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SHUT UP AND DRIBBLE: THE RACIAL SUBORDINATION OF THE BLACK PROFESSIONAL ATHLETE

AN ANALYSIS OF THE RACIAL SUBORDINATION THAT CLASS
PRIVILEGED BLACK ATHLETES FACE STARTING WITH MUHAMMAD ALI
AND LEADING TO COLIN Kaepernick AND OTHERS.

*Daniela Tenjido**

INTRODUCTION

Most popular sports in the U.S. today are dominated by Black athletes. The professional Black athlete today has opportunities that the majority of his non-athlete counterparts do not.¹ Judging objectively, professional Black athletes “made it.” Lucrative lifestyles and international fame, however, has come at a high price in recent years. In the era of the Black Lives Matter movement, a domestic race war, and the increase unleashing of violence against the Black community by police,² Black athletes are caught in the middle.

Athletes are natural born leaders. This has led to the strong convictions and rightful protest by many of them during times of turmoil. This Note aims to highlight two in particular—Muhammad Ali and Colin Kaepernick. Part I offers a brief history of African Americans in sports and the impact of professional sports on American society. This then sets the stage for why Black professional

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¹ It is a tale as old as time. For many in the Black community, especially children, success is associated with becoming a professional athlete or rapper. African American rapper J. Cole has continuously expressed his own perception of this in his music. See J. COLE, *January 28th*, on 2014 FOREST HILLS DRIVE (Columbia Records, Roc Nation & Dreamville 2014) (“What’s the price for a black man life? I check the toe tag, not one zero in sight[.] I turn the TV on, not one hero in sight [u]nless he dribble or he fiddle with mics”); see also J. COLE, *Friends*, on KOD (Interscope Records, Roc Nation & Dreamville 2018) (“[E]very black boy wanna be Pippen[.] But they only got 12 slots on the Pistons[.]”).

² See *Jamison v. McClendon*, No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723, at *1, 1–4 n.1–19 (S.D. Miss. Aug. 4, 2020).

athletes are perhaps the perfect class of individuals to highlight and discuss racial subordination in the U.S.

In part II this Note then uses the stories of Muhammad Ali, Colin Kaepernick, and others alike, to debunk three main ideas in Part III. First, it aims to highlight why we do not live in a post-racial America. Second, it criticizes a belief that suffering by racial minorities comes exclusively as a result of class rather than race. This is where the racial subordination of class privileged minorities plays a role in highlighting the other, non-economic, ways in which class privileged minorities continue to experience “otherness.” It does this in the context of Black professional athletes. Lastly, it uses the Black professional athlete to highlight other forms of racial subordination endured by class privileged African Americans and people of color that are non-economic.

I. THE IMPACT OF SPORTS ON AMERICAN SOCIETY

A. AN OVERVIEW OF THE HISTORY OF THE BLACK ATHLETE

i. The slave-athlete

The history of sports for Black athletes can be traced back to slavery. Abolitionist Frederick Douglass was perhaps one of the first to talk about slavery and sports. In his autobiography *Narrative of the Life of Frederick Douglass, An American Slave*, he portrays why the topic of sports transcends just its cultural impact.³ Sports in American history have been the source of political and social constructs since early on.⁴ From slavery, Tom Molineaux and William Greene arose amongst the first recorded Black professional athletes in the U.S. thus highlighting how the Black professional athlete has been an establishment in American society since early on.⁵

³ See FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 74–75 (1845) (describing how during the Christmas and New Years’ holidays, the enslaved were allowed time off. Some chose to visit family, others continue to be productive, and the rest chose to “engage[] in such sports and merriments as playing ball, wrestling, running foot-races, fiddling, dancing, and drinking whisky... this latter mode of spending the time was by far the most agreeable to the feelings of [the] masters”). Recreational activities were “orchestrated by slave owners as management strategy designed to promote a healthier attitude among the workforce....” It was by allowing this small period of deviation from an otherwise life of servitude that the masters prevented insurrection. Douglass describes these small freedoms as “safety-valves.” It allowed the enslaved to get some steam off from the desperation of their conditions and it maintained the status quo. In short, it kept slaves dormant. See also Al-Tony Gilmore, *Black Athletes in an Historical Context: The Issue of Race*, 58 NEGRO HIST. BULL. 7, 7 (1995).

⁴ See Damion Thomas, *Sports Leveling the Playing Field*, NAT’L MUSEUM AFR. AM. HIST. & CULTURE, <https://nmaahc.si.edu/explore/exhibitions/sports> (last visited Dec. 28, 2020) (explaining that sports have “a unique role within American culture. Within black communities, sports have always been political.”).

⁵ Tom Molineaux, a slave in the early 1800s, is believed to have obtained his freedom after winning a boxing match against a fellow slave arranged by the two masters. See Paul Magriel, *Tom Molineaux*, 12 PHYLON 329, 329 (1951). William Greene was also a slave jockey competing at races against both whites and other fellow slaves. David K. Wiggins, *Good Times on the Old*

ii. Segregation in sports

Then “[o]n December 18, [1865], the [Thirteenth] Amendment was officially adopted into the Constitution—246 years after the first shipload of captive Africans landed at Jamestown, Virginia, and were bought as slaves.”⁶ It provided that “neither slavery nor involuntary servitude . . . shall exist within the United States”⁷

The abolishment of slavery granted Black professional athletes a new world of access and possibility. From slavery to freedom, Black athletes had emerged, grown, and made waves in the sports world.⁸ This small access to professional sports was short lived, however, and once slavery was abolished, legal segregation served to replace it by becoming the law of the land.⁹ Despite the passing of the Civil War Amendments,¹⁰ America’s attitude towards African Americans remained unwavering.¹¹ The once slaves were now free but by no means equal. The effects of segregation touched every aspect of American life, including

Plantation: Popular Recreations of the Black Slave in Antebellum South, 1810-1860, 4 J. OF SPORT HIST. 260, 273–74 (1977); Gilmore, *supra* note 3, at 7 (“Beginning with recreational horse racing between slaves on the plantation, owners began to travel with their slaves to other plantations and racing establishments for the purpose of entering into competition with other jockeys . . .”).

⁶ See *Slavery abolished in America with adoption of 13th amendment*, HIST., <https://www.history.com/this-day-in-history/slavery-abolished-in-america> (last updated Dec. 26, 2019).

⁷ *Id.*; see also Jamison, 2020 WL 4497723, at *17 (“The Thirteenth Amendment ‘represented the Union’s deep seated commitment to end the “badges and incidents of servitude,” [and] was an unadulterated call to abandon injustices that had made blacks outsiders in the country they helped build and whose economy they helped sustain.””).

⁸ Gilmore, *supra* note 3, at 8 (“[T]he jockey profession had come to be dominated by blacks with Isaac Murphy, Willie Simms and Jimmy Winkfield achieving institutional acclaim . . .”). But see Avery Yang, *Black History Month: Isaac Murphy Became One Of The Best Jockeys In History*, SI (Feb. 25, 2020), <https://www.si.com/horse-racing/2020/02/25/black-history-month-isaac-murphy> (“African-American representation in the sport during the 19th century did not, of course, mean equal treatment or access. Murphy and his African-American counterparts were systemically railroaded, with white opponents colluding in an attempt to ensure an African-American man did not finish as champion.”).

⁹ See Gilmore, *supra* note 3, at 8. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (finding segregation legal).

¹⁰ The Civil War Amendments are also known as the Reconstruction Amendments—focused on building the futures of the Black citizens who had just gained their freedoms by the abolishment of slavery. See Jamison, 2020 WL 4497723, at *16–17; see also *Civil War Amendments*, HIST. CENT., <https://www.historycentral.com/Civics/Definitions/CivilWarAmendment.html> (last visited Dec. 28, 2020).

¹¹ See Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 2018 UTAH L. REV. 639, 662 (2018) (“States stepped into the legal void, drafting legislation that provided legal reinforcement for a racial caste system that endorsed different treatment based on perceived racial difference.” “During this period, reconstruction reforms died, and Jim Crow ruled”); see also Jamison, 2020 WL 4497723, at *18 n.58 (quotation marks and citations omitted)

The chasm between these two visions of America was embodied by President Johnson, who in his official capacity led a nation founded in the belief that all men are created equal, yet in his individual capacity side[d] with white supremacists, privately referred to blacks as niggers, and had a morbid fascination with miscegenation.

Id.

sports. Although sports had been one of the first institutions to allow access to African Americans, even before the abolishment of slavery, it gave into public pressures and the national norm of segregation.¹²

The story of Jack Johnson exemplifies what was going on in the U.S. at the time. Johnson was a boxing champion and the first Black athlete to challenge segregation.¹³ In 1908, Johnson defeated White boxer Tommy Burns.¹⁴ A Black man had defeated Burns and with that victory, the U.S. set out to restore “white pride.”¹⁵ This would lead to the July 4, 1910, prime time fight between White boxer James Jeffries and Johnson in Reno, Nevada.¹⁶ When Johnson defeated Jeffries, segregated sports went into a frenzy.¹⁷ Segregated America was not ready to see a Black man as the “physical symbol of manhood.”¹⁸ With Johnson’s win, race riots erupted throughout the country. Once again, “the ability of sports to manipulate racial predispositions had manifested itself in an unprecedented style and manner.”¹⁹

Since Jack Johnson, racial and political issues have continued to walk hand in hand with sports in American society. By the 1930s, names such as Jesse Owens and Joe Louis emerged against the backdrop of the rise of Adolph Hitler.²⁰ At the highly political Berlin 1936 Olympics, Jesse Owens, a Black man, emerged an unlikely champion by winning four gold medals and setting new world records for the U.S.²¹ Then, in the 1940s, Joe Louis, the “Brown

¹² See Gilmore, *supra* note 3, at 8 (explaining that sports entities gave into the public opinion and began to follow segregation laws in sports as well).

¹³ *Id.* Jack Johnson “ripped the veil off of the niceties that were used to cover up the violence of White supremacy.” See Ben Morse, *Jack Johnson: The Black boxer who sparked race riots after world heavyweight win*, CNN (July 3, 2020, 6:33 AM), <https://www.cnn.com/2020/07/03/sport/jack-johnson-fight-of-the-century-110-anniversary-boxing-cmd-spt-intl/index.html>.

¹⁴ See Gilmore, *supra* note 3, at 8 (explaining how despite the color line in sports at the time, Australia saw the commercial potential of holding an interracial match at a time when “most white fans felt assured that a black man was not mentally and physiologically capable of demonstrating courage and manhood sufficient enough to defeat a white champion.”).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ “Charles Williams, a negro fight enthusiast, had his throat slashed from ear to ear on a streetcar by a white man, having announced too vociferously his appreciation of Jack Johnson’s victory in Reno.” Matt Reimann, *When a black fighter won ‘the fight of the century,’ race riots erupted across America*, TIMELINE (Mar. 24, 2017), <https://timeline.com/when-a-black-fighter-won-the-fight-of-the-century-race-riots-erupted-across-america-3730b8bf9c98>.

¹⁸ See Gilmore, *supra* note 3, at 8.

¹⁹ *Id.*

²⁰ See Gilmore, *supra* note 3, at 9–10 (highlighting that the rise of Adolph Hitler influenced American to temporarily choose nationalism over racism—at least in the sports arena).

²¹ See Gilmore, *supra* note 3, at 10. Hitler viewed African Americans as inferior. It is not a surprise then that as Jesse Owens captured the rest of the world’s heart, Hitler refused to shake his hand at the conclusion of the Games. The “superiority of the Aryan race” had arguably been disproven. See generally *Berlin 1936: Jesse Owens and the Aryan Race*, DW (July 30, 2008), <https://www.dw.com/en/berlin-1936-jesse-owens-and-the-aryan-race/a-3524138>.

Bomber” became one of the most recognized American athletes when he defeated Italian and German boxers at a time of political turmoil in Europe.²²

iii. The end of the color line in sports

World War II and Pearl Harbor marked the next significant turn in American sports. During the war, organized baseball was bleeding with low numbers of quality players available. Team owners continued refusing to hire Black players despite the success of the Negro Baseball League.²³ Then enters Jack (John) Roosevelt Robinson.²⁴ In 1947, Robinson became the first African American signed to a Major Leagues’ Baseball team, ending the color line in the sport.²⁵

B. ATHLETES AS ACTIVISTS

The historic impact of Robinson in integrating sports in America paved the way for the greats we know and love today. It created a platform for athletes to continue the legacy that once led to the desegregation of sports. While Robinson bridged the racial gap in sports integration, the work towards equality was just beginning. Since then, athletes and sports have continued to undergo many changes. For some athletes, continuing Robinson’s legacy has meant protesting and taking a stance towards justice and equality. For these athletes, this has come at great personal costs. It is against this backdrop of sports as a catalyst for change and athletes as activists that the next portion of this Note introduces two stories—Muhammad Ali’s and Colin Kaepernick’s. It does so in light of

²² See Gilmore, *supra* note 3, at 10–11 (highlighting how Joe Louis’s fights against Schmeling and Carnera earned him adoration by White America); see also Lane Demas, *The Brown Bomber’s Dark Day: Louis-Schmeling I and America’s Black Hero*, 31 J. SPORT HIST. 253, 253–54 (2004) (explaining that Louis’ fight “took on symbolic significance in light of European Fascism” and how the Brown Bomber was also an idol amongst African Americans for whom Louis “could personify . . . the Double V campaign of ‘channeling black frustrations into positive, patriotic actions.’”).

²³ See David K. Wiggins, *Wendell Smith, the Pittsburgh Courier-Journal and the Campaign to Include Blacks in Organized Baseball, 1933-1945*, 10 J. SPORT HIST. 5, 15, 19 (1983) (explaining that the Courier Journal’s campaign to end the color line marked a critical step in desegregating baseball once and for all); *Breaking the Color Line: 1940 to 1946*, LIBR. CONG., <https://www.loc.gov/collections/jackie-robinson-baseball/articles-and-essays/baseball-the-color-line-and-jackie-robinson/1940-to-1946/> (last visited Dec. 28, 2020) (“The black press and some of their white colleagues had long campaigned for the integration of baseball. Wendell Smith of *The Pittsburgh Courier* was especially vocal. World War II experiences prompted more people to question segregation practices.”); see also Gilmore, *supra* note 3, at 9 (highlighting how, from the Negro Baseball League, many players were inducted into Baseball’s Hall of Fame).

²⁴ See *Jackie Robinson*, HIST., <https://www.history.com/topics/black-history/jackie-robinson> (last updated Dec. 13, 2019); see also *Breaking the Color Line: 1940 to 1946*, *supra* note 23 (“The player who would break the color line, Jack (John) Roosevelt Robinson, was born in Cairo, Georgia, on January 31, 1919.”).

²⁵ See Wiggins, *supra* note 23, at 5; *Breaking the Color Line: 1940 to 1946*, *supra* note 23 (“After a successful season with the minor league Montreal Royals in 1946, Robinson officially broke the major league color line when he put on a Dodgers uniform, number 42, in April 1947.”).

their protests before finally turning to the racial subordination experienced by these two Black athletes at two different times in American history.

II. WHEN BLACK ATHLETES PROTEST

A. MUHAMMAD ALI

In July of 1964, President Johnson signed the Civil Rights Act into law ending *de jure* segregation.²⁶ With some of the most influential years of the civil rights movement occurring, it is only fitting that the athlete of the time personified the political and social movement happening.²⁷ Muhammed Ali, born Cassius Marcellus Clay Jr., became the heavyweight champion of the world in the 1964 fight against Solly Liston where the phrase “float like a butterfly, sting like a bee” was born.²⁸ Ali, nicknamed “the Greatest,” has been recognized as the second best heavyweight of all times, second only to Joe Louis.²⁹ He is, without a doubt, one of the best athletes of all times. Outside the ring, he proved, once again, that sports transcend just the game and shape the political and social norms of the time. He was an outspoken Black Muslim with strong convictions.³⁰ “His defiance of the system during the Black Power movement of heightened black conscious; his sacrificing of financial security for personal convictions in the prime of his career, and his public stand against

²⁶ See, e.g., *What Are De Jure and De Facto Segregation?*, EDUPEDIA (June 13, 2018), <https://www.theedadvocate.org/edupedia/content/what-are-de-jure-and-de-facto-segregation/> (“De jure segregation, or legalized segregation of Black and White people, was present in almost every aspect of life in the South during the Jim Crow era: from public transportation to cemeteries, from prisons to health care, from residences to libraries.” “De jure segregation . . . lasted from the 1880s to 1964”); see also Lisa Vox, *The Civil Rights Act of 1964 Did Not End the Movement for Equality*, THOUGHTCO., <https://www.thoughtco.com/the-civil-rights-act-of-1964-45353> (last updated Feb. 14, 2019) (“The bill prohibited racial discrimination in public and outlawed discrimination in places of employment.”). See generally *The Civil Rights Act of 1964*, 78 HARV. L. REV. 684, 684 (1965).

²⁷ See Gilmore, *supra* note 3, at 12 (discussing Ali’s defiance of the system during the Black Power movement). In 1964, “[t]he Beatles took America by storm, as Race Riots gripped big cities – and the [sic] Civil Rights Act . . . was signed into law. Boxer Cassius Clay became Muhammad Ali and the heavyweight champion of the world.” See also Alan Taylor, *1964: The World 50 Years Ago*, ATLANTIC (May 27, 2014), <https://www.theatlantic.com/photo/2014/05/1964-the-world-50-years-ago/100743/>.

²⁸ See Gilmore, *supra* note 3, at 12 (explaining how Ali changed his name because he considered Cassius Clay was not a named suited for a champion as it “was a degrading name originating from slaveowners”); Kara McGrath, *The Origin of Muhammad Ali’s Most Famous Quote*, BUSTLE (June 4, 2016), <https://www.bustle.com/articles/164846-the-origin-of-float-like-a-butterfly-sting-like-a-bee-proved-muhammad-alis-greatness-early> (“Just before entering the ring [against Liston], Clay said what would become one of his most famous quotes, and a phrase used to define his fighting style: ‘Float like a butterfly, sting like a bee. The hands can’t hit what the eyes can’t see.’”).

²⁹ See Kelsey McC Carson, *Ranking the 10 Most Accomplished Heavyweight Champions in Boxing History*, BLEACHER REP. (Feb. 9, 2015), <https://bleacherreport.com/articles/2359542-ranking-the-10-most-accomplished-heavyweight-champions-in-boxing-history> (ranking Ali second after Joe Louis); see also Gilmore, *supra* note 3, at 12–13 (naming Ali “the world’s best known athlete.”).

³⁰ See *infra* note 33.

the unpopular Viet Nam War all combined to make him an idol among blacks and the world's best-known athlete."³¹

Against the backdrop of the Vietnam War, Muhammad Ali won his first heavyweight championship title in 1964.³² It was also around this time that the Greatest changed his name and joined the Nation of Islam as a convert Muslim.³³ At the prime of his career, young Ali was also a contender for the draft.³⁴ In 1967 he showed up for his scheduled induction into the U.S. Army but refused to serve—categorizing himself as a conscientious objector and citing his religious beliefs.³⁵ This began what became one of the biggest political demonstrations by an athlete in American history.³⁶ Its impact was felt all over the world.³⁷

In 1966, Ali was classified as 1-A and thus found eligible for military service.³⁸ Following this classification, Ali filed a Special Form for Conscientious Objector with his local draft board which was to no avail.³⁹ Then, through

³¹ Gilmore, *supra* note 3, at 12–13.

³² See *id.* at 12. See generally Krishnadev Calamur, *Muhammad Ali and Vietnam*, ATLANTIC (June 4, 2016), <https://www.theatlantic.com/news/archive/2016/06/muhammad-ali-vietnam/485717/> (discussing Ali's career during the Vietnam war).

³³ Speaking about his conversion to Islam, Ali expressed that one day, "he realized that he hadn't chosen Christianity" nor "the name Cassius Clay" and he began to resent keeping the "vestiges of slavery." Then, in 1964, Ali publicly declared his conversion. He stated:

I believe in Allah and in peace . . . I don't try to move into white neighborhoods. I don't want to marry a white woman. I was baptized when I was 12, but I didn't know what I was doing. I'm not a Christian anymore. I know where I'm going and I know the truth and I don't have to be what you want me to be. I'm free to be what I want.

Jonathan Eig, *The Real Reason Muhammad Ali Converted to Islam*, WASH. POST (Oct. 26, 2017) (internal quotation marks omitted), <https://www.washingtonpost.com/news/acts-of-faith/wp/2017/10/26/the-real-reason-muhammad-ali-converted-to-islam/>.

³⁴ See Calamur, *supra* note 32 ("On March 9, 1966, at the height of the war, Ali's draft status was revised to make him eligible to fight in Vietnam.").

³⁵ *Id.*

³⁶

My conscience won't let me go shoot my brother, or some darker people, or some poor hungry people in the mud for big powerful America . . . and shoot them for what? They never called me nigger, they never lynched me, they didn't put no dogs on me, they didn't rob me of my nationality, rape and kill my mother and father. . . . Shoot them for what? How can I shoot them poor people? Just take me to jail.

Id. (internal quotation marks omitted); see also Peniel Joseph, *Muhammad Ali Helped Make Black Power into a Global Political Brand*, UT NEWS (June 8, 2016), <https://news.utexas.edu/2016/06/08/muhammad-ali-helped-make-black-power-into-a-political-brand/> (highlighting Ali's impact as a global ambassador).

³⁷ See Joseph, *supra* note 36.

³⁸ *Clay v. United States*, 397 F.2d 901, 905 (5th Cir. 1968), *cert. granted, judgment vacated sub nom.* *Giordano v. United States*, 394 U.S. 310 (1969), *aff'd sub nom.* *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970), *rev'd*, 403 U.S. 698 (1971), and *aff'd sub nom.* *United States v. Hoffa*, 436 F.2d 1243 (7th Cir. 1970), and *aff'd sub nom.* *United States v. Battaglia*, 432 F.2d 1115 (7th Cir. 1970).

³⁹ See *id.*

various appeals, the Kentucky Appeal Board directed his case to the Department of Justice for recommendation.⁴⁰ In conjunction with the Department of Justice, the Federal Bureau of Investigation, through a hearing Officer, conducted meetings and interviews with Ali and close family, friends, and religious leaders to determine the veracity of his conscientious objector claim.⁴¹ The Hearing Officer, having heard from Ali's closest allies, determined that Ali's claims were sincere.⁴² Nonetheless, the Department of Justice, who assigned the investigation by the Hearing Officer, recommended to the Kentucky Appeal Board that Ali's request be denied—which the Board did.⁴³ After many more appeals to the local board, on April 28, 1967, Cassius Clay reported to his local board for induction but when called by his birth given name, refused to answer and declined induction on the grounds of his religious beliefs.⁴⁴

Less than a month later, Ali was indicted for violating 50 U.S.C. § 3811 which reads in part that anyone “who otherwise evades or refuses registration or service in the armed forces . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment.”⁴⁵ After a trial by jury, he was found guilty and both sentenced and fined at the maximum statutory limit.⁴⁶ Ali appealed his conviction and raised various issues deeply rooted in race, racism, and politics.⁴⁷ More than just an attack on his religious belief, Ali's appeal reflected his perception that African Americans at large were under attack.⁴⁸

Before the Fifth Circuit Court of Appeals, Ali, bold as ever, argued that his classification and induction into the armed forces was analogous to criminal prosecution because in both scenarios the government retains an individual's liberty and could cause their death.⁴⁹ Ali further argued that the lack of representation for African Americans in the Draft Boards was unconstitutional by drawing a comparison to other Fifth Circuit decisions where the court often found deliberate discrimination against African Americans in cases of jury exclusion or civil rights issues.⁵⁰ Ali's contention was “that if systematic exclusion of Negroes is constitutionally barred in the composition of juries, their

⁴⁰ *See id.*

⁴¹ *See id.* at 906; *Clay v. United States*, 403 U.S. 698, 699 (1971).

⁴² *See Clay*, 403 U.S. at 699–700; *Clay*, 397 F.2d at 906.

⁴³ *See Clay*, 397 F.2d at 906.

⁴⁴ *See id.*; Calamur, *supra* note 32 (“[Ali] repeatedly refused to step forward when his name was called—despite being warned by an officer that he was committing a felony offense that was punishable by five years in prison and a fine of \$10,000.”).

⁴⁵ *See Clay*, 397 F.2d at 906; 50 U.S.C. § 3811(a) (1965).

⁴⁶ *See Clay*, 397 F.2d at 906–07.

⁴⁷ *See id.* at 908–09 (summarizing the principal questions for decision before the Fifth Circuit Court of Appeals).

⁴⁸ *See id.* at 909–14 (addressing Ali's argument that there was a “systematic exclusion of negroes from selective service boards.”).

⁴⁹ *See id.* at 911.

⁵⁰ *See id.* at 910.

exclusion in the Selective Service System likewise infringes his rights and requires a holding that draft boards, such as those in Kentucky and Texas which considered [Ali's] case, have no jurisdiction over [him] or in fact over any Negro."⁵¹

The Fifth Circuit did not take well to Ali's comparison of the draft to criminal prosecution. Judge Andrew Ainsworth who wrote the opinion of the Court and was a Navy Veteran himself,⁵² stated in part:

There is no stigma attached to wearing the military uniform of the United States. To the contrary, it is a badge of the highest honor. Service under the flag of our country cannot properly be likened to imprisonment in a penitentiary. A proud nation with a long tradition of valor and bravery on the battlefield . . . would never permit a comparison so odious.⁵³

Similarly, the court found that a lack of African American representation in local Draft Boards was "comparable to a malapportioned legislature" but did not nullify or void the draft board system.⁵⁴ It lastly found that Ali's comparison to inclusion in juries was not relevant in Draft Boards because unlike military service, the right to jury trials is deeply rooted in the Constitution and has an element of finality to it.⁵⁵ The argument of finality is ironic considering that 58,200 U.S. soldiers are recorded as having died in the Vietnam War.⁵⁶ That's something for finality.

On appeal, Ali also objected to the Board's denial of his conscientious objector classification.⁵⁷ The findings of the Department of Justice, despite its Hearing Officer's recommendation that Ali was credible, recommended that the Kentucky Board deny Ali's claim because Ali's refusal "to participate in [the] war insofar as they [were] based upon the teachings of the Nation of Islam 'rest[ed] on grounds which [were] primarily political and racial [and] . . . constitute[d] objections to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form.'"⁵⁸ On this

⁵¹ *Id.*

⁵² See Robert Andrew Ainsworth, Jr., U.S. DISTRICT COURT EASTERN DISTRICT OF LOUISIANA, <https://www.laed.uscourts.gov/court-history/judges/ainsworth> (last visited Dec. 28, 2020) ("In 1944, [Judge Ainsworth] served as a Lieutenant in the United States Navy during World War II.").

⁵³ *Clay*, 397 F.2d at 911.

⁵⁴ See *id.*

⁵⁵ See *id.* at 912.

⁵⁶ See Ronald H. Spector, *Vietnam War 1954-1975*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Vietnam-War> (last updated Sept. 10, 2020) ("In 1982 the Vietnam Veterans Memorial was dedicated in Washington, D.C., inscribed with the names of 57,939 members of U.S. armed forces who had died or were missing as a result of the war. Over the following years, additions to the list have brought the total past 58,200.").

⁵⁷ See *Clay*, 397 F.2d at 918-21.

⁵⁸ *Id.* at 918-19.

claim, the court of appeals found sufficient evidence to affirm the rejection of Ali's claim.⁵⁹ By the end of the opinion, the court of appeals had affirmed every finding of the district court and Ali's conviction and sentence stood.⁶⁰ The Greatest athlete in the world was a convicted felon. His title, ability to fight, freedom, and life as he knew it was stripped away.⁶¹ "I am not allowed to work in America and I'm not allowed to leave America," Muhammad Ali said in February 1968, at the start of his first full year of exile from boxing. "I'm just about broke."⁶²

It was not until three years after the Fifth Circuit's decision that the United States Supreme Court reversed the decision of the court of appeals.⁶³ The question before the Supreme Court was whether the denial of Ali's status as a conscientious objector was erroneous and thus invalid.⁶⁴ Lawyers for the United States once again argued that Ali's opposition to war was racially and politically motivated rather than religious and that he opposed just some wars and not the institution of war as a whole.⁶⁵ The Supreme Court however, focused its inquiry only on the Kentucky Appeal Board's denial based on the Department of Justice's recommendation.⁶⁶ The recommendation to the Kentucky Appeal Board implied that Ali had failed to satisfy the three basic tests to qualify as a conscientious objector: (1) Registrant must oppose war in any form, (2) the opposition must be based on religious training and belief, and (3) the opposition to war must be sincere.⁶⁷

By the time the case reached the Supreme Court, the Government had conceded that tests two and three were satisfied by Ali and thus not allowable grounds for the Kentucky Appeal Board to have denied his request for conscientious objector.⁶⁸ Then, the Court highlighted that since the Appeal Board's letter did not seem to indicate on which ground it denied Ali's request, it was impossible to ascertain which of the Department of Justice's recommendation

⁵⁹ See *id.* at 921 ("There was more than adequate evidence to justify the rejection of his claim.").

⁶⁰ See *id.* at 924 ("The conviction and sentence are, therefore, affirmed.").

⁶¹ See Calamur, *supra* note 32 ("[Ali's] refusal led to [his] arrest and eventual conviction . . . His license to box was suspended in New York the same day, and his title stripped; other boxing commissions followed. Ali was unable to obtain a boxing license in the U.S. for the next three years.").

⁶² Andrew Wolfson, *Muhammad Ali lost everything in opposing the Vietnam War. But in 1968, he triumphed*, USA TODAY, <https://www.usatoday.com/story/news/2018/02/19/1968-project-muhammad-ali-vietnam-war/334759002/> (last updated Feb. 19, 2018).

⁶³ See *Clay*, 403 U.S. at 705.

⁶⁴ See *id.* at 699 (U.S. Supreme Court granted certiorari "to consider whether the induction notice was invalid because grounded upon an erroneous denial of the petitioner's claim to be classified as a conscientious objector.").

⁶⁵ See *id.* at 701–02.

⁶⁶ See *id.* at 701 ("[T]he conviction before us must still be set aside for another quite independent reason. The petitioner's criminal conviction stemmed from the Selective Service System's denial of his appeal seeking conscientious objector status. [A] denial, for which no reasons were ever given.").

⁶⁷ See *id.* at 700–01.

⁶⁸ See *id.* at 702–03.

it based its decision on.⁶⁹ From this, the Court relied on its decision in *Stromberg v. California* which found that when “it is impossible to say under which clause of [a] statute [a] conviction was obtained” and where any one of the “clauses in question is invalid” then “the conviction cannot be upheld.”⁷⁰ Because the Kentucky Appeal Board failed to state on which grounds it was denying Ali’s request based on the Department of Justice’s recommendation, the judgments of the lower courts were reversed.⁷¹

While awaiting the decision of the United States Supreme Court, Ali fought yet another battle against the New York State Athletic Commission for denying him a boxing license.⁷² About two months before his conviction, the Commission suspended Ali’s license because of his refusal for induction into the Armed Forces.⁷³ In 1969, while out on bond awaiting the appeal of his conviction, Ali applied to the Commission for renewal of his license in New York.⁷⁴ The petition was denied because of Ali’s “refusal to enter the service and (his) felony conviction in violation of Federal law [which were] regarded by [the] Commission to be detrimental to the best interests of boxing, or to the public interest, convenience or necessity.”⁷⁵

Ali petitioned the Southern District of New York on grounds that the denial by the Commission was in violation of his rights to equal protection of the law under the Fourteenth Amendment.⁷⁶ He argued that the Athletic Commission had, in prior occasions, granted licenses to boxers convicted of crimes involving moral turpitude.⁷⁷ In 1962, the same Commission had even recognized Sony Liston as the heavyweight champion of the State of New York notwithstanding his conviction for armed robbery and assault with intent to kill.⁷⁸ “The Commission’s records reveal[ed] at least 244 instances ... where it [] granted, renewed or reinstated boxing licenses to applicants” with convictions “of one or more felonies, misdemeanors or military offenses involving moral turpitude.”⁷⁹ Licensed felons included those convicted for “such anti-social activities as second degree murder, burglary, armed robbery, extortion, grand larceny, rape, sodomy, aggravated assault and battery, embezzlement, arson and receiving stolen property.”⁸⁰ The misdemeanor convictions included theft, battery, and

⁶⁹ See *Clay*, 403 U.S. at 703–04.

⁷⁰ See *id.* at 704–05.

⁷¹ See *id.* at 703–05.

⁷² See generally *Muhammad Ali v. Div. of State Athletic Comm’n of Dep’t of State of State of N. Y.*, 316 F. Supp. 1246, 1247 (S.D.N.Y. 1970) [hereinafter *Athletic Commission*] (Ali moves for declaratory judgment and injunction against the Athletic Commission).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 1248.

⁷⁷ *Athletic Commission*, 316 F. Supp. at 1248.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1249.

⁸⁰ *Id.*

fraud.⁸¹ Included were also fifteen military offenses including “convictions or dishonorable discharges for desertion from the Armed Forces of the United States, assault upon an officer, burglary and larceny.”⁸²

The court found that in light of the overwhelming evidence, the actions of the Athletic Commission duly constituted those of the state of New York and ruled that Ali’s rights to equal protection of the laws of New York under the Fourteenth Amendment were violated by deliberately and arbitrarily discriminating against him without a rational basis.⁸³

Although a victory, the damage was done. The court itself took note of this when it stated that:

Denial of a license to box has barred Ali from pursuing in New York his chosen trade, from which he earned his living for most of his adult years prior to 1967, with but a limited number of years remaining in which he can meet the rigorous physical standards essential to engaging in such activity The harm to Ali cannot be measured in damages.⁸⁴

And while his long legal battle proved successful, his public image was vilified.⁸⁵ Ali’s convictions against the war, his stance as a Muslim, and his existence as a Black famous man in America were the perfect storm for the public to condemn him. At the center of his controversy was always his race and what his actions were doing to the African American community.⁸⁶ David Susskind, an American television host, stated that he “[fou]nd nothing amusing or interesting or tolerable about [Ali]” and in fact saw him as “a disgrace to his country, his race, and what he laughingly describes as his profession He will inevitably go to prison, as well he should. He is a simplistic fool and a pawn.”⁸⁷

Jackie Robinson himself criticized Ali by alluding to how he had made millions from the American public and therefore refusing to show the same appreciation to the country that made him famous was ungrateful and not good for

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Athletic Commission*, 316 F. Supp. at 1250.

⁸⁴ *Id.* at 1253.

⁸⁵ See discussion *infra* Section II(A), at 14–15.

⁸⁶

[Ali’s] bold assertion of black identity was discomfoting to both whites and blacks He became a Muslim in a country that saw itself as Christian. He questioned a war and defied the draft, at a time when most of the country saw that as unpatriotic. At a time when fighting for civil rights meant pushing for integration by marching or sitting in, Ali did neither. Instead, he joined a religious sect that preached racial separation.

Michael A. Fletcher, *Muhammad Ali and the Complexity of Black Identity*, UNDEFEATED (June 9, 2016), <https://theundefeated.com/features/muhammad-ali-and-the-complexity-of-black-identity/>.

⁸⁷ Calamur, *supra* note 32.

the morale of the young Black men who were fighting in Vietnam.⁸⁸ Time Magazine called him “Gaseous Cassius,” a reference to Ali’s birth name which had its roots in the name of the masters that owned Ali’s relatives during slavery.⁸⁹ The Mayor of Chicago refused to call him by his Muslim name and the Illinois Governor referred to him as “unpatriotic.”⁹⁰

Having forfeited the millions of dollars boxing made him, during this time, Ali traveled across the country speaking at colleges “earning pennies on the dollar compared to his time in the ring.”⁹¹ Martin Luther King Jr. said, referring to Ali, “[he] is giving up millions of dollars in order to stand for what his conscience tells him is right. No matter what you think of his religion, you have to admire his courage.”⁹² Even after returning to boxing, three years in exile had taken an undeniable toll on Ali’s career.⁹³ His trainer expressed how “Ali’s beliefs cost him the best years of his life . . . He was robbed of his best years, his prime years.”⁹⁴

B. COLIN KAEPERNICK

On August 26, 2016, during a preseason faceoff between the Green Bay Packers and the San Francisco 49ers, Colin Kaepernick, quarterback at the time for the 49ers, remained seated for the playing of the national anthem.⁹⁵ “I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color,” Kaepernick said. “To me, this is bigger than football and it would be selfish on my part to look the other way.”⁹⁶

Almost 50 years after Ali refused induction into the Armed Forces, Colin Kaepernick marks another point in American history where Black athletes have openly protested. Although 50 years between the two superstars, and a now seemingly progressive America, following the election of the country’s first African American President, the realities that Ali lived in 1967 are very much still present.

Following Kaepernick’s symbolic sitting, the National Football League (NFL) released a damage control statement in which it stated that players are

⁸⁸ *Id.*

⁸⁹ See Wolfson, *supra* note 62.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Calamur, *supra* note 32.

⁹⁴ *Id.* (internal quotation marks omitted).

⁹⁵ See Euan McKirdy, *NFL star Colin Kaepernick sits in protest during national anthem*, CNN SPORTS (Aug. 28, 2016), <https://www.cnn.com/2016/08/28/sport/nfl-colin-kaepernick-protest-sit-down-national-anthem/index.html>; see also Tribune News Services, *49ers QB Kaepernick refuses to stand for national anthem in protest*, CHI. TRIB. (Aug. 27, 2016), <https://www.chicagotribune.com/sports/ct-colin-kaepernick-national-anthem-20160827-story.html> (highlighting the after-game questions around Kaepernick’s decision to sit through the national anthem).

⁹⁶ Tribune News Services, *supra* note 95.

encouraged but not required to stand for the national anthem.⁹⁷ All seemed well, until it wasn't.⁹⁸

The days following Kaepernick's first protest drew controversy from fans, team players, and sports commentators alike.⁹⁹ NFL Commissioner, Roger Goodell, stated that he did not personally agree with Kaepernick's actions and that the NFL as well as himself believed in patriotism.¹⁰⁰

Though a bad season for the 49ers and possibly the worst season of his career, Kaepernick remained a promising quarterback having "the 24th-best career passer rating of all time."¹⁰¹ Nonetheless, January 1, 2017, was the last time Kaepernick played a professional football game.¹⁰² What followed were a series of events one can only presume were in direct retaliation to his protest on the football field.¹⁰³ Similar to Ali 50 years earlier, yet again, another Black athlete was stripped of his craft for speaking out.

In March of 2017, Kaepernick, like many NFL players often do, opted out of his contract in search of a better opportunity.¹⁰⁴ As the months passed, and

⁹⁷ Matt Maiocco, *NFL: Standing for national anthem 'not required'*, NBC SPORTS (Aug. 27, 2016), <https://www.nbcsports.com/bayarea/49ers/nfl-standing-national-anthem-not-required> ("The national anthem is . . . an opportunity to honor our country and reflect on the great liberties we are afforded as its citizens. In respecting such American principles as freedom of religion and freedom of expression, we recognize the right of an individual" to not participate in the national anthem).

⁹⁸ See discussion *infra* Part II(B), at 16–20.

⁹⁹ See Brittney Watkins, *Kaepernick Can Kick It!: Employment Discrimination, Political Activism, and Speech in the NFL*, 59 WASH. U. J.L. & POL'Y 259, 263 (2019) ("Immediately, Kaepernick experienced widespread public backlash. Current and former NFL players felt that Kaepernick was being disrespectful, while others conveyed agreement with the reasons behind Kaepernick's protest but not his method.").

¹⁰⁰ See Roger Goodell on Colin Kaepernick: 'We believe very strongly in patriotism in the NFL', USA TODAY SPORTS (Sept. 7, 2016), <https://www.usatoday.com/story/sports/nfl/2016/09/07/goodell-doesnt-agree-with-kaepernicks-actions/89958636/> ("[W]e believe very strongly in patriotism in the NFL. I personally believe very strongly in that."). But see Thurgood Marshall, HIST. (Nov. 17, 2019), <https://www.history.com/topics/black-history/thurgood-marshall> ("To protest against injustice is the foundation of all our American democracy.").

¹⁰¹ See Rodger Sherman, *The NFL's Colin Kaepernick Excuses Look Even More Damning in Retrospect*, RINGER (June 15, 2020), <https://www.theringer.com/nfl/2020/6/15/21289577/colin-kaepernick-protest-black-lives-matter-nfl-team-excuses> ("[A]ny arguments that Kaepernick fell out of the league for football reasons alone are misleading and incorrect."); see also *2016 San Francisco 49ers Statistics & Players*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/teams/sfo/2016.htm> (last visited Dec. 28, 2020) (highlighting that the 49ers went 2–14 in 2016).

¹⁰² See Juan Carlos Guerrero, *TIMELINE: Colin Kaepernick's journey from San Francisco 49ers star to kneeling to protest racial injustice*, 7 NEWS (Aug. 29, 2020), <https://abc7news.com/colin-kaepernick-kneeling-when-did-first-kneel-date-what-does-do-now/4147237/> (acknowledging that on January 1, 2017, Kaepernick played his last game).

¹⁰³ See Watkins, *supra* note 99, at 263 ("Several NFL executives anonymously conveyed that Kaepernick was a 'traitor' and that they would never sign Kaepernick. These executives approximated that '90 to 95 percent of the NFL front offices felt the same way.'").

¹⁰⁴ See *id.* at 265 ("Following the conclusion of the 2016 season, on March 3, 2017, the stakes of Kaepernick's protest were raised when he opted out of his contract with the San Francisco 49ers and became a free agent.").

other less skilled players signed contracts, Kaepernick remained blacklisted.¹⁰⁵ Then, on October 15, 2017, Kaepernick filed a collusion grievance under the Collective Bargaining Agreement against the NFL, alleging that all 32 teams that make up the league were conspiring to intentionally keep him out of the game.¹⁰⁶

Following his filing, Kaepernick, still unemployed, is estimated to have lost tens of millions of dollars between his NFL salary and endorsements, not to mention not being able to perform his craft during the prime of his career.¹⁰⁷ To add injury to insult, the NFL moved for summary judgment during arbitration.¹⁰⁸ However, almost a year after the grievance's filing, the arbitrator decided that Kaepernick's lawyers had presented sufficient evidence to proceed to a hearing.¹⁰⁹ Then, on February 15, 2019, a private and confidential settlement was reached between Kaepernick and the NFL.¹¹⁰ Today, however, during what could be the last years of his career, Kaepernick is still unemployed.¹¹¹

What Kaepernick's story shows is that the America Muhammad Ali lived through 50 years earlier is still alive and well. The public's opinion around Black athletes continues to predominantly be one dominated by race. Black athletes who don't "stay in line" are vilified and their careers leveraged against them. Ali was prosecuted and had to fight both the U.S. government and the

¹⁰⁵ See Victor Mather, *A Timeline of Colin Kaepernick vs. the N.F.L.*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/sports/nfl-colin-kaepernick-protests-timeline.html>; see also Joe Virgillito, *Another Mediocre QB Signed Before Colin Kaepernick*, BTRTODAY (Nov. 2, 2017), <https://www.btrtoday.com/read/featured/another-mediocre-qb-signed-before-colin-kaepernick/> ("The Indianapolis Colts tried out four quarterbacks on Tuesday, including Josh Johnson, who hasn't thrown a regular season pass since 2011. Somebody call Yahoo! and tell them to update their tracker. Kaepernick remains the most qualified professional quarterback without an NFL roster spot.").

¹⁰⁶ See Mather, *supra* note 105; see also Watkins, *supra* note 99, at 271 ("Colin Kaepernick 'filed a grievance' against the NFL for collusion . . . [T]he NFL Collective Bargaining Agreement . . . governs collusion and outlines rules prohibiting the NFL and Clubs from 'restrict[ing] or limit[ing] individual Club decision-making' in certain ways concerning making offers to players and entering into contracts with them.").

¹⁰⁷ See Chris Murray, *Murray's Mailbag: How much money did Colin Kaepernick cost himself with protest?*, RENO GAZETTE J. (Aug. 20, 2018), <https://www.rgj.com/story/sports/college/nvada/2018/08/20/murrays-mailbag-how-much-money-did-colin-kaepernick-lose-protest/1044306002/> (estimating Kaepernick's monetary loss).

¹⁰⁸ See Michael McCann, *Why the Arbitrator Ruled in Favor of Colin Kaepernick, and What This Means for the NFL*, SI (Aug. 30, 2018), <https://www.si.com/nfl/2018/08/31/colin-kaepernick-collusion-case-nfl-arbitrator> ("[A]rbitrator Stephen Burbank has denied the NFL's request for summary judgment.").

¹⁰⁹ See *id.* ("Burbank's ruling means that, absent a negotiated settlement between Kaepernick and the NFL, Kaepernick's grievance will proceed to a trial-like hearing before Burbank later this year.").

¹¹⁰ See Watkins, *supra* note 99, at 273; see also Mather, *supra* note 105.

¹¹¹ See Hunter Noll, *'Not much' movement when it comes to NFL teams interested in signing Colin Kaepernick*, CLUTCH POINTS (June 26, 2020), <https://clutchpoints.com/nfl-news-not-much-movement-in-signing-colin-kaepernick/> ("Kaepernick had a workout in 2019, but a lot of people saw that as a public relations move by the NFL and it didn't result in him joining a team. But even though the temperature has recently changed in regard to Kaepernick, he's still awaiting teams' calls.").

Athletic Commission to regain his freedom, identity, and well-being.¹¹² Kaepernick was blacklisted and pushed out, drowned in Collective Bargaining Agreements drafted in an industry predominantly sustained by Black athletes but not designed for them.¹¹³ Kaepernick's legal and employment battle however, measured against his battle in the public's eye, makes it apparent that America does not love Black men like it loves Black entertainment.¹¹⁴

To be un-American is to act inconsistent "with American customs, principles, or traditions."¹¹⁵ To be perfectly clear, Kaepernick is not un-American. In fact, the right to protest stands amongst one of the most American values on which many of the rights we enjoy today stand.¹¹⁶ He made this clear when he stated that he loves America, loves people, and this is the reason he protests—to help make America better; yet, at the center of Kaepernick's protest and public image have been the words "American" and "patriotism."¹¹⁷

In response to Kaepernick's protest, many fans burned his jersey.¹¹⁸ When rumors began that the Cardinals were thinking of acquiring Kaepernick, a fan of the team wrote on Twitter that he "[w]ouldn't go, or watch another Cardinals game EVER."¹¹⁹ Others threatened to stop watching their beloved sport

¹¹² See discussion *supra* Section II(A).

¹¹³ See Nikhil Sonnad, *The NFL's racial divide, in one chart*, QUARTZ (May 24, 2018), <https://qz.com/1287915/the-nfls-racial-makeup-explains-much-of-its-national-anthem-problems/>.

The Institute for Diversity and Ethics in Sport (TIDES), shows that while 70% of NFL players are black, only 9% of managers in the league office are (that's vs. 13% of Americans overall). And as for team CEOs or presidents—the ones chiefly responsible for deciding what to do about kneeling—it's exactly 0%.

Id.

¹¹⁴ See Patrick C. Barham Quesada, *Black Players White Fans*, HARV. CRIMSON (Oct. 31, 2019), <https://www.thecrimson.com/article/2019/10/31/barham-quesada-black-players/>.

In the end, we must ensure that athletes are not a product and that fans are not the consumers, especially when those in the stands or in the back office and those on the field look as different demographically as they do. As it is now, it's a bad look.

Id.; see also Samuel G. Freedman, *When white sports fans turn on black athletes*, GUARDIAN (Oct. 5, 2017), <https://www.theguardian.com/commentisfree/2017/oct/05/white-sports-fans-nfl-black-athletes-race-protest> ("You've had that pattern since the late 1960s. People try to protect this sacred space of sport. What doesn't happen is engaging the protesters' actual ideas about race and racism.").

¹¹⁵ See *Un-American*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/un-American> (last visited Dec. 28, 2020).

¹¹⁶ Abolitionist Frederick Douglass said it best when he stated that "[p]ower concedes nothing without a demand." And while voting is an effective means to drive change through policy, protesting is what drives the vote which eventually drives the policy. One cannot exist without the other. See Andre M. Perry & Carl Romer, *Protesting is as important as voting*, BROOKINGS (Aug. 28, 2020), <https://www.brookings.edu/blog/the-avenue/2020/08/28/protesting-is-as-important-as-voting/>.

¹¹⁷ See Guerrero, *supra* note 102.

¹¹⁸ See Watkins, *supra* note 99, at 263.

¹¹⁹ See EJ Montini, *Cardinals fans apparently against signing a player with a conscience . . . Colin Kaepernick*, AZCENTRAL (Nov. 14, 2019, 8:39 PM), <https://www.azcentral.com/story/opinion/op->

altogether if the NFL allowed players to kneel or sit during the national anthem.¹²⁰ President Donald Trump also took to Twitter to vilify Kaepernick stating that players “have to stand proudly for the national anthem or [they] shouldn’t be playing, [they] shouldn’t be there, maybe [they] shouldn’t be in the country.”¹²¹

The same rhetoric faced by Ali was once again deployed against Kaepernick. It is the idea that America will draw insult from a Black athlete sitting down during the national anthem but will not meet police killing unarmed Black individuals with the same indignation. It is this un-Americanization of the Black athlete that then justifies and allows their continued vilification and for their livelihood to be leveraged against their morals, beliefs, and right to protest.

C. THE ONES THAT CAME BEFORE AND AFTER ALI AND KAEPERNICK

In 1968, Kareem Abdul-Jabbar, a prospective athlete for the U.S. Olympic Men’s Basketball Team, boycotted the Mexico City Olympic games because of the treatment of African Americans in the U.S. at the time.¹²² As a result of the boycott, Kareem explained the experience as follows: “I was met with a vicious backlash criticizing my lack of gratitude for being invited into the air-conditioned Big House where I could comfortably watch my community swelter and suffer.”¹²³ In the same Mexico City Olympics Kareem boycotted, John Carlos and Tommie Smith stood on the medal podium when they famously raised their fists in a Black Power salute when the American national anthem began playing.¹²⁴ Again, America was outraged and Carlos and Smith were kicked out of

ed/ej-montini/2019/11/14/cards-fans-against-signing-player-conscience-colin-kaepernick/4198472002/ (“The NFL has had murderers, wife beaters, drug dealers. But a guy who takes a knee to protest racial injustice gets blackballed.”).

¹²⁰ See *id.* (“NFL fans don’t mind if a player has a record. But they can’t abide one with a conscience.”).

¹²¹ Trump not only failed to address *why* Kaepernick protests and rather just highlighted his strong disagreement with *how* he protests, but also implied that Kaepernick, an American citizen, should leave this country for protesting. See *Trump: NFL kneelers ‘maybe shouldn’t be in country’*, BBC NEWS (May 24, 2018), <https://www.bbc.com/news/world-us-canada-44232979> (highlighting President Trump’s statement stating: “Wouldn’t you love to see one of these NFL owners, when somebody disrespects our flag, to say, ‘Get that son of a bitch off the field right now, out, he’s fired. He’s fired.’”).

¹²² See Gilmore, *supra* note 3, at 13.

¹²³ See Kareem Abdul-Jabbar, *Hope is a dying ember for black people in the US. Athletes have rekindled it*, GUARDIAN (Aug. 28, 2020), <https://www.theguardian.com/sport/2020/aug/28/kareem-abdul-jabbar-athlete-protests-nba-mlb-jacob-blake>.

¹²⁴ See Mélissa Godin, *Athletes Will Be Banned From Protesting at the 2020 Tokyo Olympics. But the Games Have a Long History of Political Demonstrations*, TIME (Jan. 14, 2020, 12:19 PM), <https://time.com/5764614/political-protests-olympics-ioc-ban/>; see also Freedman, *supra* note 114 (highlighting how there is a “morally corrupt contract” that white fans make with black athletes where the fans will accept the Black athlete but only if they “surrender [their] political voice,” and explaining how Tommie Smith and John Carlos’ actions in the 1968 Olympics set the stage for the backlash against Kaepernick and James today. It reminds the reader how “a major television broadcaster, maligned Smith and Carlos as ‘a pair of black-skinned stormtroopers’”).

the Olympic village and sent home suspended from the team; “[t]hey never let us forget that we were wrong,” Smith added. “We were not wrong. We were only ahead of our time.”¹²⁵

In the midst of a year where America fights two public health crises—racism and Covid-19—multiple NBA teams decided to skip game 5 of their first-round playoff series in the 2020 season, following the shooting of Jacob Blake in Kenosha, Wisconsin.¹²⁶ The NBA and other league players showed their support and solidarity with the African American community.¹²⁷ LeBron James, who has spoken out before, joined the protests strongly and loudly—he is “the strongest voice in the NBA . . . [and] probably the strongest voice in all of sports. So when the King gets upset, you listen.”¹²⁸

Once again however, LeBron James’ and the NBA’s support of its players and of the Black Lives Matter movement created indignation. In the past, when James gave his opinion on President Trump’s time in office, the vilification of the Black athlete with a political voice once again resurfaced.¹²⁹ Journalist Laura Ingraham responded to James’ comments on politics with ad hominem attacks “calling them ‘barely intelligible’ and ‘ungrammatical’” and telling him to keep his political comments to himself and to just “shut up and dribble.”¹³⁰

From Ali, to Kaepernick, to James, many other athletes have also used their visibility to demand social change, even when it has come at great personal costs. What it has shown? There are not enough quantifiable, public,

¹²⁵ See Godin, *supra* note 124.

¹²⁶ See Marc Stein, *Led by N.B.A., Boycotts Disrupt Pro Sports in Wake of Blake Shooting*, N.Y. TIMES (Aug. 26, 2020), <https://www.nytimes.com/2020/08/26/sports/basketball/nba-boycott-bucks-magic-blake-shooting.html> (highlighting how other leagues followed suit in postponing or canceling sporting events. “‘We demand change,’ [Lebron] James said on Twitter, writing in all caps. ‘Sick of it.’”); see also Tim Bontemps & Malika Andrews, *Three Game 5s set for Wednesday postponed after Bucks’ decision to not take floor*, ESPN (Aug. 26, 2020), https://www.espn.com/nba/story/_/id/29747523/three-game-5s-set-wednesday-postponed-bucks-decision-boycott (“When we take the court and represent Milwaukee and Wisconsin, we are expected to play at a high level, give maximum effort and hold each other accountable. We hold ourselves to that standard, and in this moment, we are demanding the same from our lawmakers and law enforcement.”).

¹²⁷ See Stein, *supra* note 126 (MLB and WNBA also showed solidarity).

¹²⁸ See Benjamin Zweiman, *LeBron James, NBA community react to protests that have halted playoffs*, DRAFTKINGS NATION, <https://dknation.draftkings.com/2020/8/26/21403212/nba-playoffs-2020-postponed-protests-strike-lebron-james-twitter-social-media-reaction-teams> (last updated Aug. 26, 2020).

¹²⁹ See Emily Sullivan, *Laura Ingraham Told LeBron James To Shut Up And Dribble; He Went To The Hoop*, NPR (Feb. 19, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/19/587097707/laura-ingraham-told-lebron-james-to-shutup-and-dribble-he-went-to-the-hoop> (highlighting how the media portrays James as nothing more than an athlete whose political views are not only invalid but should be kept silent).

¹³⁰ See *id.* But see also *id.* (“‘We will definitely not shut up and dribble. . . . I mean too much to society, too much to the youth, too much to so many kids who feel like they don’t have a way out,’ James [stated].”).

extraordinary, and meritorious performances by Black athletes that can shield them from the suffering perpetuated by being Black in America.¹³¹

III. DEBUNKING THE MYTHS OF A POST RACIAL AMERICA THROUGH THE LENS OF PROFESSIONAL ATHLETES

The stories of Muhammad Ali, Colin Kaepernick, LeBron James, and others highlight one very simple, yet controversial, topic in this country—we have not lived, and do not live, in a post racial America.

Post racialism by definition is the state of “having overcome or moved beyond racism: having reached a stage or time at which racial prejudice no longer exists or is no longer a major social problem.”¹³² Rather, most people who also believe that America is post-racial, by the same token attribute the racial injustices we continue to see as a *class* issue, rather than a *race* issue.¹³³ That is, any separation, injustice, racism, marginalization, or otherness, that Black people experience is due to their poverty, not their race.¹³⁴

While poverty is undoubtably weaved into the way in which those living it experience the world, believing that poverty alone shapes those experiences is where the problem lies.¹³⁵ Seeing class as the main issue, as post-racialism

¹³¹

Do you want to know what it feels like to be black in America this week? Think about Survivor, or Naked and Afraid, or Alone – or any of those wilderness shows in which a person’s survival in a hostile environment depends on keeping that crucial campfire burning bright. Inevitably, some disaster occurs and the fire nearly goes out. Then, on their hands and knees, the person tries desperately to fan one dying ember back to life.

See Abdul-Jabbar, *supra* note 123; see also Freedman, *supra* note 114 (explaining how the status of professional athlete provides Black athletes “with provisional, symbolic whiteness – in the forms of adulation, affluence, product endorsements, social acceptance In return, however, the black athlete must surrender his or her political voice as a black person. Obstructing justice in a murder case, fine; seeking justice for fellow blacks, intolerable.”).

¹³² *Post-racial*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/post-racial> (last visited Dec. 28, 2020) (defining post-racialism); see Khiara M. Bridges, *Excavating Race-Based Disadvantage Among Class-Privileged People of Color*, 53 HARV. C.R.-C.L. L. REV. 65, 65 (2018) (“[P]ost-racialism—the sense that we, as a nation, have overcome our racial problems.”). See generally Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009).

¹³³ See Cho, *supra* note 132, at 1602 (“Post-racialists, for both theoretical and practical reasons, reject strategies or remedies that rely upon racial identity. Theoretical post-racialists reject race-based remedies because they believe that such remedies obscure a more fundamental problem, typically one of class-based injuries.”).

¹³⁴ See Bridges, *supra* note 132, at 71 (“The dramatic visibility of the poor’s suffering, combined with the relative *invisibility* of the suffering of those who are not poor, breeds the belief that class is now the main issue—the thing that *really* matters.”).

¹³⁵ See *id.* at 71–74 (The belief that class is now the main issue shows its flaws when “we judge wealthier racial minorities against those who share their class privilege, as opposed to those who share their racial ascription”); see also Cho, *supra* note 132, at 1589 (explaining how the “retreat from race” takes on three forms. The “material, as the retreat from state-imposed remedies; sociocultural, as the retreat from white liberal/progressive deference to Black normativity on the meaning of racial equality and justice; and political, as the retreat from collective political entities organized along racial lines and agendas as a legitimate protest or reform vehicle.”).

suggests, then leads to the believe that we must “dismantle any racial stratification that we witness through race-neutral, class-based means.”¹³⁶

But, if one is to give into the idea that class, rather than race, perpetuates the experiences of minorities, especially people of color, in the U.S., then from that, it naturally flows that once poverty is overcome, racial subordination is overcome.¹³⁷ And while economic suffering or “economic subordination” is dealt with by overcoming poverty, it is crucial to realize the other types of subordinations that money cannot beat.¹³⁸

Moreover, even when looking at economic subordination—that is also skewed. Even class privileged racial minorities are disadvantaged when compared to their white class privileged counterparts.¹³⁹ According to Deborah Malamud, “[a]ll of the multi-generational disadvantages the [B]lack middle class suffers in housing, occupational segregation, education, and income translate into lower lifetime earnings, diminished return on housing capital, diminished likelihood of inheritance of wealth from parents, and therefore into reduced wealth accumulation over the life course.”¹⁴⁰ So, what Malamud suggests is that even a class privileged Black family will still inevitably be dealing with the historical effects of the racial subordination of their ancestors and thus, when compared to the White class privileged family, will have less accumulated wealth.¹⁴¹

Another phenomenon associated with believing in class as the contributing factor for the suffering of racial minorities is the belief then that we need social policies that are race neutral.¹⁴² This belief has been at the forefront of our

¹³⁶ See Bridges, *supra* note 132, at 71.

¹³⁷ See Sullivan, *supra* note 129 (highlighting how journalist Laura Ingraham stated that Lebron James having political views or protesting is invalid since James gets paid “\$100 million a year to bounce a ball.”). But see Bridges, *supra* note 132, at 80 (“[W]hen wealthier black people create enclaves of their own . . . these neighborhoods are not comparable to the ones that their wealthier white counterparts create. Despite the residents’ class privilege, these communities do not attract the businesses, jobs, shops, amenities, and investment that make neighborhoods covetable and comfortable.”).

¹³⁸ See Bridges, *supra* note 132, at 110 (“[T]his fact—that racial discrimination has produced economic injuries—easily is corrupted into the claim that racial discrimination has only produced economic injuries, ignoring the fact that racial discrimination has also produced sociocultural and political injuries[]”); see also Christina Similien, *NBA Stardom Isn’t a Cure for Mental Health Issues*, EBONY (Oct. 10, 2019), <https://www.ebony.com/exclusive/nba-stardom-isnt-a-cure-for-mental-health-issues/> (“[A] career in sports doesn’t free Black athletes from the pains and tribulations of the outside world.”); Bruce Carrington, *Social Mobility, Ethnicity and Sport*, 7 BRITISH J. SOCIO. EDUC. 3, 4 (1986) (highlighting how conflict theorist Harry Edwards explained that “the heightened value placed on sports participation by young Afro-American males will be defective unless it [considers] . . . ‘race’ as a restraint upon life-chances; blacks’ unequal access to economic and cultural resources and power; and the marginal position of the group in the labour market, education and other social contexts.”).

¹³⁹ See Bridges, *supra* note 132, at 79 n.42.

¹⁴⁰ *Id.* at 81–82.

¹⁴¹ *Id.*

¹⁴² See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1383 (1988) (“The race neutrality of

jurisprudence for years now. It is a paradox putting race-based policies between a rock and a hard place. By having to “rely on rights rhetoric when it is necessary to protect Black interests” one also seems to “undermine the ability to move forward toward a broader vision of racial equality. In the quest for racial justice, winning and losing have been part of the same experience.”¹⁴³ That is, without race-based policies, minorities do not get a seat at the table, but with race-based policies, if they do get a seat at the table, the perception is that it was given, not earned. “[J]ust as surely as [B]lack people’s presence in institutions from which they have been excluded historically is taken to demonstrate their inferiority, their *absence* from these same institutions would be taken to demonstrate the same.”¹⁴⁴

In *Grutter v. Bollinger*, a case about the constitutionality of affirmative action in college admissions, Justice Thomas, only the second African American to serve in the United States Supreme Court, stated in his dissent that affirmative action only worked to further stereotypes that Black students underperform and therefore cannot be admitted to college on their own merits.¹⁴⁵ He goes on to state that affirmative action also leads to “the conspiracy theorist’s belief that ‘institutional racism’ is at fault for every racial disparity in our society.”¹⁴⁶ As Khiara M. Bridges puts it, “[t]o Thomas and like-minded persons, institutional racial discrimination is the stuff of conspiracy theory. Believing that it explains present-day racial stratification is akin to believing that the moon landing was staged in a Hollywood movie lot, or that Tupac is alive and well and living in Cuba.”¹⁴⁷

Justice Thomas can be seen as stating that institutional racism is a non-issue while Bridges argues that both institutional racism, and individualist racism, more accurately reflect our society.¹⁴⁸ From this, “[r]acial hierarchy cannot be

the legal system creates the illusion that racism is no longer the primary factor responsible for the condition of the Black underclass; instead, as we have seen, class disparities appear to be the consequence of individual and group merit within a supposed system of equal opportunity.”); see also Bridges, *supra* note 132, at 93 (“[R]ace-neutral policies operate so as to make [B]lack people and other racial minorities poorer, sicker, more incarcerated, more racially isolated, and less politically represented than their white counterparts.”).

¹⁴³ Crenshaw, *supra* note 142, at 1385.

¹⁴⁴ See Bridges, *supra* note 132, at 128.

¹⁴⁵ See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2365 (2003) (Thomas, J., concurring in part and dissenting in part) (“Nevertheless, the possibility remains that this racial discrimination will help fulfill the bigot’s prophecy about [B]lack underperformance”); see also Clarence Thomas, OYEZ, https://www.oyez.org/justices/clarence_thomas (last visited Dec. 28, 2020) (“Clarence Thomas is the second [B]lack justice and the only one currently sitting on the bench.”).

¹⁴⁶ See *Grutter*, 123 S. Ct. at 2365.

¹⁴⁷ See Bridges, *supra* note 132, at 92.

¹⁴⁸ See *Definitions of Institutional Racism*, RACE, RACISM & THE LAW, <https://racism.org/articles/defining-racism/324-racism08b> (last visited Dec. 28, 2020). Institutional Racism is defined as the:

[C]ollective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin which can be seen or detected

cured by the move to facial race-neutrality in the laws that structure the economic, political, and social lives of Black people.”¹⁴⁹

This Note instead takes well to Bridges view of both forms of racism shaping American society. As the next portion will discuss, it is the policies and long-standing practices of *institutions* that lead to the *individual* racism that even professional Black athletes experience.¹⁵⁰ It is this combination of institutional and individual racism that make it impossible to live in a world where we can collectively believe that class privileged individuals do not experience racism and suffering simply because they have overcome economic subordination.¹⁵¹ To think so, as Bridges explains, “obscures the effect that any racially subordinating event—like Japanese internment, or chattel slavery and Jim Crow, or the Holocaust, or the forced sterilization of women in Puerto Rico—has had on wealthier racial minorities; this group appears to have escaped any negative consequences of the event.”¹⁵² This is where professional Black athletes become the perfect models for debunking the idea that only economic subordination exists and that it is connected solely to class, not race.

Justice Sotomayor best explained this paradigm that class privilege cannot beat racism in her dissent in *Schuetz v. Coalition to Defend Affirmative Action*, where she perfectly articulates the significance of race to those racial minorities who are not poor:

Race matters to a young man’s view of society when he spends his

in processes; attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantages minority ethnic people.

Id. See also Bridges, *supra* note 132, at 86 (defining individualist racial discrimination as acts “that individuals take that function to harm, stigmatize, or otherwise disadvantage a member of a racial group. What makes it racial discrimination is that the individual acts so as to injure the affected party *because of* the affected party’s racial group membership.”). Bridges offers a definition of individualist racism and argues that in order to understand how class privileged minorities also suffer beyond economic subordination, we must first agree on race discrimination that does not just encompass individual or institutional racism. *Id.* at 127.

¹⁴⁹ Crenshaw, *supra* note 142, at 1378.

¹⁵⁰ See Carrington, *supra* note 138, at 4 (suggesting that participation in sports still cannot meet the “political and material needs” of Black athletes and their families); see also Phoebe Weaver Williams, *Performing in a Hostile Environment*, RACE, RACISM & THE LAW, (last visited Dec. 28, 2020), <https://racism.org/articles/basic-needs/employment/1201-performing-1>

[T]he experiences of Black athletes, whose merits are meticulously, statistically, and publicly documented, undermine arguments that merit alone rather than race matters in our society. If Black athletes still experience racism, what of other African-Americans whose meritorious performances are not so quantifiable, not so public, and not so clearly extraordinary? If the wealth, the performances, and the economic value African-American athletes bring to our economy do not shield them from racism, then what will shield the rest of us?

Id.

¹⁵¹ See Williams, *supra* note 150.

¹⁵² See Bridges, *supra* note 132, at 108.

teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you *really* from?", regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here."¹⁵³

Now, I propose Bridges' view which takes Justice Sotomayor's view one step further by putting the subordination of class privileged minorities in light of institutional, rather than merely individualist, racism:

Race matters when a [B]lack woman is not assumed to be the owner of the home in front of which she stands. Race matters when a Latina's doctor offers her a long-acting contraceptive injection while this same doctor offers her counterpart with race privilege a simple birth control pill. Race matters even in hackneyed ways—when a [B]lack man finds it impossible to hail a cab in any major metropolitan city. It matters when police stop a [B]lack or Latino man while letting white men pass undisturbed. It is undeniable that class privilege ameliorates some of the effects that the lack of race privilege would otherwise produce. But, it should also be undeniable that even those racial minorities with class privilege have had the hurtful experiences described here. *Race matters irrespective of class.*¹⁵⁴

In both of these insightful women's perspective, one can see how (1) we are not living in a post racial America, (2) economic subordination is not the only basis of suffering for minorities, and (3) institutional and individual racism equally affect class privileged minorities.

This is especially true when looking at Black professional athletes, who by society's standards, are *privileged*.¹⁵⁵ They out earn most people in society; they have clout, influence, power, extremely defined and specialized skills, and

¹⁵³ See *Schuetz v. Coal. to Defend Affirm. Action, Integration & Immigr. Rts. & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).

¹⁵⁴ See Bridges, *supra* note 132, at 97 (emphasis added).

¹⁵⁵ See Williams, *supra* note 150; see also Sullivan, *supra* note 129 (describing the challenges LeBron James faces for "being [B]lack and a public figure in America"). But see Abdul-Jabbar, *supra* note 123 (highlighting LeBron James' powerful statement about athletes protesting: "I know people get tired of hearing me say it, but we are scared as [B]lack people in America. Black men, [B]lack women, [B]lack kids, we are terrified." As tired as white people may be of hearing it, [B]lack people are even more tired of living it."); see also Similien, *supra* note 138 (highlighting the fallacy in the notion "that once a Black athlete makes it as a professional, his problems go away; that the poverty, violence and [or] systematic racism he rose out of all just disappear from his world.").

the list of attributes goes on.¹⁵⁶ Yet, they serve as the perfect model because despite the prestige of their profession, Black athletes cannot beat the suffering and struggles perpetuated by their race.¹⁵⁷ If some of the wealthiest people in the U.S. cannot beat racism, this debunks a class based rather than race-based system.

So, if they do experience racism, and if it's not through economic subordination, then how is it manifested and why does it matter?

To explain this, once again the professional Black athlete presents a unique circumstance. The un-Americanization of the Black athlete, the unwillingness to allow their protest, the otherness, and the vilification of those athletes when they do protest is what this Note argues is the landmark of the Black athlete experience.

It is the sociocultural and political injuries of class privileged minorities that set the stage to debunk post-racialism claims. As the next subsections will highlight, a look at professional Black athletes paints a different picture than that of class-privileged racial minorities who have seemingly not been injured economically and thus appear to be unaffected by racial discrimination.

Analyzing the subordination of the Black professional athlete can quickly debunk not just the idea of a post racial America, but most importantly, it can help debunk the tempting but flawed idea that class privileged Black people do not experience racial subordination simply because they do not experience it in an economic way. Only once we are past that, can we have an honest conversation about the labor, health, religious, and political policies, amongst many other, that affect racial minorities in our country—regardless of their class.

A. MUHAMMAD ALI

Ali's battle to regain his status in society and in boxing are prime indicatives that not even Ali, the most famous athlete of his time, could escape the consequences of the color of his skin.¹⁵⁸

While Ali's economic subordination was the primary way in which his status and identity were stripped, many more ways were used which do not include class, and which have everything to do with race. First, was his religious stance as a Black Muslim and the main reason his legal battle began. Even atop the world's highest platform, and in the midst of being crowned champion, Ali was denouncing the lack of African Americans in the military draft board.¹⁵⁹ Along with this, one can also see how the lack of Muslims on the board all contributed to the finding by the draft board that Ali was lying about his status as a conscientious objector based on his Muslim faith.¹⁶⁰ While this racially

¹⁵⁶ See Williams, *supra* note 150; see also Similien, *supra* note 138.

¹⁵⁷ See Similien, *supra* note 138; see also Williams, *supra* note 150.

¹⁵⁸ See discussion *supra* Section II(A).

¹⁵⁹ See Clay, 397 F.2d at 910.

¹⁶⁰ See Clay, 397 F.2d at 906, 918–21.

disadvantaging process did not *impoverish* Ali, this process nevertheless *disadvantaged* him.¹⁶¹ Thus, his class could not beat the institutional structure that allowed a draft board in a predominantly Black drafting state to have close to zero Black or Muslim members.¹⁶²

From this, one has to wonder, how would the number of African Americans in World War II have been different if there had been more African American representation in the Draft or Appeals boards? What impact would this have had on the Black families left without their men? These questions are important because they shed light on why class-based discrimination does not begin to cover the experiences that poverty cannot explain, only race can.

The un-Americanization of Ali is another way in which non-class-based subordination can be seen. Ali received criticism from even other African Americans who thought Ali was ungrateful for standing up for himself in light of the career America had allowed him.¹⁶³ While this has hints of economic subordination, it sheds light on a much deeper issue of what patriotism ought to be when you are Black. Analyzing Ali's story, it leads to the conclusion that Black is un-American if it does the most American thing there is—protest.¹⁶⁴ This has, overtime, tremendous effects on the advancement of Black people for whom not protesting leads to perceived compliance and thus lack of improvement in their lives.¹⁶⁵ The chastising of those who protest silences them—this

¹⁶¹ See Paul T. Murray, *Blacks and the Draft: A History of Institutional Racism*, 2 J. BLACK STUD. 57, 66 (1971) (“Although officially committed to a position of nondiscrimination, the Selective Service System was unwilling to attack Southern racism and tolerated the exclusion of [B]lacks from local boards.”); see also Bridges, *supra* note 132, at 120 (discussing institutional processes that disadvantage racial minorities, Bridges notes that “[w]hile these processes have not *impoverished* [class privileged racial minorities] as they have poor racial minorities, these processes nevertheless have disadvantaged them.”).

¹⁶² See Clay, 397 F.2d at 910 (noting how Ali claimed that the Draft Board did not have Black members when he was being drafted); see also Murray, *supra* note 161, at 66 (“Black representation was completely denied in many heavily [B]lack areas of the South.” In 1953, “[o]nly three Southern states had [B]lacks on local boards: Virginia had ten, North Carolina had four, and Kentucky had three . . . Governors who appointed the local board members refused to give [B]lacks power over white draftees.”).

¹⁶³ See Calamur, *supra* note 32; see also discussion *supra* Section II(A) pp. 15–16 (discussing the criticism Ali received from Jackie Robinson).

¹⁶⁴ See Eric Zorn, *Refusing to Stand for the National Anthem is Also a Patriotic Act*, CHI. TRIB. (Sept. 29, 2017, 1:01 PM), <https://www.chicagotribune.com/columns/eric-zorn/ct-perspec-zorn-anthem-football-trump-20171001-story.html> (criticizing the vilification of protest in sports by stating that “[p]atriotism isn’t a performance. It’s an attitude that’s with you whether you’re in a crowd or alone on your sofa, and it’s perfectly consistent with protest and criticism.”); see also Kenneth Arthur, *Why Fan Reaction to NFL National Anthem Protests is About Racism, Not Patriotism*, ROLLING STONE (Sept. 26, 2017, 12:55 PM), <https://www.rollingstone.com/culture/culture-sports/why-fan-reaction-to-nfl-national-anthem-protests-is-about-racism-not-patriotism-201838/> (“As a football player, many believe that you are required to represent your city, but have no right to represent your country.”).

¹⁶⁵ See Perry & Romer, *supra* note 116 (“[P]rioritizing voting over protesting is the not-so-subtle way we devalue marginalized groups. Voting is only one way that people can exercise their power to create policy change—now, as national protests grow and Black athletes boycott their games, we are being shown that there are other ways to influence policy.”).

is political subordination.¹⁶⁶ It leads to less representation in government and less policy aimed at representing minorities.

If anything can debunk the idea that class-privileged minorities do not suffer racial subordination to the same extent as their non-class privileged counterparts, it is the story of Muhammad Ali. Not money, nor fame, nor talent, helped Ali escape the almost four years spent fighting in court. It also did not stop the vilification he experienced publicly and the critical effects it all has in combination. If indigent people of color are the only people of color who are burdened, class appears to be the best explanation of their suffering. However, class alone cannot explain the burdens that Ali endured.

B. COLIN KAEPERNICK

Colin Kaepernick represents yet again, the notion that class cannot solve the racial animosity on which the United States is built.

Even in what some call Obama's post-racial America, Kaepernick could not escape racism.¹⁶⁷ Much like Ali, Kaepernick's protest brought on what has largely been categorized as the end of his professional career. Kaepernick peacefully protested police violence against African Americans in the U.S. and did so by simply remaining seated during the national anthem.¹⁶⁸ Again, the loss of employment and endorsement deals is the obvious economic effect Kaepernick endured due to his protest. He also saw, while actively looking for a job, many of his white teammates with worse performances, get signed while he went unemployed.¹⁶⁹ This otherness brought on by the fact that he is a Black man protesting in a White man's sport, has profound effects.¹⁷⁰

When even the President of the United States takes to Twitter to condemn the peaceful act of protesting police brutality, what does that do to the political views of African Americans compared to their white counterparts? Does it disfranchise them thus creating political subordination? How about the effect that rules put in place to forbid kneeling or sitting during the national anthem have

¹⁶⁶ See Bridges, *supra* note 132, at 112 n.184 (listing sources in which the political disadvantage of minorities becomes apparent.).

¹⁶⁷ Although Obama becoming the first African American President merits recognition as a proud moment in American history, the idea that with his election post-racialism was reinforced must be pushed back against. This rhetoric only aims to push back against race-based policies with a belief that we are passed that. This can have detrimental effects not just for racial minorities but also for other marginalized groups. It is similar to the idea that when the first female president is elected, all policies aiming to improve women's rights will suddenly be solved at the declaration of a female president. See, e.g., Cho, *supra* note 132, at 1593 (explaining how through the Obama presidency, "[p]ost-racialism [] bec[a]m[e] the 'race card' of whites, deployed with obligatory reference" to the presidency of the first African American President.); see also discussion *supra* Section II(B) (providing a timeline of Kaepernick's protest and its aftermath).

¹⁶⁸ See discussion *supra* Section II(B).

¹⁶⁹ See Mather, *supra* note 105.

¹⁷⁰ See Sonnad, *supra* note 113 (depicting the disparity in the racial representation between players and everyone else in the NFL).

on other minorities in the field?¹⁷¹ If the national anthem and the idea that American is “One Nation Under God,” does not fit the religious beliefs and identity of a player who is nonetheless forced to stand, is this religious subordination?¹⁷² Once again, the same otherness and vilification experienced by Ali was also felt by Kaepernick but perhaps on a larger scale—facilitated by the use of social media. Does widespread information and hatred contribute to mental health issues in minority communities who carry the weight of their race on their shoulders, and watch as athletes like Ali, Kaepernick, and LeBron become publicly vilified and politically disfranchised? Does this have a widespread negative effect on the mental health and representation of all racial minorities, poor and rich alike?¹⁷³

These profound questions clearly go beyond class. Once again highlighting why money can’t beat racism. It also cannot substitute the lack of “[B]lack peoples’ political participation and representation, [or] examine cultural discourses about [Black] people, or measure the rates at which they die from certain diseases.”¹⁷⁴

IV. CONCLUSION

Talking about race subordination in the context of Black professional athletes sheds light on why racial discrimination has disadvantaged people of color economically, but also socio-culturally and politically. This matters every time a Black athlete protests and is made to feel un-American. It matters when a Black athlete is disfranchised by his or her own government and vilified by their own fans. It matters in the political, religious, and health representation of Black athletes but also Black individuals at large watching the scrutiny play out. Sports have been a catalyst for change since their inception in American history.

¹⁷¹ See Tadd Haislop, *What is the NFL’s National Anthem Protest Policy? Here are the Rules for Kneeling in 2020*, SPORTING NEWS (Sept. 20, 2020), <https://www.sporting-news.com/us/nfl/news/nfl-national-anthem-policy-2020-kneeling-protests/1o88fwivdxvqu1d8nnbiw5dw3z> (highlighting the new NFL policy which reads in part that “all league and team personnel *shall stand and show respect for the flag and the anthem*. Personnel who choose not to stand for the anthem *may stay in the locker room* until after the anthem has been performed.”).

¹⁷² Basketball player Mahmoud Abdul-Rauf lost prime playing years, endured death threats and even had his house burned down as backlash for refusing to stand for the national anthem. See Jesse Washington, *Still No Anthem, Still No Regrets for Mahmoud Abdul-Rauf*, UNDEFEATED (Sept. 1, 2016), <https://theundefeated.com/features/abdul-rauf-doesnt-regret-sitting-out-national-anthem/>

Like Kaepernick, Abdul-Rauf said he viewed the American flag as a symbol of oppression and racism. Abdul-Rauf also said standing for the anthem would conflict with his Muslim faith. “You can’t be for God and for oppression. It’s clear in the Quran, Islam is the only way,” he said at the time. “I don’t criticize those who stand, so don’t criticize me for sitting.”

Id.

¹⁷³ See Similien, *supra* note 138.

¹⁷⁴ Bridges, *supra* note 132, at 113–14.

Athletes have broken racial barriers before other institutions in our country have and paved the way for change. For this to continue, Black athletes protesting needs to be embraced and celebrated. Additionally, the institutions that represent these athletes better serve them and the fight towards racial equality by not vilifying or undermining a Black athlete's right to protest. As this Note has pointed out, anything less than the embracing of Black athletes' protest and use of their voices only works to disadvantage them and the African American community by perpetuating their continued racial subordination.