breast . . . When these things are rung in and rung out with every variety of aggravation upon a people who hear them and nothing else, you can very well understand how they go out on their nightly orgies of burning, scourging, and murder.¹¹³

This legislative history has been largely overlooked. Research shows lawmakers were concerned about racial violence directed at schools for Black students, which has significance for racism in college coaching. Congress could have limited Section 1985(3) to apply to “any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws.”¹¹⁴ However, they added a broader expression in the ellipsis of this quote—“or class of persons.”¹¹⁵ Scholars and courts have already observed the Act was poorly drafted, burdened by its confusing structure and terms.¹¹⁶ Courts have relied on legislative history to reveal the law’s meaning.¹¹⁷

This approach can be persuasive in lawsuits against athletic directors, school officials, and the NCAA. My research in this part shows lawmakers viewed students and teachers at Black schools as a class targeted for racial violence by the Klan. The Klan terrorized Black educational institutions, enabling former slaves to become their equals.¹¹⁸ Lawmakers also included terrorizing quotes from Klansmen,¹¹⁹ with references to racial slurs.¹²⁰

¹¹³ *Id.* at 309.

¹¹⁴ 42 U.S.C. § 1985(3) (1871).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* See also *United Bhd. of Carpenters and Joiners v. Scott*, 463 U.S. 825 (1983) (using legislative history to interpret the statute).

¹¹⁸ *Id.* Cong. Globe, 42d Cong., 1st Sess. 288 (1871).

¹¹⁹ *Id.*

¹²⁰ *Id.*

B. THE JURISPRUDENTIAL EVOLUTION OF THE KU KLUX KLAN ACT OF 1871

The Ku Klux Klan Act of 1871 was passed with five sections knitted together in a long, confusing tangle.¹²¹ Its immediate purpose was to eradicate the Klan and its reign of terror.¹²² The Supreme Court struck down the law's criminal

¹²¹ The best summary of the law appears in Kush, *supra* note 11, at 724—25. Because it provides clarity to such a poorly drafted law, it is quoted at length:

Although § 2 contained only one long paragraph when it was originally enacted, that single paragraph outlawed five broad classes of conspiratorial activity. In general terms, § 2 proscribed conspiracies that interfere with (a) the performance of official duties by federal officers; (b) the administration of justice in federal courts; (c) the administration of justice in state courts; (d) the private enjoyment of “equal protection of the laws” and “equal privileges and immunities under the laws”; and (e) the right to support candidates in federal elections. As now codified in § 1985, the long paragraph is divided into three subsections. One of the five classes of prohibited conspiracy is proscribed by § 1985(1), two by § 1985(2), and two by § 1985(3). The civil remedy for a violation of any of the subsections is found at the end of § 1985(3). The reclassification was not intended to change the substantive meaning of the 1871 Act.

Three of the five broad categories, the first two and the fifth, relate to institutions and processes of the federal government—federal officers, § 1985(1); federal judicial proceedings, the first portion of § 1985(2); and federal elections, the second part of § 1985(3). The statutory provisions dealing with these categories of conspiratorial activity contain no language requiring that the conspirators act with intent to deprive their victims of the equal protection of the laws. Nor was such language found in the corresponding portions of § 2 of the 1871 Act . . .

The remaining two categories, however, encompass underlying activity that is not institutionally linked to federal interests and that is usually of primary state concern. The second part of § 1985(2) applies to conspiracies to obstruct the course of justice in state courts, and the first part of § 1985(3) provides a cause of action against two or more persons who “conspire or go in disguise on the highway or on the premises of another.” Each of these portions of the statute contains language requiring that the conspirators' actions be motivated by an intent to deprive their victims of the equal protection of the laws.

¹²² *United Bhd. of Carpenters and Joiners v. Scott*, 463 U.S. 825, 836 (1983) (§1985(3) was to neutralize attacks against Blacks and their supporters).

provisions in 1883.¹²³ This ruling reflected broad judicial hostility to Reconstruction-era civil rights laws.¹²⁴ Judicial curtailment of the Act extended to the twentieth century.¹²⁵ For nearly 80 years, the Act lay dormant.¹²⁶ *Griffin v. Breckenridge*, a landmark case in 1971, revived Section 1985(3).¹²⁷ This section provides a civil

¹²³ In *United States v. Harris*, 106 U.S. 629 (1883), the Court declared the criminal conspiracy section of the Ku Klux Klan Act of 1871 unconstitutional.

¹²⁴ Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L.REV. 1323 (1952), at 1357:

The civil rights program of the Reconstruction era has thus come down to a pitiful handful of statutory provisions, most of which are burdened by the dead weight of strict constructionism. The great fervor with which the elected representatives of the people decided to nationalize civil rights has been ‘cooled by the breath of judicial construction (citation omitted).’ One by one, the constitutional amendments and the civil rights statutes have been blown down by that breath. The few stark remnants that remain are mute testimony to the power of the judiciary to render impotent the expressed will of the people.

¹²⁵ *James v. Bowman*, 190 U.S. 127, 142 (1903); *Hodges v. United States*, 203 U.S. 1, 10 (1906), *overruled by Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968).

¹²⁶ *Collins v. Hardyman*, 341 U.S. 651, 661 (1951), marked a major setback in efforts to revive Section 1985(3). The law was revived, however, after courts were presented with evidence of congressional intent behind Section 1985(3). *See, e.g., Byrd v. Sexton*, 277 F.2d 418, 427 (8th Cir. 1960) (“We are impressed here with the particular history and origin of these sections, with their specific original purpose and with their dormancy until recent years.”). This court also attributed resourceful plaintiffs’ lawyers for invoking “the application of the Civil Rights Act in situations far removed from those which were no doubt predominantly in the minds of the members of Congress in 1871 when they first enacted the legislation.” *Id.* *See also Koch v. Zuieback*, 194 F.Supp. 651, 657 (S.D. Cal. 1961) (“[T]he fact that they were initially designed for a particular purpose, coupled with the fact of slipshod draftsmanship, has resulted in a deep suspicion of these laws and a judicial reluctance to apply them in any but the most limited situations”).

¹²⁷ 403 U.S. 88, 101—04 (1971). The Black plaintiffs who sued under Section 1985(3) sought compensatory and punitive damages from two white men who beat them with deadly weapons. *Id.* at 89. *Griffin* quoted the text of that law, including its provision that “the party so injured or deprived may have an action for the recovery of damages,

remedy for a private conspiracy depriving a person of equal protection, privileges, or immunities based on their race or class.¹²⁸

Section 1985(3) applies to conspiracies motivated by racial animus.¹²⁹ In the 1970s, courts began to broaden the law's scope beyond race.¹³⁰ These later cases involved the law's

occasioned by such injury or deprivation, against any one or more of the conspirators.” *Id.* at 92.

¹²⁸ Eugene Griffin and other Black men were stopped in their car by White men who mistook them as civil rights activists and beat them. Reading the law's text, examining its legislative history, and comparing it to related provisions in the Ku Klux Klan Act, the Court concluded that Congress intended this statute to reach private conspiracies. *Id.* at 101. Griffin also concluded that “the varieties of private conduct that [Congress] may make criminally punishable or civilly remediable [under Section Two of the Thirteenth Amendment] extend far beyond the actual imposition of slavery or involuntary servitude.” *See also* 403 U.S. at 105.

¹²⁹ *See Crumsey v. Just. Knights of the Ku Klux Klan*, No. 1-80-287, slip op. at 690 (E.D. Tenn. 1982), reported in Charles H. Jones, *An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment*, HARV. C.R.-C.L. L. REV. 689 (1986) (shooting of five Black women by Klansmen results in judgment of \$535,000 under Section 1985(3) and injunction prohibiting Klan from engaging in violence and entering Black community); *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F.Supp. 993, 993 (S.D.Tex. 1981) (section 1985(3) injunction following cross burning and shooting a cannon directed at Vietnamese fishermen).

¹³⁰ *See, e.g., Glasson v. City of Louisville*, 518 F.2d 899, 912 (6th Cir. 1975) (supporters of a political candidate); *Weise v. Syracuse Univ.*, 522 F.2d 397, 397 (2d Cir. 1975) (female faculty members); *Means v. Wilson*, 522 F.2d 833, 833 (8th Cir. 1975) (Indian supporters of a political candidate); *Marlowe v. Fisher Body*, 489 F.2d 1057, 1057 (6th Cir. 1973) (Jewish employees); *Smith v. Cherry*, 489 F.2d 1098, 1098 (7th Cir. 1973) (voters who were deceived as to the effect of their vote); *Cameron v. Brock*, 473 F.2d 608, 608 (6th Cir. 1973) (supporters of a political candidate); *Azar v. Conley*, 456 F.2d 1382, 1382 (6th Cir. 1972) (middle class white family); *Action v. Gannon*, 450 F.2d 1227, 1227 (8th Cir. 1971) (members of a predominantly white Catholic parish); *Harrison v. Brooks*, 446 F.2d 404, 404 (1st Cir. 1971) (married couple); *Richardson v. Miller*, 446 F.2d 1247, 1247 (3d Cir. 1971) (persons who advocated racial equality in employment opportunities).

enigmatic use of “class.”¹³¹ Claims by women¹³² and the disabled¹³³ alleging class-based interference with rights have often failed.¹³⁴ Courts have resisted interpreting class to mean “any group of people”—instead, they have limited Section 1985(3) to animus against a group experiencing prejudice.¹³⁵

¹³¹ *Trautz v. Weisman*, 819 F.Supp. 282, 291 (S.D.N.Y.1993), explains the lack of precision around “class,” observing: “The best that can be said of § 1985(3) jurisprudence thus far is that it has been marred by fits and starts, plagued by inconsistencies, and left in flux by the Supreme Court.” See also Note, Matthew C. Hans, *Lake v. Arnold: The Disabled and the Confused Jurisprudence of at 42 U.S.C. § 1985(3)*, 15 J. CONTEMP. HEALTH L. & POL’Y 673, 696 (1999).

Earlier, the Supreme Court tried to clarify the meaning of “class” in Section 1985(3). See *United B’hd of Carpenters and Joiners of America v. Scott*, 463 U.S. 825 (1983). However, the facts in that case were so atypical that the decision failed to clear up questions of interpretation. *Id.* at 839. The Court ruled that class-based animus does not extend to group of nonunion workers who alleged that union workers conspired to assault them for crossing a picket line at a construction site. *Id.* at 838. Rejecting the Section 1985(3) claims of injured nonunion workers, the Court concluded that Griffin limited §1985(3) “to combat the prevalent animus against Negroes and their supporters. The latter included Republicans generally, as well as others, such as Northerners who came South with sympathetic views towards the Negro.” *Id.* at 836.

¹³² *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 286 (1993) (ruling that abortion providers who seek to enjoin protesters from blocking access to their clinics, thereby depriving women their constitutional right to terminate a pregnancy, lack Section 1985(3)’s requirement of invidious animus because protesters oppose abortion but not women as a group).

¹³³ *D’Amato v. Wis. Gas Co.*, 760 F.2d 1474, 1474 (7th Cir.1985) and *Wilhelm v. Cont’l Title Co.*, 720 F.2d 1173, 1173 (10th Cir. 1983) held that disabled individuals do not fall within the purview of Section 1985(3). For cases holding that disabled people may state a claim under Section 1985(3), see *Lake v. Arnold*, 112 F.3d 682, 682 (3d Cir. 1997); *People by Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 34 (2d Cir. 1982), *vacated in part on other grounds*, 718 F.2d 22 (2d Cir. 1983).

¹³⁴ *Kush*, *supra* note 11.

¹³⁵ *Warner v. Greenebaum*, 104 Fed.Appx. 493, 493 (6th Cir. 2004) (environmentalists not a class); *Johnson v. Hettleman*, 812 F.2d 1401, 1401 (4th Cir. 1987) (“Section 1985(3) does not encompass conspiracies motivated by economic, political or commercial animus.”); *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340, 340 (5th Cir. 1981) (employees who file workers compensation claims are not a racial or

Some courts have applied Section 1985(3) to conspiracies motivated by animus against Republicans and other political groups,¹³⁶ equal rights advocates for Blacks,¹³⁷ and religious groups.¹³⁸

The Supreme Court applied a related provision of the Act, Section 1985(2)(ii), in *Kush*.¹³⁹ This law prohibits private actor conspiracies from denying equal protection by interfering with courts.¹⁴⁰ Remarkably, this case involved a college football coach, Kush, violently attacking his punter, Kevin Rutledge, in a game.¹⁴¹ After Kevin Rutledge sued the coach, he alleged the coach and athletic director at Arizona State University interfered with his lawsuit by intimidating witnesses.¹⁴² Kush and other officials argued no racial animus existed and the Act did not apply because

political class); *Browder v. Tipton*, 630 F.2d 1149, 1149 (6th Cir. 1980) (picket-line crossers who were falsely accused of criminal conduct in a labor dispute were not a class protected); *McLellan v. Miss. Power & Light Co.*, 545 F.2d 919, 925—26 (5th Cir. 1977) (bankrupt persons not a class); *Lopez v. Arrowhead Ranches*, 523 F.2d 924, 924 (9th Cir. 1975) (citizens have no fundamental right to a job); *Hughes v. Ranger Fuel Corp.*, 467 F.2d 6, 6 (4th Cir. 1972) (environmentalists are not a class); *O’Neill v. Grayson Co. Hosp.*, 472 F.2d 1140, 1140 (6th Cir. 1973) (county hospital’s refusal to grant admitting privileges to a physician not a form of invidious discrimination); *Place v. Shepard*, 446 F.2d 1239, 1246 (6th Cir. 1971) (hostile treatment of a nurse who criticized hospital care did not allege racial or class-based discrimination). *Cf.*, *Westberry v. Gilman Paper Co.*, 507 F.2d 206, 206 (5th Cir. 1975) (environmentalist may be part of a class where there is a murder conspiracy claim). More recent federal district court rulings have followed this trend. *See Ruff-El v. Nicholas Fin. Inc.*, 2012 WL 252134, at *4 (S.D. Ohio Jan. 26, 2012) (failure to state class-based animus in a claim against seizure of personal property); *Friedrich v. Se. Christian Church of Jefferson Cnty.*, 2005 WL 2333638, at *4 (W.D. Ky. Sept. 22, 2005) (animal rights activists arrested for protesting are not a class).

¹³⁶ *Keating v. Carey*, 706 F.2d 377, 387 (2d Cir. 1983) (“In our view, Congress did not seek to protect only Republicans, but to prohibit political discrimination in general.”).

¹³⁷ *Id.* at 386—88.

¹³⁸ *See, e.g., Ward v. Connor*, 657 F.2d 45, 48 (4th Cir. 1981) (“[R]eligious discrimination, being akin to invidious racial bias, falls within the ambit of §1985(c).”).

¹³⁹ *Kush*, *supra* note 11, at 720.

¹⁴⁰ *Id.* at 725.

¹⁴¹ *Id.* at 720—721.

¹⁴² *Id.*

the player and coach were both White.¹⁴³ The Court rejected this view, and held Section 1985(2)(ii)'s text prohibits conspiracies to deny equal protection by interfering with courts, regardless of racial animus.¹⁴⁴

More recently, the Court applied Section 1985(2)(i-ii) in *Haddle v. Garrison*¹⁴⁵ to an at-will employee who was fired in retaliation for cooperating with federal authorities in a Medicare fraud investigation.¹⁴⁶ The Court ruled the “gist of the wrong at which § 1985(2) is directed is not deprivation of property, but intimidation or retaliation against witnesses in federal-court proceedings.”¹⁴⁷ Significantly, the court found alleging third-party interference with at-will employment relationships was a claim for relief under § 1985(2).¹⁴⁸

Although *Haddle* was a federal lawsuit, it shows a player who complains to an athletic director about a coach's racism is similar to an employee who opposes his employer's fraudulent practices. Both situations involve wrongdoers whose fear of exposure to legal proceedings leads them to interfere with independent investigations.

¹⁴³ *Id.* at 726.

¹⁴⁴ *Id.*

¹⁴⁵ 525 U.S. 121, 127.

¹⁴⁶ *Id.* at 123. *Haddle*'s employer was in bankruptcy when his fired-superiors conspired with a remaining company officer to terminate *Haddle*'s employment. *Id.* The conspiracy was meant to intimidate *Haddle* and retaliate against him for answering a grand jury summons. *Id.*

¹⁴⁷ *Id.* at 125.

¹⁴⁸ *Id.* at 126.

III. APPLYING THE KU KLUX KLAN ACT TO CONSPIRACIES TO SILENCE PLAYER COMPLAINTS OF COACHING RACISM

This Article suggests a new approach for applying the Act to conspiracies between NCAA and school officials to silence players who complain about coaching racism. Table 1 diagrams a hypothetical conspiracy. This table describes each step in the conspiracy. Part III.B discusses events at the University of Illinois at Urbana-Champaign that plausibly fit within the Table 1 model. These public sources suggest a conspiracy, but no conclusive evidence of wrongdoing exists.

A. MODEL OF A CONSPIRACY BETWEEN NCAA OFFICIALS AND A SCHOOL: SILENCING COMPLAINTS OF RACIST TREATMENT OF PLAYER

A model imputing liability to school officials who handle complaints of coaching racism by intentionally delaying or impeding information gathering should be imposed because the Act pertains to concealed conspiracies. The statute references secretive racial conspiracies, saying “two or more persons in any State . . . (who) conspire or *go in disguise*”¹⁴⁹ to deprive “any person or class of persons of the equal protection of the laws (emphasis added).”¹⁵⁰ The model below is a graphical attempt to diagram a racial conspiracy indicating concealment. Additionally, coaching racism is real. This model offers a litigation theory to address this problem. Pretrial tools such as subpoenas, discovery, and depositions, can unearth more information than research for a law review article.

¹⁴⁹ *Id.* at 124 n.1.

¹⁵⁰ *Id.*

Table 1A
Hypothetical Conspiracy Between NCAA and School:
Silencing Complaints of Racist Treatment of Player



Table 1B
**Sequence of Hypothetical School-NCAA Conspiracy to
Silence Player Complaint of Coaching Racism**

First, Coach A (Box 1) uses a racist epithet, slur, insult, or threat in the player's presence (Box 2).

Second, the player (Box 2) reports the incident to a School A official (Box 3).

Third, School A (Box 3) makes an initial assessment to determine the complaint's credibility.

Fourth, if the complaint is credible, and the player is unsatisfied with the school's response, School A (Box 3) promises to release the player (Box 2) without limiting his transfer, with the understanding he pursues no legal redress and keeps silent.

Fifth, to effectuate School A's agreement with the player, a school official communicates the situation to the NCAA (Box 4).

Sixth, the NCAA (Box 4) requests School A (Box 3) to address the complaint by taking remedial action.

Seventh, the NCAA (Box 4) communicates the possibility of a transfer waiver to the School A (Box 3), and School A (Box 3) discloses this information to the player (Box 2).

Eighth, the player (Box 2) is released from the scholarship by the School A (Box 3), and contacts School B (Box 5 and Box 6) to transfer.

Ninth, the NCAA (Box 4) informs School B the player (Box 2) has a release and may be granted a transfer-restriction waiver.

Tenth, School B (Box 5) offers the player (Box 2) a scholarship.

Eleventh, before the next season starts, the NCAA (Box 4) approves the player's (Box 2) petition for a waiver of the transfer penalty, after the player maintains silence for some time.

Twelfth, after the player (Box 2) fulfills his part of the agreement by making no complaint of race discrimination to a federal or state court, the NCAA grants him immediate eligibility (Box 7).

B. APPLYING THE NCAA-SCHOOL CONSPIRACY MODEL:
 CASE STUDY OF THE RACIAL HARASSMENT COMPLAINT
 AGAINST THE UNIVERSITY OF ILLINOIS'S MEN'S
 BASKETBALL COACH IN 2017-2018 SEASON

1. *INVESTIGATING UNIVERSITY OF ILLINOIS BASKETBALL
 COACH OVER RACIAL HARASSMENT: A BLACK PLAYER WHO
 TRANSFERRED WITH AN NCAA WAIVER WITHOUT LOSING
 ELIGIBILITY*

On April 12, 2019, the Division of Intercollegiate Athletics (DIA) at the University of Illinois at Urbana-Champaign (UIUC) issued a thirty-five page press release concerning claims of abuse and racial harassment by its men's basketball coach.¹⁵¹ DIA received allegations about Coach Brad Underwood's "communication style and interactions with student-athletes on his team . . ." ¹⁵² These communications consisted of "abuse, racial harassment, and punitive use of physical activity."¹⁵³ The press release "specifically discredited" these allegations.¹⁵⁴ The publicly reported events below, from first through eleventh, are direct quotes from published sources. The sequence corresponds to the hexagons (called boxes, *infra*) in Table 1A:

First, a coach (Box 1) uses a racist epithet, slur, insult, or threat in the player's presence (Box 2).

The allegations against Underwood after the 2017-18 basketball season, accused the coach of "verbal abuse, racial harassment and punitive use of physical activity," according to a summary released by the Division of Intercollegiate Athletics following media inquiries.¹⁵⁵

¹⁵¹ The events in the timeline are based on reporting in *UIUC Division of Intercollegiate Athletics, THE-MARK-SMITH-REPORT* (April 4, 2019), <http://illinireport.info/wp-content/uploads/2019/04/The-Mark-Smith-Report.pdf>.

¹⁵² *Id.* at 1.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Julie Wurth, *Underwood Cleared in Probe, but Faculty Questions Remain*, *NEWS-GAZETTE* (April 12, 2019), <https://www.news->

Second, the player (Box 2) reports the incident to a school official.

In an interview with News-Gazette Media, Underwood and (Athletic Director) Whitman refused to provide more details or say whether it was a former or current player, parent or someone else who lodged the complaints, in order to protect the identity of those involved.¹⁵⁶

Third, the university (Box 3) makes an initial assessment to determine the complaint's credibility.

"Needless to say, the allegations were sufficiently concerning that obviously we thought it was appropriate to take immediate action and to look into the matter more carefully," Whitman said.¹⁵⁷

Fourth, the school (Box 4) promises to release the player (Box 2) if this individual is unsatisfied with the school's response. The player's transfer is not limited given the understanding he may not pursue legal redress and must keep the matter silent.

"I had a chance to work with Missouri on the substance of the waiver for Mark, and I felt comfortable with the contents of that waiver. I felt comfortable with the justification that they provided. I would not have supported the waiver for Mark if the justification was something that made me feel uncomfortable or was inaccurate," Whitman said.¹⁵⁸

Fifth, the school communicates the situation to the NCAA (Box 4).

Smith received a waiver from the NCAA to play at Missouri this year, *which Whitman signed off on*. Whitman wouldn't comment on whether the waiver was

gazette.com/news/underwood-cleared-in-probe-but-faculty-questions-remain/article_dd6d526d-7d90-5004-a3de-1aa96316fddf.html.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

related to the allegations against Underwood (emphasis added).¹⁵⁹

Sixth, the NCAA (Box 4) requests the school (Box 3) to address the complaint by taking remedial action. The NCAA's role in remediating this coach's behavior may not exist in a record, but a news report contains information about the school's remediation approach:

However, Whitman also said he had spoken to Underwood before the allegations surfaced about ways to improve his "use of language" and his interactions with players.

"I saw notable changes in the way he interacted with the team this year," Whitman told News-Gazette Media. "He coaches in a certain way, and I don't expect him to change the way he coaches. He's intense, he creates an environment where he makes his players uncomfortable to get them to go places they didn't think they could go. I think that's important for our program to grow and improve."¹⁶⁰

Seventh, the NCAAA communicates the possibility of a player transfer waiver to the school. The school (Box 3) then discloses this information to the player (Box 2).

(Mark) Smith, joined by his dad Anthony and his mom Yvonne, met with Illinois athletic director Josh Whitman, who granted a scholarship release that should be finalized by mid-week. Smith moved off campus Sunday and will finish the semester as a student at Illinois while making a decision on his next school.¹⁶¹

...

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Greg Shashack, *Edwardsville's Smith Leaving Illinois - "I Just Don't Fit the System,"* THE TELEGRAPH (March 5, 2018), <https://www.thetelegraph.com/sports/article/COLLEGE-MEN-8217-S-BASKETBALL-12729192.php>.

Smith received a waiver from the NCAA to play at Missouri this year, which Whitman signed off on. Whitman wouldn't comment on whether the waiver was related to the allegations against Underwood.¹⁶²

Eighth, the school (Box 3) releases the player (Box 2) from his scholarship, and the player contacts School B (Box 5 and Box 6) to transfer.

Smith announced his transfer to the University of Missouri on April 15. At this time, he still was under an NCAA rule that would require him to sit out and lose that year of eligibility.¹⁶³

Ninth, the NCAA (Box 4) informs School B that the player (Box 2) has a scholarship release and may qualify for a transfer-penalty waiver.

Missouri added some quality depth to its rotation on Friday night as the program announced that Illinois transfer Mark Smith will be immediately eligible for the 2018-19 season after receiving a waiver from the NCAA.¹⁶⁴

Tenth, School B (Box 5 and Box 6) offers the player (Box 2) a scholarship.

Welcome to the #Mizzou Family @ Mark_Smith_13!
Signed Mark Smith.¹⁶⁵

¹⁶² The events in the timeline are based on reporting in *UIUC Division of Intercollegiate Athletics*, *supra* note 151.

¹⁶³ Dave Matter, *Mizzou Basketball Lands Illinois Transfer Mark Smith*, ST. LOUIS POST-DISP. (April 15, 2018).

¹⁶⁴ Scott Phillips, *Missouri's Mark Smith Receives NCAA Waiver for Immediate Eligibility*, NBCSPORTS (Oct. 27, 2018), <https://collegebasketball.nbcsports.com/2018/10/27/missouris-mark-smith-receives-ncaa-waiver-for-immediate-eligibility/>.

¹⁶⁵ @Mizzou Hoops (10:33 a.m., April 16, 2018), republished in Josh Matejka & Tashan Reed, *Rounding Up Mizzou's 2018 Recruiting Class: The Transfers*, ROCK M NATION (May 17, 2018), <https://www.rockmnation.com/2018/5/17/17330288/missouri-basketball-2018-kj-santos-mark-smith>.

Eleventh, the NCAA (Box 4) approves the player's (Box 1) petition for a waiver of the transfer penalty before the next season starts.

The NCAA granted Smith an immediate waiver to play at Missouri on or about October 27, 2019.¹⁶⁶

Twelfth, the player (1) does not complain about underlying racial discrimination to a federal or state court. Through July 21, 2020 I researched legal databases in PACER, Westlaw, Bloomberg Law, and the Champaign County Illinois Circuit Court and found no recorded lawsuit filed by Mark Smith against the University of Illinois at Urbana-Champaign, its athletic officials, coach, or other university employees.

2. INVESTIGATING UNIVERSITY OF ILLINOIS BASKETBALL COACH OVER RACIAL HARASSMENT: TWO BLACK PLAYERS TRANSFERRED RESULTING IN LOSS OF ELIGIBILITY FOR ONE SEASON AND NO NCAA WAIVER

An April 12, 2019 press release announced six Illinois players were departing with remaining eligibility.¹⁶⁷ The press release gave a vague time frame for the player allegations, stating they were received after the 2017-18 men's basketball season, but before the 2018-19 season.¹⁶⁸ These times mark the beginning and endpoints in Table 2, from late February, when one season ended, to October, when the next season began. The press release also obscured the time when the investigation occurred: "The review, which took nearly a month to prepare, execute, and conclude, included interviews with all *returning* scholarship men's basketball student-athletes."¹⁶⁹ Nonetheless, this establishes the

¹⁶⁶ Phillips, *supra* note 164.

¹⁶⁷ The events in the timeline are based on reporting in *UIUC Division of Intercollegiate Athletics*, *supra* note 151. The press release did not reference the six players. For this information, see Shannon Ryan, *Brad Underwood's 2nd Roster, With 8 Newcomers, Means Another Illinois Team Requires Patience*, CHICAGO TRIB. (Oct. 11, 2018).

¹⁶⁸ *UIUC Division of Intercollegiate Athletics*, *supra* note 151, at 1—2.

¹⁶⁹ *Id.* at 1.

investigation commenced only after scholarship players returned for the 2018-2019 academic year. Notably, investigation of team members did not begin in early March when Mark Smith and his parents met with the Illinois athletic director.¹⁷⁰

The report did not state how many players were included in the investigation. Table 2A depicts the investigation using the press release and other public sources. It focused on four players— the “*returning* scholarship men’s basketball student-athletes”¹⁷¹— excluding six scholarship players who left Illinois with remaining eligibility. The investigation may have added returning walk-on players, including the coach’s son.

¹⁷⁰ *Id.* at 8 (“Both of our colleagues informed us they were aware of the allegations. They told us the matter had been investigated in September, and they participated in the investigation.”).

¹⁷¹ *Id.*

Table 2A Investigating Allegations Into Coach Underwood’s “Verbal Abuse, Racial Harassment, and Punitive Use of Physical Activity”				
	Included in Investigation	NCAA Waived Art. 14.5.5.1 Transfer Rule	Ended College Basketball Career	Player’s Race
Scholarship Players with Remaining Eligibility Who Left Illinois After 2017—2018 (Date of Publicizing Departure)				
Mark Smith* (March 5, 2018)	Not Likely	Yes	No	Black
Te’Jon Lucas* (March 26, 2018)	Not Likely	No	No	Black
Greg Eboigbodin* (June 7, 2018)	Not Likely	No	No	Black
Leron Black (March 15, 2018)	Not Likely	N/A (Pro)	Yes	Black
Michael Finke (March 26, 2018)	Not Likely	N/A (Grad)	No	White
Matic Vesel (April 25, 2018)	Not Likely	(Left U.S.)	Yes	White
Scholarship Players with Remaining Eligibility Who Returned to Illinois After 2017—2018				
Trent Frazier	Likely	Not Apply	No	Black
Da’Monte Williams	Likely	Not Apply	No	Black
Trent Frazier	Likely	Not Apply	No	Black
Kipper Nichols	Likely	Not Apply	No	Black
Bold Font Highlights Players and Circumstances for Analysis of Section 1985(2) (clause ii) and Section 1985(3) claims in Part V				

The DIA press release failed to answer questions germane to the analysis in Section 1985(2)(ii) and Section 1985(3) Part V. These questions suggest the possibility of a conspiracy to silence coaching racism complaints.

1. Why did the school limit its investigation to returning players? Why did the press release fail to mention six scholarship players left after the 2017-2018 season?¹⁷²

2. Why did the April 2019 press release state that “(c)laims related to racial harassment and punitive use of physical activity were *specifically discredited* (emphasis added)”¹⁷³ when the press release said only returning players were investigated? The exclusion of the transferring players from the investigation undermines the DIA’s exculpatory statement.

3. The press release stated, “In addition, Whitman ... communicated directly with the source of the original allegations to better understand those concerns and to build evaluation of those claims into the review process.”¹⁷⁴ Did this communication express support for a transfer waiver in exchange for signing a confidentiality agreement?

4. The press release occurred more than two weeks after a second Black player, Te’Jon Lucas, announced he was leaving Illinois with remaining eligibility. Considering Illinois spoke to only one source in spring 2018, but two Black players with remaining eligibility separately announced transfers in March,

¹⁷² The six players were Mark Smith, Te’Jon Lucas, Greg Eboigbodin, Michael Finke, LeRon Black, and Matic Vesel. For the dates the players announced their intention to leave Illinois, see Alex Brzezinski, *Mark Smith to Transfer from Illinois*, SPORTING NEWS (Mar. 5, 2019), <https://www.sportingnews.com/us/basketball/news/mark-smith-to-transfer-illinois-college-basketball/1t8tz1yjcaqx1fdtnjw376rbo>; Shannon Ryan, *Illinois Forward Leron Black Leaving to Pursue Pro Career*, CHICAGO TRIBUNE (Mar. 15, 2018), <https://www.chicago.tribune.com/sports/college/ct-spt-illinois-leron-black-leaving-20180315-story.html>; *Illinois’ Finke, Lucas decide to Transfer*, ASSOCIATED PRESS (Mar. 26, 2018), <https://apnews.com/article/f4b7efc93e38421b8cc02948a6acb614>; Stephen Cohn, *Matic Vesel Will Not Return to Illinois Basketball, Per Derek Piper*, THE CHAMPAIGN ROOM (Apr. 25, 2018), <https://www.thechampaignroom.com/2018/4/25/17083394/matic-vesel-intends-to-transfer-illinois-fighting-illini-slovenia-basketball-big-ten-mark-smith>; Jeremy Werner, *Te’Jon Lucas: ‘I still love Illinois,’* ILLINI INQUIRER (Apr. 25, 2018), <https://247sports.com/college/illinois/Article/TeJon-Lucas-discusses-his-transfer-from-Illinois-to-UW-Milwaukee-117676130/>; Derek Piper, *Greg Eboigbodin Will Transfer from Illinois*, ILLINI INQUIRER (June 7, 2018), <https://247sports.com/college/illinois/Article/Sophomore-center-Greg-Eboigbodin-will-transfer-from-Illinois-Fighting-Illini-118811247/>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

how could the press release say “(c)laims related to racial harassment and punitive use of physical activity were *specifically discredited*”?¹⁷⁵

5. Following the press release becoming public, a news interviewer asked the athletic director why the “six players who left the program last year were not interviewed as part of the Underwood investigation.”¹⁷⁶ The athletic director “said they had all done exit interviews before graduating or leaving the university, a standard practice.”¹⁷⁷ He added: “We had just spoken to each of those individuals and felt like we had a good pulse on their experience . . . and nothing had been brought to our attention that resonated with any of these allegations.”¹⁷⁸ Why were standard exit interviews used as a proxy for investigation into allegations of misconduct?

¹⁷⁵ Wurth, *supra* note 155.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

Table 2B
Timeline Investigating
Illinois Men’s Basketball Coach

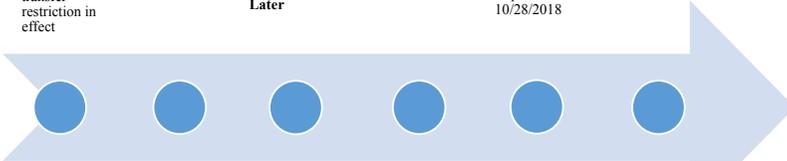
Mark Smith Leaves Illinois Following 2017-2018 Season

- Illinois season ends (02/28/2018)
- Smith meets with AD, receives promise for release to transfer (03/05/2018)
- Smith leaves Illinois team (03/06/2018)
- Smith transfers to Missouri in April with NCAA transfer restriction in effect

No Investigation from March 5, 2018 - August 24, 2018 or Later

NCAA Grants Transfer Waiver to Mark Smith

- NCAA Waiver for Mark Smith Reported on 10/28/2018



Five More Illinois Players Leave Illinois Basketball

- Leron Black turns pro (03/15/2018)
- Te'Jon Lucas announces transfer (03/26/2018)
- Michael Finke announces graduate transfer (03/26/2018)
- Matic Vasel returns to Slovenia (04/25/2018)
- Greg Eboigbodin transfers to Northeastern (06/07/2018)

Investigation Begins with "Returning" Scholarship Players

- School year starts on 08/27/2018
- Investigation lasts a month
- Two Faculty Reps, Chief Integrity Officer, and Senior AD conduct investigation

Te'Jon Lucas and Greg Eboigbodin Sit Out Next Season Due to Transfer Restriction in Art. 14.5.5.1

Te'Jon Lucas Sits Out 2018-2019 Season at Wisconsin-Milwaukee
 Greg Eboigbodin Sits Out 2018-2019 Season at Northeastern

Part III concludes by assessing my model in Part III.A and timeline of events in Part III.B. In a Section 1985 complaint, a plaintiff must show (1) the conspiracy exists; (2) a conspiratorial purpose to deprive a person or class of persons of a civil right; (3) committing an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff.¹⁷⁹ The model in Table 1A is potentially helpful to plaintiffs in the first and third elements because it depicts unusual communications between a player and an athletic director, and the NCAA and the school where the athlete transfers.

Due to incomplete information, my model is weaker for the second and fourth elements. A player would have no injury if his only intention was to transfer without contemplating legal action and the transfer was granted with no conditions. That scenario is possible in the Illinois case. Then, no evidence of a conspiratorial purpose would exist. Also, if the player was free to comment on allegations his coach engaged in racial harassment, or free to pursue legal action, these conditions would significantly weaken a claim the other transferring Black players were injured by a cover-up. These conditions would indicate that the complaining player was not silenced.

IV. LEGAL ANALYSIS OF A RACIAL HARASSMENT COMPLAINT AGAINST A COACH

The analysis in Part III began with an abstract model and added publicly reported facts matching the model's elements with varying degrees of closeness. In Part IV, the analysis applies Section 1985(2)(ii) to the player who received a transfer waiver, and Section 1985(3) to two Black players who transferred close in time without a waiver. This demonstrates the players could state claims under Section 1985 at least to survive a motion to dismiss.

¹⁷⁹ The first clause in Section 1985(3) pertains to overt actions of intimidation by the conspirators, including "to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court," and related forms of obstructing a witness or party involved in a federal court proceeding. *See* 42 U.S.C. § 1985(2)—(3). Smith's waiver resulted between Illinois and Missouri, with no evidence of force, intimidation, or threat by anyone at these schools.

A. A PLAUSIBLE SECTION 1985(2) (CLAUSE II) CONSPIRACY

The analysis proceeds on the possibility Illinois had a confidentiality agreement with a transferring player. This inference comes from the athletic director's published interview, where he stated: "I had a chance to work with Missouri on the substance of the waiver for Mark, and I felt comfortable with the contents of that waiver."¹⁸⁰ This quote indicates a negotiation over formal agreement's substantive terms. Because the University of Missouri worked on the waiver, it could mean the terms applied to Smith after his departure from Illinois and during his enrollment at his new school. The analysis focuses on Section 1985(2)(ii) because no background facts suggest Smith's waiver implicated the more coercive terms in clause i.¹⁸¹ Clause ii, in contrast, plausibly fits Smith's circumstances. The analysis below tracks the complaint's requirements under Section 1985(2).

The Requirement of a "Conspiracy" Between "Two or More Persons": For clause ii, Section 1985(2) requires proof of a conspiracy between two or more persons. A plaintiff must present evidence of overt action to further the conspiracy.¹⁸² This element could relate to the Illinois athletic director and officials at the NCAA. A news report stated "Smith received a *waiver from the NCAA* to play at Missouri this year, *which Whitman signed off on* (emphasis added)."¹⁸³ "Signed off on" plausibly refers to an agreement between the NCAA and athletic director.

The Conspiracy's Purpose Must be to Impede, Hinder, Obstruct, or Defeat, in any Matter, the Due Course of Justice. During an interview, the Illinois athletic director suggested a possible connection between his discussions with the basketball

¹⁸⁰ Wurth, *supra* note 155.

¹⁸¹ The first clause in Section 1985(3) pertains to overt actions of intimidation by the conspirators, including "to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court," and related forms of obstructing a witness or party involved in a federal court proceeding. *See* 42 U.S.C. § 1985(2)—(3). Smith's waiver resulted from between Illinois and Missouri, with no evidence of force, intimidation, or threat by anyone at these schools.

¹⁸² State officers are "persons" liable for Section 1985(2) violations. *See, e.g.,* Kush, *supra* note 11, where a coach, assistant coach, and athletic director were sued along with their school's board of regents.

¹⁸³ Wurth, *supra* note 155.

coach and Smith's waiver—an interview where he admitted the coach's behavior required corrective intervention.¹⁸⁴ This is potentially important to the Section 1985(2)(ii) claim because the athletic director admitted the coach's interactions with players created a problem. He did not deny the coach interacted improperly with his players.

The Supreme Court has not ruled on the meaning in Section 1985(2)(ii) of “impeding, hindering, obstructing, or defeating”¹⁸⁵ justice. My analysis focuses on the Act's use of “defeating,” the least aggressive of its transitive verbs. This word has several definitions, including “to balk or defeat in an endeavor.”¹⁸⁶ I focus on “defeating” because the interaction by the Illinois athletic director, and Smith and his parents, appeared to be more mutual and cooperative compared to the *Kush* case involving intimidation and obstruction.

Section 1985(2) Requires the Alleged Conspirators Have Discriminatory Intent in Depriving Any Citizen of the Equal Protection of the Laws. If Smith were subjected to racial harassment by his coach at Illinois, a state university, Smith would likely have an equal protection claim. Smith could rely on *Doe by Doe v. City of Belleville, Ill.*¹⁸⁷ The Seventh Circuit reversed a trial court order dismissing an equal protection claim by two sixteen year-old boys who were subjected to pervasive homophobic taunts while working summer jobs for an Illinois municipality.¹⁸⁸ In its opinion, the Court “also [found] the record adequate to support the finding of discriminatory intent that their Equal Protection claim requires.”¹⁸⁹ The boys' supervisor, and former Marine coworker, taunted the teenagers with homophobic insinuations.¹⁹⁰ Although

¹⁸⁴ Wurth, *supra* note 155. (“However, Whitman also said he had spoken to Underwood before the allegations surfaced about ways to improve his ‘use of language’ and his interactions with players.”).

¹⁸⁵ *Kush*, *supra* note 11 (quoting the Ku Klux Klan Act is its entirety).

¹⁸⁶ MERRIAM-WEBSTER ONLINE DICTIONARY (Definition 1A).

¹⁸⁷ 119 F.3d 563 (7th Cir. 1997).

¹⁸⁸ *Id.* at 566.

¹⁸⁹ *Id.* at 598.

¹⁹⁰ *Id.* at 567 (“Dawe, a former Marine of imposing stature, constantly referred to H. as ‘queer’ and ‘fag’ and urged H. to ‘go back to San Francisco with the rest of the queers.’”). The court added: “Like Dawe, Stan Goodwin, the plaintiffs’ supervisor, referred to H. as a ‘queer’ or ‘fag’ because H. wore an earring. Once, in reference to Dawe’s

the teenagers sued as employees under a sex discrimination theory, the equal protection ruling in *Doe by Doe* could apply to Smith, a nonemployee student athlete at a state university, if he claimed invidious racial harassment by his coach.

Smith could also make an equal protection claim based on his status as a minor. His birthdate is August 16, 1999.¹⁹¹ Smith played during the 2017-2018 season.¹⁹² Smith could have enrolled at Illinois in summer school as a seventeen year-old and participated in basketball team workouts.¹⁹³ The University of Illinois at Urbana-Champaign maintains a policy intended to protect minors from abuse and neglect by employees.¹⁹⁴ If Smith

repeated announcement that he planned to take H. ‘out to the woods’ for sexual purposes, Goodwin asked Dawe whether H. was ‘tight or loose,’ ‘would he scream or what?’” *Compare* Coach Underwood’s allegedly repeated use of “pussy” and “fucking pussy” in *UIUC Division of Intercollegiate Athletics*, *supra* note 151. The derogatory or vulgar use of “pussy” means “a weak, cowardly, or effeminate man.” *See* DICTIONARY at https://www.google.com/search?rlz=1C1EKKP_enUS774US775&sxsrf=ALeKk00uKY9FM7mj230EmzfwE30s7hjjRg:1605643158093&q=Dictionary&stick=H4sIAAAAAAAAAAONQesSo yi3w8sc9YSmZSWtOXmMU4-LzL0jNc8IMLsnMz0ssqrRiUWJKze NZxMqFEAMA7_QXqzcAAAA&zx=1605643518023#dobs=pussy.

¹⁹¹ University of Missouri 2020-21 Men’s Basketball Roster, <https://mutigers.com/sports/mens-basketball/roster>.

¹⁹² *2017-18 Illinois Fighting Illini Roster and Stats*, SPORTS REFERENCE COLLEGE BASKETBALL, <https://www.sports-reference.com/cbb/schools/illinois/2018.html> (last visited Nov. 20, 2020).

¹⁹³ *See* NCAA COUNTABLE ATHLETICALLY RELATED ACTIVITIES, <https://www.ncaa.org/sites/default/files/20-Hour-Rule-Document.pdf>

¹⁹⁴ UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN, THE PROTECTION OF MINORS (2016), <https://www.hr.uillinois.edu/cms/One.aspx?portalId=4292&pageId=5689>.

I. Policy Statement

The University of Illinois recognizes a fundamental obligation to protect minor children in its care; the youngest and potentially most vulnerable members of its community. Accordingly, the University has adopted certain safeguards intended to better protect minor children when they are on University premises participating in University programs and activities designed to include minors, or when they are in the care of University staff. The University and its employees shall comply with applicable federal and state laws to provide a safe environment for children to learn, discover, and achieve their full potential.

were subjected as a minor to a coach's racial harassment, he could claim the school's policy was not applied to him equally as a basketball player compared to nonplayer minors who are supervised in campus activities.

Depending on the racial harassment's severity, Smith could also file a claim for intentional infliction of emotional distress. In *Irving v. J.L. Marsh, Inc.*, a University of Illinois student who returned merchandise to a commercial music store was presented with a receipt for signature on which the clerk wrote, "'Arrogant Nigger refused exchange—says he doesn't like products.'" ¹⁹⁵ In 1977, an Illinois appellate court dismissed Irving's claims against the store, including one for intentional infliction of severe emotional distress. ¹⁹⁶ Since then, some Illinois courts have declined to dismiss complaints alleging intentional infliction of emotional distress where a defendant allegedly used similar racial slurs. ¹⁹⁷

These precedents address the shortcoming identified in Part IV. *Doe by Doe* shows how bigoted slurs directed at teenage subordinates with a supervisor's knowledge can create a cognizable legal injury. *Irving* and its inconsistent progeny illustrate Illinois courts have not settled on a consistent approach to treating racial slurs as a cause of emotional distress.

¹⁹⁵ 360 N.E.2d 983 (1977).

¹⁹⁶ *Id.* at 984.

¹⁹⁷ Illinois courts have allowed employment discrimination complaints that allege intentional infliction of emotional distress to proceed where an employer's agents have used racial epithets. While these cases are not directly applicable to Smith because he was not an employee of UIUC, they undermine the ruling in *Irving*, and would afford Smith an opportunity to allege this tort. See *James F. Jackson v. Local 705, Intern. Broth. of Teamsters, AFL-CIO*, No. 95 C 7510, 2002 WL 460841 (N.D.Ill. Mar. 26, 2002) (denying summary judgment to defendant-union on plaintiff's emotional distress claim which alleged that he was repeatedly called a "nigger" by union officials, and subjected to other racially offensive expressions); and *Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir.1993) ("Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment,' than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates.")

B. A PLAUSIBLE SECTION 1985(3) CONSPIRACY

Two other Black basketball players, Te'Jon Lucas and Greg Eboigbodin, left Illinois with remaining eligibility after racial harassment complaints had been made, but before an investigation was completed. Unlike Mark Smith, Lucas and Eboigbodin did not receive waivers.¹⁹⁸ When Lucas transferred to the University of Wisconsin-Milwaukee and Eboigbodin transferred to Northeastern University, both players were required to sit out for one year due to NCAA's transfer rules in Art. 14.5.5.1.¹⁹⁹ No explanation exists for why Lucas and Eboigbodin were treated differently than Smith.

Section 1985(3) can be applied to their circumstances.²⁰⁰ This law has disjunctive clauses. I will examine the italicized Section 1985(3) portions:

*If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.*²⁰¹

¹⁹⁸ See Werner, *supra* note 177 (Lucas transfer), and Piper, *supra* note 177 (Eboigbodin transfer).

¹⁹⁹ NAT'L COLLEGIATE ATHLETIC ASS'N, 2020-21 NCAA DIVISION I MANUAL, *supra* note 3.

²⁰⁰ My analysis uses the a common burden of proof, where a claim under Section 1985(3) must show: (1) the existence of a conspiracy; (2) a conspiratorial purpose to deprive a person or class of persons, directly or indirectly, of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) the commission of an overt act in furtherance of the conspiracy; and (4) either that the plaintiff suffered an injury to her person or property, or depriving a constitutionally protected right or privilege. See *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996).

²⁰¹ 42 U.S.C. § 1985(3).

1. *Existence of a conspiracy*: Section 1985(3) covers private persons as well as state actors.²⁰² Officials at Illinois, Missouri, and the NCAA reportedly discussed substantive terms for Smith's waiver.²⁰³ Thus, state university officials and the NCAA's actions are covered by "two or more persons" in this law.²⁰⁴ Section 1985(3) does not require a conspiracy—a collusive agreement is sufficient to state a claim under the law.²⁰⁵

The Illinois athletic director and NCAA officials may have conspired to delay Smith's transfer waiver to protect the coach from a more searching inquiry. The silence may have extended into Smith's time at Missouri, and to other Black players who left Illinois before the investigation. The NCAA did not grant Smith's waiver until October.²⁰⁶ Lucas and Eboigbodin left Illinois before formal investigation into the coaches' racism

²⁰² See Vikram David Amar, *The NCAA as Regulator, Litigant, and State Actor*, 52 B.C. L. REV. 415 (2011).

²⁰³ *Id.*

²⁰⁴ *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999).

²⁰⁵ See Marlowe, *supra* note 130. Marlowe filed a Title VII complaint of religious discrimination, claiming that GM and the UAW restricted his income and harassed him. Later, he refiled his complaint, after he claimed that he learned of a secret conspiracy by the defendants to harass him. Denying the motion to dismiss his Section 1985(3) complaint, the Sixth Circuit reasoned:

While the amended complaint does not use the word 'conspire' or 'conspiracy' it charges wrongful collusion and secret agreements between the defendants. Collusion is defined in Webster's Third International Dictionary Unabridged, 1971 Ed., as 'a secret agreement or secret cooperation for a fraudulent or deceitful purpose.' An example given is 'a secret agreement between two or more persons to defraud a person his rights often by the forms of law.' We believe that the language of the amended complaint meets the requirement that a conspiracy be charged. The complaint also satisfies the other requirements of § 1985(3) in that it charges that the collusion of the defendants was for the purpose of depriving plaintiff of equal employment opportunities, that the defendants acted in furtherance of their agreement and the result was injury to the plaintiff.

In my analysis of Smith's transfer, I noted that the Illinois athletic director publicly acknowledged that he spoke to Missouri about this player's waiver. Wurth, *supra* note 155. The waiver could have been intended to silence Smith in discussing coaching racism at Illinois even during his time at Missouri.

²⁰⁶ Phillips, *supra* note 164.

began. The possible Illinois-NCAA conspiracy could silence players' coaching racism complaints. Under Section 1985(2)(ii), a plaintiff may allege an effect "indirectly," a seemingly low threshold for stating a claim.²⁰⁷ In other words, if there existed a conspiracy to silence Smith and to delay an investigation of team members until the next school year, Lucas and Eboigbodin would have been indirectly injured by not having information about Smith's unique treatment, nor being included in the investigation.

2. *Conspiratorial Purpose to Deprive a Class of Persons of Equal Rights or Privileges.* The putative conspiracy may have been to cover-up adverse publicity and strict accountability for coaching racism. Therefore, the Illinois athletic director may have delayed the investigation until players returned after summer break. Lucas and Eboigbodin could allege their transfers were responses to the athletic department's inaction in investigating the coach for racial harassment.

In other circumstances, university students who leave school after being subjects of a tainted investigation have been ruled a class for stating a complaint under Section 1985(3). In *Brown v. Villanova University*,²⁰⁸ some students advocated for a greater voice in school affairs.²⁰⁹ Some were suspended and one was expelled for organizing a publicity event during a weekend when newly admitted applicants visited their school.²¹⁰ Rowdy Villanova students disrupted the student rights publicity event by organizing a party.²¹¹ The scene devolved into a heated conflict, and campus police were called to restore order.²¹² Villanova University and its president blamed the students' rights group for this unruly event.²¹³ After proposing a hasty hearing process, Villanova suspended or expelled these students in April.²¹⁴

The court found the university president was personally hostile to the students' rights group.²¹⁵ Because it was late in the academic year, the disciplined students had difficulty being

²⁰⁷ 42 U.S. Code § 1985(3) (quoting the adverb in the law).

²⁰⁸ 378 F.Supp. 342 (E.D. Pa. 1974) (students who had exercised first amendment rights held to be sufficient class).

²⁰⁹ *Id.* at 343.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 343—344.

²¹³ *Id.* at 344.

²¹⁴ *Id.*

²¹⁵ *Id.*

admitted to other schools.²¹⁶ The lead plaintiff was expelled after the annual admissions cycle ended, thereby delaying his transfer for the following semester.²¹⁷ The court found the plaintiffs experienced delay and disruption to their education.²¹⁸

These fact-findings are like the hardships experienced by Lucas and Eboigbodin. Like the Villanova students, their educations were disrupted. Lucas and Eboigbodin were likely harmed looking for a new team in the spring, an off-cycle time for schools to admit students, and an unconventional time for basketball programs to have available scholarships.²¹⁹ Moreover, the NCAA's transfer penalty of sitting out the next year was evidence of an injury.

Brown made legal findings in favor of the plaintiffs. Their complaint was "properly based on 42 U.S.C. § 1985, in that there is a substantial probability that plaintiffs will show at trial that there was a conspiracy among some of the defendants to deny plaintiffs rights which are guaranteed them under the constitution" ²²⁰ The court also found the plaintiffs "will suffer irreparable injury unless the imposition of their penalties is enjoined."²²¹

3. *Overt Act in Furtherance of the Conspiracy.* The athletic director said the six players who left Illinois after the 2017-2018 basketball season, "had all done exit interviews before graduating or leaving the university, a *standard practice* (emphasis added)."²²² The transferring players could argue that using standard exit interviews when people allege racism is an overt act in furtherance of a conspiracy to silence racism complaints.

In *Brown*, the university initially set ten-minute hearings for each student who was charged with violating Villanova's rules.²²³ The process was amended after students' counsel

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ NAT'L COLLEGIATE ATHLETIC ASS'N, 2020-21 NCAA DIVISION I MANUAL, *supra* note 3, at art. 13.17.2 (outlining a basketball recruiting period that is concentrated in the months before these players transferred).

²²⁰ *Id.* at 345.

²²¹ *Id.*

²²² Wurth, *supra* note 155.

²²³ Brown, *supra* note 208, at 344.

complained.²²⁴ Nonetheless, the court found Dr. Duffy, the Vice-President of Student Affairs, initially testified his decisions were based entirely on the hearing panel's findings; however, on cross examination,²²⁵ he admitted he was involved in making certain decisions for the Villanova administration and based his decisions on discussions outside the hearings with other university officials.²²⁶ *Brown* shows a school's flawed internal investigation can be an "overt act."

4. *Injury to Person or Property, or a Depriving a Constitutionally Protected Right or Privilege*: Lucas and Eboigbodin would need to show they transferred due to the coach's racial harassment. There has been no public reporting of their motivations to transfer. However, they could rely on cases where players who have lost eligibility due to NCAA policies have prevailed in court.²²⁷

Lucas and Eboigbodin could also claim their standard exit interviews denied them equal protection compared to Smith's face-to-face meeting with the athletic director. Players have won constitutional cases against the NCAA when they demonstrated potential for an economic injury.²²⁸ One federal court has concluded the "opportunity to participate in intercollegiate athletics is of substantial economic value to many students."²²⁹

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ See *Phillip v. Nat'l Collegiate Athletic Ass'n*, 960 F. Supp. 552, 557—58 (D. Conn. 1997), where the NCAA counted a student's math sequence as one-third rather than one-half of a credit hour ("Darren Phillip testified at the preliminary injunction hearing, and his testimony was persuasive . . . He feels, perhaps justifiably so, that he has done all one could be expected to do to meet the eligibility requirements."). The Second Circuit also appeared to sympathize with the student by reversing the district court but allowing four months for a rehearing on the matter. See *Phillip v. Fairfield Univ.*, 118 F.3d 131, 135 (2d Cir. 1997). See also *Ganden v. Nat'l Collegiate Athletic Ass'n*, No. 96 C 6953, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996) (granting the swimmer's motion for a preliminary injunction).

²²⁸ *E.g.*, *Nat'l Collegiate Athletics Ass'n v. Yeo*, 114 S.W.3d 584 (Tex. App. 2003), *rev'd*, 171 S.W.3d 863 (Tex. 2005); *Hill v. Nat'l Collegiate Athletics Ass'n*, 1 Cal. App. 4th 1398 (1990), *rev'd*, 865 P.2d 633 (1994).

²²⁹ *Behagen v. Intercollegiate Conf. of Fac. Representatives*, 346 F.Supp. 602, 604 (D. Minn. 1972).

Courts recognize a “chance to display . . . athletic prowess in college stadiums and arenas throughout the country is worth more in economic terms than the chance to get a college education.”²³⁰ College players have also successfully challenged NCAA rules and procedures.²³¹ The NCAA’s strict rules limiting student compensation were not rational under the Equal Protection Clause.²³²

To conclude, Part III applies Section 1985(2)(ii) to the transfer scenario involving a player who received an NCAA waiver, and Section 1985(3) to two transferring players who sat out the following season with no waiver. These two sets of claims potentially differ because a confidentiality and nondisclosure agreement may have prevented the first player from pursuing justice in exposing coaching racism, while the transfer penalty for other transferring players may have denied them equal treatment. All three players could allege facts and cite precedents to state claims that could survive motions to dismiss.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Wiley v. Nat’l Collegiate Athletic Ass’n*, 612 F.2d 473, 478 (10th Cir. 1979) (reporting on an unpublished ruling). This occurred when an impoverished student was granted a \$2,621 scholarship for track, and a \$1,400 federal grant, which together pushed his compensation above the NCAA’s limit. The appeals court ruled that his graduation did not moot the case; but there was no substantial federal question. *Id.* at 474—76. The NCAA’s student age limits have created special problems for aliens who competed in another country before enrolling in a U.S. school. A trial court ruled that the NCAA’s eligibility rules, as applied to foreign students, violated Equal Protection. *Howard Univ. v. Nat’l Collegiate Athletic Ass’n*, 510 F.2d 213 (D.C. Cir. 1975); *see also* *Buckton v. Nat’l Collegiate Athletic Ass’n*, 366 F. Supp. 1152, 1160 (D. Mass. 1973) (NCAA’s classification system irrationally discriminates against Canadian hockey players who attend U.S. schools as resident aliens). An appeals court also ruled that the NCAA’s classification was arbitrary. *Howard U. v. Nat’l Collegiate Athletic Ass’n*, 510 F.2d 213, 222 (D.C. Cir. 1975).

**CONCLUSION:
APPLYING THEORY AND LEGISLATIVE HISTORY TO CASE
ANALYSES**

In Part III, I developed a theory of how schools and the NCAA could conspire to silence players' coaching racism complaints. In Part IV, I applied the Illinois case study to two codified sections of the Ku Klux Klan Act of 1871. Both sections focused on scenarios specific to one school's handling of complaints about a coach's alleged racial harassment. In this concluding section, I relate these applied analyses to my theoretical discussion in Part I and analysis of legislative history of the Ku Klux Klan Act in Part II.

As part of the conclusion, I also incorporate more recent cases of Black athletes who transferred after allegations against their coaches surfaced relating to racial harassment. Additional discussion shows the Illinois case study likely reveals a generalized pattern of exploiting NCAA transfer rules to cover-up coaching racism.

**A. RELATING THEORETICAL PERSPECTIVES TO NCAA
COACHING RACISM**

Confidentiality Agreements: The public information timeline in Part III suggests Mark Smith signed a confidentiality agreement with the University of Illinois at Urbana-Champaign as a condition for being released from his scholarship and receiving a transfer waiver. The Illinois athletic director's published news interview also referenced two other actors in the context of his "signing off" a waiver: The NCAA and University of Missouri. This is circumstantial evidence consistent with a silencing agreement related to coaching racism.

This situation is not unique. In the Big Ten alone, three other players have transferred due to coaching racism complaints in the short time that has elapsed since Smith's transfer. Rasir Bolton's and DJ Johnson's following accounts explicitly suggest efforts by their former schools to ignore or minimize complaints about coaching racism.

- A Wisconsin basketball player, Kobe King, transferred due to coaching racism.²³³ King announced his transfer decision mid-season, on January 29, 2020.²³⁴ News reporting of his circumstances do not indicate if he made prior complaints of a problem with racist coaching; however, Wisconsin acted promptly on his concerns in 2020.
- Rasir Bolton, another basketball player, explained: “A ‘noose’ around my neck is why I left Penn State,”²³⁵ referring to a racist slur directed at him by Head Coach Patrick Chambers.²³⁶ Bolton did not reveal his reason for transferring in 2019. However, in his July 6, 2020 tweet, Bolton remarked:

There is serious need for change in the way players are protected and helped across the country when faced with these situations. Surface level resources are not good enough. In most cases it is the Coach who is protected, while the player is left to deal with it or leave.²³⁷

²³³ Jack Baer, *Report: Wisconsin Investigating Allegation That Staffer Used Racial Epithet in Front of Transferring Player*, YAHOO SPORTS (Feb 5, 2020), <https://sports.yahoo.com/wisconsin-basketball-kobe-king-transfer-racial-epithet-045006371.html> (reporting that Kobe King could be granted immediate eligibility from the NCAA). King, who informed Wisconsin athletic officials about the incident, transferred to Nebraska but withdrew in June. See David Cobb, *After Transferring from Wisconsin to Nebraska, Kobe King Won't Be Playing for Cornhuskers After All*, CBS SPORTS (June 19, 2020), <https://www.cbssports.com/college-basketball/news/after-transferring-from-wisconsin-to-nebraska-kobe-king-wont-be-playing-for-cornhuskers-after-all/>.

²³⁴ Ryan Young, *Wisconsin Coach Greg Gard 'Disappointed' After Kobe King Announces Plans to Transfer*, YAHOO SPORTS (Jan 29, 2020), <https://sports.yahoo.com/wisconsin-badgers-coach-greg-gard-disappointed-kobe-king-transfer-040655818.html>.

²³⁵ Mike Rosenstein, *Penn State's Pat Chambers Apologizes for Racially-Charged 'Noose' Comment to Rasir Bolton*, NJ.COM (July 7, 2020), <https://www.nj.com/rutgersbasketball/2020/07/penn-states-pat-chambers-apologizes-for-racially-charged-noose-comment-to-rasir-bolton.html> (reporting Rasir Bolton's reaction to Penn State's disappointing response to his complaint about his coach's racist comment to him).

²³⁶ *Id.*

²³⁷ *Id.*

The NCAA granted Bolton eligibility to play at Iowa State without enforcing its requirement to sit out the next season.²³⁸

- D.J. Johnson, a football player at Iowa, announced his decision to transfer to Purdue on June 12, 2020.²³⁹ Johnson joined numerous former Iowa players who posted online their concerns about the football program's culture of racism and bullying.²⁴⁰ As of August 2020, Johnson's petition to the NCAA for a transfer waiver was pending.²⁴¹

Table 3 shows a pattern of player transfers directly related to coaching racism. The table portrays the NCAA's intermediating role in facilitating players' movement from one school to another by granting waivers, possibly to suppress legal action. The Mark Smith and Rasir Bolton transfers are similar because the NCAA granted their waivers near the start of the next basketball season. This emerging pattern suggests cooperation by, or even collusion, between schools and the NCAA in a mutual effort to squelch publicity about coaching racism.

²³⁸ Bolton entered the NCAA transfer portal on April 26, 2019. Mikey Mandarino, *Rasir Bolton Granted Immediate Eligibility To Play For Iowa State*, ONWARD STATE (Sep 25, 2019), <https://onwardstate.com/2019/09/25/rasir-bolton-granted-immediate-eligibility-to-play-for-iowa-state/>. The NCAA granted Bolton's waiver request around September 24, 2019. See Travis Hines, *Iowa State Men's Basketball: Rasir Bolton Declared Immediately Eligible*, AMES TRIB. (Sept. 24, 2019 4:35 PM), <https://www.amestrib.com/sports/20190924/iowa-state-mens-basketball-rasir-bolton-declared-immediately-eligible>.

²³⁹ *Former Iowa DB D.J. Johnson transferring to Purdue*, THE GAZETTE (June 20, 2020), <https://www.thegazette.com/subject/sports/hawkeyes/iowa-football/dj-johnson-iowa-transfer-purdue-20200612>.

²⁴⁰ *Id.*

²⁴¹ Tom Dienhart, *Brohm OK With Playing Spring and Fall of 2021, If Need Be*, GOLDANDBLACK (Aug. 9, 2020), <https://purdue.rivals.com/news/brohm-ok-with-playing-spring-and-fall-of-2021-if-need-be>.

Table 3				
Big Ten Player Transfers Related to Coaching Racism				
	Leaving School Announcement	Player Publicizes Complaint	NCAA Ruling on Waiver	NCAA Waiver Date
Mark Smith Illinois to Missouri	March 5, 2018	No	Yes	October 27, 2018
Rasir Bolton Penn State to Iowa State	April 26, 2019	Yes (Delayed) July 6, 2020	Yes	September 27, 2019
Kobe King Wisconsin to Nebraska	January 29, 2020	Yes January 29, 2020	Pending	No Ruling
DJ Johnson Iowa to Purdue	May 20, 2020	Yes May 20, 2020	Pending	No Ruling

Table 4			
NCAA Division I Football and Basketball: Coaches and Players by Race (2019)²⁴²			
<i>Coaches</i>		<i>Players</i>	
FBS Football Head Coach (Black)	9 (13.8%)	FBS Football Student-Athletes (Black)	3,671 (46.1%)
FBS Football Head Coach (Other)	4 (6.1%)	FBS Football Student-Athletes (Other)	1,355 (17.0%)
FBS Football Head Coach (White)	52 (80.0%)	FBS Football Student-Athletes (White)	2,935 (36.9%)
<i>Sub-Total Football</i>	65	<i>Sub-Total Football</i>	7,961
Men's Basketball Head Coach (Black)	10 (14.9%)	Men's Basketball Student-Athlete (Black)	528 (51.4%)
Men's Basketball Head Coach (Other)	3 (4.5%)	Men's Basketball Student-Athlete (Other)	237 (23.0%)
Men's Basketball Head Coach (White)	54 (80.6%)	Men's Basketball Student-Athlete (White)	263 (25.6%)
<i>Sub-Total Men's Basketball</i>	67	<i>Sub-Total Men's Basketball</i>	1028
Women's Basketball Head Coach (Black Female)	8 (18.6%)	Women's Basketball Student-Athlete (Black)	436 (48.4%)
Women's Basketball Head Coach (Other Female)	1 (2.3%)	Women's Basketball Student-Athlete (Other)	247 (27.4%)

²⁴² See NCAA, *Diversity Research: NCAA Race and Gender Demographics Database*, <http://www.ncaa.org/about/resources/research/diversity-research>.

Women's Basketball Head Coach (White Female)	34 (79.1%)	Women's Basketball Student-Athlete (White)	218 (24.2%)
<i>Sub-Total Women's Basketball Female</i>	43	<i>Sub-Total Women's Basketball</i>	901
Women's Basketball Head Coach (Black Male)	2 (9%)		
Women's Basketball Head Coach (Other Male)	1 (4.6%)		
Women's Basketball Head Coach (White Male)	19 (86.4%)		
<i>Sub-Total Women's Basketball Male</i>	22		

For men's sports, in Division I FBS football 80% of head coaches were White and only 13.8% were Black; however, 46.1% of players were Black and 17% were Other Non-White. In Division I basketball, 80.6% of head coaches were White. However, in the player population, 51.4% of individuals were Black and 23% were Other Non-White.

In women's Division I basketball, among female head coaches 79.1% were White and only 18.6% were Black. There were fewer male head coaches. In this group, 86.4% were White and 9% were Black. As in men's sports, most women players were Black (48.4%) or Other Non-White (27.4%).

Racial harassment in collegiate athletics reinforces the power imbalance, already cleaved along racial lines in NCAA sports, between White coaches and players of color. When schools and the NCAA fail to investigate coaching racism vigorously and

independently, and instead deal with this serious problem by relocating players through the NCAA's waiver process, they signal white racist coaches are immune from serious consequences while Black players pay for these injurious incidents by uprooting their education and sitting out a season under NCAA rules.

These demographic inequalities translate into measurable economic disparities cutting along racial lines. A recent economics study concluded "(t)he athletes generating the rents are more likely to be black and come from lower-income neighborhoods, and the rents are shared with a set of athletes and coaches that are more likely to be white."²⁴³ This economic reality may help explain why athletic directors and other officials either benignly dismiss coaching racism, or worse, preserve a racially imbalanced power structure due to their own biases. Exploiting the NCAA transfer process to hide coaching racism may reflect athletic directors' discomfort with upsetting the financial status quo at their schools.

Institutional Racism: Data in Table 4 and my Section 1985 case analyses point to a common contextual agent: institutional racism. Section 1985(3) applies not only to racial groups experiencing animus, but also to a class. To reiterate, the jurisprudence around "class of persons" in the Act is muddled.²⁴⁴ However, statistics provide empirical grounding for this statutory term in coaching racism context. The fact 51.4% of NCAA Division I men's basketball players in 2019 were Black underscores how three Black players who transferred from Illinois in 2018, and three other Black players who transferred more recently from Big Ten schools, compose an identifiable class able to state Section 1985 claims for relief.

²⁴³ Craig Garthwaite et al., *Who Profits from Amateurism? Rent Sharing in Modern College Sports*, NAT'L BUREAU OF ECON. RESEARCH (Working Paper 27734, Aug. 2020), <http://www.nber.org/papers/w27734>.

²⁴⁴ *Trautz v. Weisman*, 819 F.Supp. 282, 291 (S.D.N.Y. 1993).

B. RELATING THE LEGISLATIVE HISTORY OF THE KU KLUX KLAN ACT OF 1871 TO COACHING RACISM

The Supreme Court has repeatedly turned to the Act's legislative history. It has examined this record to decipher the act's perplexing structure and to unravel opaque terms.²⁴⁵ In addition, attorneys have been resourceful in adapting the Act to circumstances far removed from torch-bearing, hooded Klansmen, including a football player's case against his coach.²⁴⁶ The hypothetical complaints I pose for Section 1985(2)(ii) and Section 1985(3) can be supported by legislative history showing Congress intended to redress conspiracies to interfere with educating Black people.

This legislative history relates to NCAA coaching racism. First, lawmakers understood the Klan's school-based racial hatred had young victims.²⁴⁷ They seemed to understand racial terror committed against young people in a school was part of the Klan's campaign against Blacks who sought to vote or participate in court proceedings. Second, Klan attacks on teachers and schools widened the spatial separation of Whites and Blacks to preserve white superiority.²⁴⁸ A terror campaign aimed at Black schools and their teachers was intended to force Blacks to accept a meager life at society's margins. Finally, in terror accounts of Blacks schools lawmakers repeatedly mentioned the Klan using "nigger,"²⁴⁹ perhaps to show the slur was bayoneted to the Klan's guns, torches, and nooses. That term was more than vulgarity: It was a cudgel, a whip, a verbal rope to drive Blacks into submission.

Racial slurs used by NCAA coaches in gyms and locker rooms are not social faux pas. These painful barbs reinforce the racial hierarchy pervading NCAA athletics. The NCAA transfer rule in Art. 14.5.5.1. maintains a racialized culture of player submission to their coach's oppressive language. This Article demonstrates Section 1985 can be an important new tool to address systemic racism by allowing for personal damages against

²⁴⁵ Kush, *supra* note 11, at 720 ("The legislative history supports this conclusion.").

²⁴⁶ Byrd, *supra* note 126. *See also* Kush, *supra* notes 134—139.

²⁴⁷ *See supra* notes 92—93.

²⁴⁸ *See, e.g., supra* note 94.

²⁴⁹ *Supra* notes 98—99, 106—107, 109.

athletic directors, other school officials, and the NCAA when they conspire to deprive college athletes their civil rights.²⁵⁰

²⁵⁰ Griffin, *supra* note 127.