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APPLYING THE FIRST AMENDMENT TO PRAYER IN A PUBLIC UNIVERSITY LOCKER ROOM: AN ATHLETE'S AND COACH'S PERSPECTIVE

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I. INTRODUCTION

Most athletes are familiar with the traditional pre-game prayers undertaken prior to athletic contests. Most athletes participate in these rituals without any thought as to the consequences or potential impact of the prayers on their teammates. Athletes often participate in these pre-game rituals out of habit or a sense of team unity. Others are forced to participate due to threats of reduced playing time or other coercive acts. An excellent example of the potential involvement of religion in the locker room can be highlighted by events at the University of Colorado. At the University of Colorado, football coach Bill McCartney was accused of publicizing his religious views and giving priority in hiring, recruiting, and playing time to individuals sharing his religious attitude.[1] While similar practices might have gone unchecked in the past, several recent Supreme Court decisions have limited the days of blind indifference to these rituals.

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1. Peter Monaghan, *Religion in a State-College Locker Room: Coach's Fervor raises Church-State Issue*, 31 CHRON. HIGHER EDUC., 3, 37, 38 (1985). It should be noted that even though Mr. McCartney is a coach known for leading players in prayer, the practice has not slowed substantially during his thirteen years with the University of Colorado. Legal observers felt that, "any hiring and recruiting practice that favored persons of a particular religious bent would be vulnerable in a court of law, but they disagreed on the legality of prayer in state college football programs." *Id.* The American Civil Liberties Union's (ACLU) stance was that the injection of religion into a state-financed program violated the constitutional mandate for a course of government neutrality toward religion. *Id. See also*, Peter Monaghan, *U. of Colorado Football Coach Accused of Using His Position to Promote His Religious Views*, 39 CHRON. HIGHER EDUC. 12, November 11, 1992, A35, A37.

Pre-game prayers are regularly held in public high school and university locker rooms throughout the United States. These rituals are often undertaken without any thought to possible legal consequences because the coach, team, or school have never received any complaints from concerned athletes or parents. However, the Supreme Court has recently limited the various avenues by which prayers can enter into public school activities.[2]

The First Amendment protects student-athletes by providing them with certain safeguards against state endorsed adherence to a specific religion, most often the coach's religion. This constitutional protection must be balanced against the coach's right to effectively run his or her team without having every word or action scrutinized. The conflict of prayer in a public university locker room centers on the students' right to be free from state imposed religious indoctrination and the coach's right to free speech. This conflict can be examined through the eyes of the First Amendment's Entanglement, Free Exercise and Free Speech clauses.

Courts have yet to specifically address the topic of prayer in a public university's locker room. Since there are no cases on point, this article will attempt to present the possible legal arguments that would be presented by the two sides of this debate. The players' interest in practicing their religion is weighed against a coach's right to motivate his/her team. Both of these rights have to be examined in light of any action undertaken or attributable to the state, and whether those actions constitute endorsement of the prayers by the state. Based on the present state of intercollegiate athletics, the student-athletes' right to be protected from religious indoctrination by a coach supersedes a coach's free speech right. However, voluntary, neutral moments of silence would neither impinge on a student-athlete's rights nor curtail a coach's right to effectively motivate his or her team.

II. The Establishment Scale From Public School Prayer Through Prayer Opening Legislative Sessions

Team prayer in a public university locker room can be looked at as a morale booster and a tool to build team unity. Team prayer also requires the application of the First Amendment to protect the rights of student-athletes opposed to or uncomfortable with the prayer. Even if student-athletes do not object to the prayers, the prayers can constitute a

2. *See infra* text accompanying notes 27-39.

violation of the First Amendment. The First Amendment's Establishment Clause "protects every individual's right to freedom of belief while the Free Exercise Clause protects the individual's freedom to practice his [or her] religion."[3] The Establishment Clause requires the state to be "neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions then it is to favor them."[4]

To help ensure a degree of separation between church and state, a metaphoric wall has been created by the courts.[5] While the wall used to be solid and straight, it has over the years become "serpentine," with some bricks having fallen or having been knocked out, leaving large breaches.[6] The amount of protection the wall actually affords to college athletes can be demonstrated by analyzing an Establishment Clause case law scale from elementary school prayer to prayer opening legislative sessions cases. Falling in between these two ends of the continuum are high school and college prayer cases.

In an absolute sense, some relation between state and religion is inevitable.[7] The amount of permissible relations between government and religion has been established by several major Supreme Court decisions. The current standard used to judge Establishment Clause issues is the *Lemon* test. In *Lemon v. Kurtzman*,[8] the Supreme Court struck down a state salary supplement to non-public elementary school teachers because funds would flow from the state to parochial schools, which involve substantial religious activity. In order to ensure neutrality, the government would have to control the sectarian school programs.[9] State action passes the *Lemon* test if it has a secular legislative purpose. In other words, the principal or primary effect of the law must neither advance nor inhibit religion. Additionally, the law must not foster excessive government entanglement with religion.[10]

There have been several attempts to change the *Lemon* test, and the Court has shown a predisposition over the past several years to adopting a new standard. However, no new standard has been developed to re-

3. Malnak v. Yogi, 440 F. Supp. 1284, 1316, n.20 (D.C. N.J. 1977).
4. Everson v. Board of Education, 330 U.S. 1, 18 (1947).
5. Engel v. Vitale, 370 U.S. 421, 445-46 (1962) (Stewart, J., dissenting).
6. THAYER S. WARSHAW, RELIGION, EDUCATION AND THE SUPREME COURT 12 (1979).
7. In fact the Court requires both accommodation and the exercise of benevolent neutrality. *Id.* at 28, *See also* Lynch v. Donnely, 465 U.S. 668 (1984).
8. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
9. *Id.* at 619-20.
10. *Id.* at 612-14.

place the *Lemon* test.[11] Justices White, Scalia, and Rehnquist attacked the *Lemon* test in *County of Allegheny v. ACLU*[12] as unduly limiting government's involvement with religion, while Justice Kennedy argued that the Establishment Clause is violated only if the state literally creates a church or coerces religious participation. In contrast, Justices Blackmun and O'Connor argued that governmental action is invalid if the action symbolically endorses religion generally or a particular religion specifically.[13]

The Court's disposition in Establishment Clause cases was best expressed by the *Allegheny* Court when it indicated that:

> In the course of adjudicating specific cases, [the Supreme Court] has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs.[14]

The hallmark of current analysis in Establishment Clause cases, based on the Court's rationale in *Allegheny*, is the determination of the degree of entanglement between the governmental unit and the religious practice. Justice Blackmun's opinion in *Allegheny* set out the most logical approach to determine if there has been excessive entanglement between government and religious practices. This approach is the "reasonable observer" standard.[15] Using this approach, a reasonable observer can examine whether an individual is forced into praying or if the state acts in a manner that can be construed by the person being affected as an endorsement of religion.[16] Each Establishment Clause case hinges on an analysis of the level of governmental involvement and the perception of governmental endorsement. By examining Establishment Clause

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11. *See generally* County of Allegheny v. ACLU 492 U.S. 573 (1989), *infra* notes 12-15. The Court in 1993 received another opportunity to overturn the *Lemon* Test, but failed to do so. Lamb's Chapel v. Center Moriches School Dist., 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). Justice Antonio Scalia, a known *Lemon* critic, compared the test to a "ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys. . . ." *Id.* at 365. Justice Scalia went on to allege that the other justices had "driven pencils through the creature's heart" (in previous decisions), but had failed to bury it permanently. *Id.*

12. *Allegheny*, 492 U.S. at 606-07, 659-660.

13. *Id.* at 620-21, 627-28.

14. *Id.* at 590-91.

15. *Id.* at 620.

16. *Id.*

cases from elementary schools, high schools, colleges, and public institutions, a scale can be established to help determine the amount of protection which would be afforded to student-athletes in a public university setting. After analyzing the Establishment Clause scale, college athletes might best be placed in between the rights of ordinary college students and those of employees at public institutions.[17]

A. *Elementary School*

Engel v. Vitale[18] is a perfect example of a case determining the amount of interaction allowed between church and state in the context of elementary school prayer. *Engle* involved a state law requiring the recitation of a prayer in public school classrooms.[19] The Supreme Court struck down the state prayer by concluding that the prayer officially establishes a state religion, even though the prayer was neutral on its face and recitation of the prayer was voluntary.[20] The prayer violated the Establishment Clause because the prestige and financial support of the state were used to support a particular religion.[21] The respondents, intervenors, and the Board of Regents, as *amicus curie*, sought to distinguish the school payer based on "our spiritual heritage."[22] Nonetheless, the Court concluded that the Establishment Clause did not indicate a hostility towards religion or prayer, but the prayer in the *Engle* case involved sponsorship of an unquestionable religious exercise, thus justifying the elimination of the prayer, even if its elimination ran afoul with "our spiritual heritage."[23]

B. *High School*

The amount of government entanglement with religious exercise at the high school level varies in different judicial districts. In *Doe v. Al-*

17. Analyzing prayer in a university locker room based on a scale of first amendment decision is not a new theory. A similar analytical approach to solving the problem of religion in the locker room was forwarded by R. Claire Guthrie, chairman of the continuing-legal-education committee of the National Association of College and University Attorneys. Ms. Guthrie stated that, "the question to ask should be where team prayers might fall along a continuum between prayer in elementary and secondary schools and prayer before legislative sessions in states or the U.S. Congress." Monaghan, *supra* note 2.

18. *Engel*, 370 U.S. at 421.

19. *Id.* at 422.

20. *Id.* at 430.

21. *Id.* at 431.

22. *Id.* at 425.

23. *Id.* at 433-435.

dine Independent School District,[24] a Texas District Court held that the school district's prayer violated the Establishment Clause. The court held that the singing of prayers before athletic contests, pep rallies, and graduation, occurred at extracurricular events, on school property and the prayers were state-initiated, encouraged and supervised.[25] However, in *Stein v. Plainwell Community Schools*, a Michigan District Court upheld similar prayers because the,

> [P]roposed plans for graduation at high schools did not violate establishment clause, where school districts were following long tradition of including invocations and benedictions in their ceremonies, had purpose of permitting students to plan or participate in their own commencement exercise, graduation ceremony was not mandatory part of school curriculum, speakers were other than school employees, contested prayers took only a few minutes, were given only once a year, and reached different audience each time, graduation was not part of educational program of school, and there was no evidence that speakers intended to use invocations and benedictions as opportunity to proselytize.[26]

A rash of graduation prayer cases exploded out of various courts throughout the 1980's and early 1990's.[27] The Supreme Court's action in denying certiorari in the *Jager v. Douglas County School District*[28] case helped reinforce the *Lemon* test and reduced the opportunities for prayer before high school football games. In *Jager*, the Eleventh Circuit stated that a constitutional challenge to the practice of giving invocations prior to high school football games was not controlled by the *Marsh v. Chambers* case, but rather by the *Lemon* test.[29] The court felt that the pre-game prayers had a religious purpose and the primary effect of advancing religion.[30] Even though there was no entanglement visible on the face of the invocation practice, the use of the school's sound system

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24. Doe v. Aldine Indep. Sch. Dist., 563 F. Supp. 883 (D.C. Tex. 1982). *See also* Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist., 669 F.2d 1038 (5th Cir. 1982).

25. *Doe*, 563 F. Supp. at 883-84.

26. Stein v. Plainwell Community Sch., 610 F. Supp. 43, 44 (D.C. Mich. 1985). *See also* Wood v. Mt. Lebanon Township Sch. Dist., 342 F. Supp. 1293 (W.D. Pa. 1972); Grossberg v. Deusebio, 380 F. Supp. 285 (D.C. Va. 1974).

27. Some of the key cases in this regard include: Jones v. Clear Creek, 977 F.2d 963 (5th Cir. 1992); Lee v. Weisman, 120 L.Ed. 467 (1992); Friedmann v. Sheldon Comm. Sch. Dist., 995 F.2d 802 (8th Cir. 1993). *See generally* Henry J. Reske, *Student-Led Prayers a Tough Subject*, A.B.A.J., November 1993, at 20. *See also supra* note 26.

28. Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir. 1989), *cert. denied*, May 30, 1989 (88-1610).

29. *Id.* at 828. The *Marsh* case is discussed *infra* note 43 and accompanying text.

30. *Id.* at 829-31.

and the event being a school sponsored event, at a school owned facility, would convey a message that the school endorsed the religious invocation.[31]

Since *Jager*, the high school prayer debate has been readdressed by the Supreme Court, as well as several lower courts.[32] Two recent cases, *Lee v. Weisman* and *Jones v. Clear Creek*[33], have clarified the constitutionality of middle/high school graduation prayers. The *Weisman* case involved the Supreme Court's first foray into the middle/high school commencement and graduation cases. In a 5-4 majority the Court held that a "religious exercise" at a middle school graduation was forbidden by the Establishment Clause of the First Amendment.[34] The case mirrored a typical high school graduation prayer case. A rabbi was invited by a middle school principal to give an invocation and a benediction at graduation exercises.[35] Plaintiff's challenged the prayer, claiming the prayer violated the First Amendment right to be free from state sponsorship of religion.[36] The Court struck down the prayer based on the fact the school helped control the content of the prayer, the obligatory nature of the ceremony, and the government involvement which was pervasive to the point of creating a state-sponsored and directed religious exercise in a public school.[37]

The Court concluded that the constitution "forbids the state to exact religious conformity from a student as the price of attending her own high school graduation."[38] The Court's decision was based on law as much as the understanding that societal and peer pressure combined with the graduation tradition would create an environment where students would not want to miss their graduation.[39]

In *Jones v. Clear Creek*, the Fifth Circuit upheld the constitutionality of a school district resolution that allowed senior high school students to vote on whether or not they wanted to allow student-led prayers at the school's graduation.[40] The difference between the *Weisman* and the *Jones* case is the amount of governmental entanglement. In *Weisman*,

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31. *Id.* at 831.
32. *See generally supra* note 28 and accompanying text.
33. *See supra* note 28.
34. *Weisman*, 120 L Ed. 2d 467, 487.
35. *Id.* at 476.
36. *Id.* at 478.
37. *Id.* at 480.
38. *Id.* at 486.
39. *Id.* at 484-5.
40. *Jones*, 977 F.2d at 971-2. *See also Reske, supra* note 27, *citing,* ACLU v. Blackhorse Pike Regional Board of Education, No. 93-5368 (3d Cir. 1993), wherein the Third Circuit felt

the school chose the prayer and the deliverer, while in *Jones* the students made their own decision.

C. Colleges

Elementary and high school cases can be distinguished from Establishment Clause cases at the college level because of the maturity of the student. College cases deal primarily with the development and implementation of religious activities by individual administrators or more mature students. The Supreme Court concluded in *Tilton v. Richardson* that the college student is more mature than other students and that college students are less impressionable and susceptible to religious indoctrination.[41]

D. Public Institutions

In *Marsh v. Chambers*,[42] the Supreme Court analyzed the constitutionality of a paid legislative chaplain and prayers opening the start of each Nebraska Legislature session. Former Chief Justice Burger concluded that the practice of legislative and other bodies opening their sessions with prayer is "deeply embedded in the history and tradition of this country."[43] The difference between *Marsh* and the various school prayer cases lies in the age of the person exposed to the religious message and their perception of the religious activity. In *Marsh* the individual claiming injury by the practice was an adult who was "presumably not readily susceptible to religious indoctrination. . .or peer pressure."[44] It should be understood, however, that the *Marsh* court reached its decision not

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that delegating the decision to hold prayers to the students did not alter the fact that graduation was a school sponsored event.

41. Tilton v. Richardson, 403 U.S. 672, 686 (1971). *See also* Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 750 (1976).

College students, as well as any other individuals, can face discrimination in a variety of contexts which can include religious discrimination. One of the claims in Bath v. NAIA, 843 F.2d 1315, 1316 (10th Cir. 1988), was for a civil rights violation based on the practice of pregame prayers at Mesa College. The claim was made under 42 U.S.C. Section 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d et seq., but the claim was not decided because the prayer issue was non-justiciable. *Id.* at 1317.

42. Marsh, Nebraska State Treasurer v. Chambers, 463 U.S. 783 (1983). *See also* Bogen v. Doty, 598 F.2d 1110 (1979); Marsa v. Wernik, 430 A.2d 888 (S.C. NJ 1981); Lincoln v. Page, 241 A.2d 799, 109 N.H. 30 (1968).

43. *Marsh*, 463 U.S. at 783.

44. *Id.* at 792.

by applying the *Lemon* test, but rather by analyzing the historical grounds of prayer opening legislative sessions.[45]

The cases used to create an Establishment Clause scale of decisions affecting schools and public institutions help expose several important concerns. While the Supreme Court has taken several shots at the *Lemon* test, it still is alive and the law of the land. Likewise, the Supreme Court has indicated that the historical precedence of certain prayers helps reinforce the validity of other prayers, especially before mature audiences. Somewhere between governmental acquiescence and attempted religious indoctrination lies the case of prayer in a public university locker room.

E. Free Exercise Clause

Besides examining potential violations of the Establishment Clause, it is also possible for a prayer in a university locker room to violate the Free Exercise clause of the First Amendment. In *Engel*, the Supreme Court concluded that "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion" cannot be constitutionally tolerated.[46]

An encompassing theme of the Religion Clause is protection of religious minorities from the religious majority no matter how much the protection offends the majority.[47] The Constitution states that religious liberties are values that deserve a high degree of protection.[48] Under the Free Exercise clause students must be given the option of what religious message they want to be exposed to without coercive pressure being subtly applied. In the locker room, student-athletes might not have that choice. If freedom of religion has any meaning, it is that people, especially religious minorities, have the right to practice their religion or beliefs without government interference. If locker room prayers force an athlete to make a choice between their religion and the religion of the state, then the Free Exercise Clause is violated.

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45. *Id.* at 786. Historical grounds is often argued as a rationale for prayer at various levels of public schools. *See generally supra* note 23 and 26.

46. *Engel*, 370 U.S. at 431. *See generally* The Religious Freedom Restoration Act of 1993 which limits the amount and extent of government involvement in burdening a person's exercise of their religion. CQ US HR 1308.

47. The Court struck down the in-class reading of the Bible in *Abington School District*, *infra* note 73. The Reverend Dr. Billy Graham declared the decision, "a penalty for the 'eighty percent [of Americans who] want Bible reading and prayers in school.' " LEO PFEFFER, GOD, CAESAR, AND THE CONSTITUTION 210 (1975).

48. Warshaw, *supra* note 6, at 9.

III. APPLYING THE SCALE TO STUDENT-ATHLETES

University students have been fighting for their constitutional rights for years. Constitutional protections for university students have traditionally been minimal because the Supreme Court considered attendance at a university a privilege, not a right; thus, students did not require extensive constitutional protections.[49] The Supreme Court in the pivotal discrimination case of *Brown v. Board of Education*[50] increased the amount of constitutional protection afforded to all students by concluding that educational opportunity is not a privilege, but a right safeguarded by the Fourteenth Amendment. The advancement of students' First Amendment rights was best expressed by Justice Powell in *Healy v. James*, when he asserted that, "state colleges and universities are not enclaves immune from the sweep of the First Amendment."[51] However, even with the advancement of the general student body's rights, one section of the student body has lagged far behind. This group is made up of what are perhaps the most rigidly controlled students on the campus—student-athletes.[52]

Most college students live a life free of unusual burdens or controls imposed by their colleges. Most students can choose which classes they want to take, with whom they can associate, what time they will to go to bed, when and what they can eat, and numerous other personal decisions. College athletes on the other hand, especially in the major collegiate sports of football and basketball, often lack these fundamental rights. Sports psychologist J. Scott observed;

> [T]he athlete lives in a world where one misplaced word or action often threatens the immediate end of his athletic career. From Little League baseball through professional football, the correct attitude is as important as actual athletic skill, and once an athlete is labeled a troublemaker or uncoachable, his athletic career is

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49. "Courts tended to look upon attendance at a public college or university as a privilege, not a constitutional right from which it followed that the institution was to insist upon whatever binding conditions of behavior it deemed appropriate." David Fellman, *Religion, the State, and the Public University*, RELIGION AND THE STATE 303 (1975). *See also* Hamilton v. Regents of the University of California, 293 U.S. 245 (1934); Waugh v. Board of Trustees of University of Mississippi, 237 U.S. 589 (1915); Steier v. New York State Education Comm'n, 271 F.2d 13 (2nd Cir. 1959).

50. Fellman, *supra* note 49, at 304, *citing* Brown v. Board of Education, 347 U.S. 483, 493 (1954).

51. Healy v. James, 408 U.S. 169, 180 (1972). *See also* Lansdale v. Tyler Junior College, 470 F.2d 659, 664 (5th Cir. 1972); Tinker v. Des Moines School District 393 U.S. 503, 506 (1969).

52. Robert L. McGahey, Jr., *A Comment on the First Amendment and the Scholar-Athlete*, 6 HUM. RTS. Q. 155 (1976-77).

> usually doomed. For many years athletes perceived themselves as being in a powerless position within the sports world, and like most power-less groups they survived by deferring to authorities-coaches, athletic directors, and professional team owners.[53]

A coach's authority over an athlete can extend to determining the athlete's choice of degree programs or the type of person with whom the athlete can associate. Athletes used to be unwilling to challenge a coach's authority because they could have their scholarship revoked or they could be "benched." The student-athlete's fear of retaliation helps explain the relatively minimal number of grievances brought by student-athletes.[54]

While the athletes as a group still defer to their coaches, cracks are beginning to appear in coaches' armor. The 1993 collegiate sports season was a watershed year for athlete's rights. Student-athletes exerted their strength and brought reform or changes to several programs. The most notable of these occurrences include: Morgan State University which canceled the last football game of the season when the players threatened a halftime protest to demand the dismissal of the head coach; the University of Maryland at College Park, where the men's soccer team signed a petition asking for the removal of the head coach, who resigned one week later; and football players at Memphis State University and Georgia Institute of Technology publicly clashed with their coaches after suffering tough losses.[55] As noted in one sports business publication, "players are far less likely to bow to the authority of their coaches than they might have a decade ago."[56]

While some student-athletes have found the strength to exert their rights, these students are normally the exception to the rule. Most student-athletes defer to coaches because coaches are often their closest associates, mentors, and teachers. A student-athlete may feel closer to a coach than any other older person and they frequently seek parental type assistance from that coach.[57] The high pressured, win-at-all-cost,

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53. *Id.* at 157, *citing* J. SCOTT, THE ATHLETIC REVOLUTION 66 (1971).

54. *Id. See infra* note 69-71 and accompanying text. The attorney in the Memphis State locker room dispute commenting on why football players were reluctant to come forward stated, "[I]t is clear that personnel on athletic scholarships are not going to complain." Farrell, *Memphis State Coach is Accused of Imposing Religious Beliefs on Players*, 29 THE CHRONICLE OF HIGHER EDUCATION 6, 26 (1984).

55. Debra E. Blum, *Series of Locker-Room Revolts Has Some Wondering About the Clout of Athletes*, 39 CHRON. OF HIGHER EDUC., February 10, 1993, 23, A35-36.

56. Rick Berg, *Motivation or Abuse*, ATHLETIC BUSINESS, June 1993, at 9.

57. Harry M. Cross, *The College Athlete and the Institution*, 38 LAW AND CONTEMPORARY PROBLEMS 150, 168-169 (1973). The fatherly/motherly position is often created due to the

atmosphere of some athletic programs exerts tremendous pressure on student-athletes, and their coaches are often their sounding board as well as their emotional and psychological crutch.

To determine how much interaction is allowed between the university and prayer, the university's support of the prayer has to be examined along with the coach's rights, the need for governmental monitoring and the potential impression created by the university endorsing the prayers.

Prayer in the locker room can be distinguished from the prayer referred to in the high school graduation cases because: college athletes are normally required to participate, the coach is a school employee, the same audience is addressed each time, a small controlled audience is involved instead of a large crowd, the prayer is part of the official school program and the result of the prayer can lead a reasonable observer to conclude that the state is endorsing religion.[58]

As sports sociologist Jay Coakley concluded, religion's role in sport sometimes seems to be targeted solely to the advancement of the religious values of a certain individual at the expense of others.[59] A "no pray/no play" rule is instituted by a coach to force acceptance of a certain belief or face repercussions including reduced or no playing time. "No pray/no play" rules violate the Free Exercise and Establishment Clauses because a student is forced to choose between his religion and the coach's religion. "No pray/no play" rules are the simpler cases because there is direct pressure and coercion to violate one's religious beliefs. The more difficult cases are those of indirect pressure.

While a "no pray/no play" rule is clearly a First Amendment violation in a public university locker room, a non-religious moment of silence represents a more acceptable position. Moments of silence can be used to bring prayer into the locker room in a manner that might not exert pressure on a student-athlete to choose between religion and non-religion. Moments of silence are effective because coaches and other athletes will not know whether the athlete used the silent moment for prayer, inner reflection, or just relaxation.

Anything more than a voluntary moment of silence for inner reflection would require stricter adherence to the First Amendment, due to the potential for peer pressure. Besides the coercive authority exercised by a coach in endorsing prayer, the peer pressure put on the athletes to

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student-athlete being away from his/her parents for the first time when they enter the pressure filled environment of a university athletic program.

58. *See generally Stein, supra* note 26; *Doe, supra* note 25.

59. Jay J. Coakley, SPORT IN SOCIETY: ISSUES AND CONTROVERSIES 288-289 (1982).

be "team players" can deprive student-athletes of the choice of whether or not to participate in the prayer. Being branded uncoachable by a coach can be a difficult stigma to overcome, but an athlete that is not considered a "team player" by his fellow athletes is often in a worse position than someone that is considered uncoachable. Peer pressure can generate a social stigma for those bucking the trend. Other athletes might view non-compliance as an indication of a lack of willingness to cooperate with other athletes on the field.

Even absent coercion by the state, the impact of peer pressure tolerated by the state can implicate the state.[60] Peer pressure can be analogized to being in a captive audience.[61] The negative impressions of an athlete's teammates can force an athlete into participating in prayers. In analyzing the effect of prayers on adults in opening legislative sessions, the court concluded in *Marsh* that an adult was "presumably not readily susceptible to religious indoctrination. . .or peer pressure."[62] This view is not uniformly accepted across the judicial bench. Justice Douglas stated it best in his *Engle* concurrence when he concluded that if there was coercion in the school prayer, then there would be coercion in the prayers opening up Congress because few people would leave while those prayers are going on. The audience is in a sense, a "captive" audience, because the stigma attached to leaving a prayer opening congress is most likely severe.[63] A greater stigma attaches to the very visible act of leaving a locker room while one's teammates are united in prayer. A college locker room and athletic team are normally smaller than a large legislative assembly hall filled with hundreds of legislators. Thus, if a student-athlete did not participate in a prayer, that fact would probably be quite evident to everyone on the team.

Based on the First Amendment restrictions imposed on state actions which tend to endorse and put the power and prestige of the state behind religion, "no pray/no play" rules would be held unconstitutional. Likewise, any active involvement by the state in locker room prayers will sound the alarm of a First Amendment violation. Thus, the safest approach to allowing prayer in a locker room would be voluntary moments of silence.

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60. *See generally* Mergens, *infra* note 108. As indicated in Brandon v. Board of Educ., 635 F.2d 971, 978 (1980), an adolescent may perceive a voluntary school prayer in a different light if he/she saw the teams football captain or other popular individuals on campus participating in communal prayer meetings in the captive audience forum of a school.

61. *Marsh*, 463 U.S. at 792. *See also Jager*, 862 F.2d at 828.

62. *Id.*

63. *Engel*, 370 U.S. at 442.

IV. COACHES' RIGHTS

A public university is an agency of the state and the public university employees, acting in their capacity as employees, are also agents of the state.[64] Thus, the actions of a coach, executing his or her job, are equivalent to state action. Justice Douglas, in his *Engle* concurrence, compared school prayer to prayer opening Congress each morning and felt that both prayers would violate the Establishment Clause because in each instance the person praying is a public official, on the public payroll, performing a religious exercise in a governmental institution.[65] A public university athletic coach is traditionally a public official, on the public payroll and a locker room is part of a government facility.[66] Based on the involvement of a state employee at a state facility during a state sponsored event, there is an over abundance of indicia demonstrating governmental entanglement with prayers in a public university's locker room.

Nevertheless, a coach could argue that team unifying prayers are an essential element required to effectively perform his/her coaching responsibilities. Some of the responsibilities of a coach include: the educating of his/her players in the playing rules and attendance penalties, to promote the welfare of the sport in an honorable way, instilling in the player a desire to win, and improving the player in the technique of the sport.[67]

In *Dunham v. Pulsifer*, a case involving an unconstitutional athletic grooming code, the Vermont District Court stressed the importance of team discipline when it stated that:

> The coach must be able to control within reasonable limits those aspects of a player's behavior which relate to his performance as a contributing member of the team. . . The coach's right to regulate the lives of his team members does have limits, however. A coach may not demand obedience to a rule which does not in some way further other proper objectives of participation and performance. It is bootstrap reasoning indeed to say that disobedience of any rule weakens the coach's authority or shows a lack of desire on

64. Breen v. Runkel, 614 F. Supp. 355, 358 (D.C. Mich. 1985).

65. *Engel*, 370 U.S. at 441.

66. This assumption applies to both paid and volunteer coaches, as volunteer coaches are still supervised by state actors the same as paid coaches or athletic administrators.

67. Cross, *supra* note 57, at 167. *See also* PHILLIP S. SLOAN, THE ATHLETE AND THE LAW 13 (1983); Omar S. Parker, *The Authority of a College Coach: A Legal Analysis*, 49 OR. L. REV. 442, 449-50 (1970).

the part of the competitor thus justifying disobedience to any rule however arbitrary.[68]

One such arbitrary rule is a "no pray/no play" rule. At Memphis State University, several football players alleged that the coaches were not just espousing their personal belief, they were subtly (and not so subtly), "attempting to convert the student-athletes to Christianity, to be saved, to be part of the Born-Again movement."[69] Ray Dempsey, the football coach, held mandatory prayer meetings and, if the student-athlete did not pray, he did not play.[70] The ACLU was considering legal action on behalf of the players until the university reprimanded the coach for violating state educational rules on religious activity.[71]

Coaches often argue that team prayers help unite the team, which is an essential task in a team sport such as football. The school district in *Doe* contended that prayers served the clearly secular purpose of instilling a sense of school spirit and pride in the students.[72] The *Doe* court, relying on *Abington School District v. Schempp*,[73] found the school district's purpose in conflict with the requirement of secular purpose because a state cannot seek to advance non-religious goals and values through religious means.[74] A coach should accomplish the goal of team unity in a less intrusive manner, because the continuation of prayer impermissibly puts the power and prestige of the state behind a certain religion. Team unity, team spirit, and team "psyching" can be accomplished through non-religious means, therefore a "no pray/no play" policy becomes an arbitrary rule that students should not have to follow. Preaching might help instill team unity, but accomplishing team unity by coercing a religious minority to undertake activities inconsistent with that person's own belief is unconstitutional.

V. Free Speech

Freedom of expression is a vital part of the educational process.[75] Thus, educational speech is afforded comprehensive First Amendment

68. Dunham v. Pulsifer, 312 F. Supp. 411, 420 (D.C. Vt. 1970).
69. Farrell, *supra* note 54, at 26.
70. *Id.*
71. Monaghan, *supra* note 1, at 38.
72. *Doe*, 563 F. Supp. at 886.
73. Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).
74. *Doe*, 563 F. Supp. at 886. *See also* D. H. White, Annotation, *What Constitutes "Prayer" Under Federal Constitutional Prohibition of Prayer in Public Schools*, 30 ALR 3d 1352, 1353 (1994).
75. McGahey, *supra* note 52, at 159.

protection. On the whole, "neither the state in general, nor the university in particular, is free to prohibit any kind of expression because it does not like what is being said."[76] The state, however, can still regulate certain speech if there is an overriding state interest,[77] and the regulation is reasonable.[78]

In the context of the Religious Clauses, the suppression of religious speech is very limited. As the Supreme Court in *Bender v. Williamsport* stated, "it is common ground that nothing in the Establishment Clause requires the state to suppress a person's speech merely because the content of the speech is religious in character."[79] Nonetheless, universities have censored religious speech in the past, based on Establishment Clause concerns.[80]

The leading case involving student-athletes and the Establishment Clause focuses on the permissibility of censoring political/religious speech. The *Williams v. Eaton* series of cases involved a group of black athletes that were dismissed from the University of Wyoming football team following a dispute over the players' intentions to wear black armbands during a game against Brigham Young University.[81] The Tenth Circuit concluded that the only reason for wearing the armbands was to protest the religious views of the Mormon Church, and if the athletes were allowed to display the armbands, their action would violate the Establishment Clause.[82] The court further concluded that the university trustees' decision was reasonable because there was strong support for a policy restricting hostile expression against religious beliefs of others by representatives of a state or its agencies.[83]

If courts are willing to go as far as to regulate student-athletes' expression as representatives of the state it would only seem reasonable

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76. Charles Alan Wright, *The Constitution on the Campus*, 22 VAN. L. REV. 5, 1027, 1039 (1969).

77. *Id.* at 1055.

78. *Id.* at 1043. *See also* Widmar v. Vincent, 454 U.S. 263 (1981).

79. Bender v. Williamsport Area School District, 475 U.S. 534, 552 (1986). The dissent in *Widmar* did not deny that speech about religion was protected by the First Amendment, however, they argued that "religious worship," in contrast to secular speech about religion, is not speech generally protected by the free speech guarantees of the First Amendment. *Widmar*, 454 U.S. at 269, n. 6.

80. *See* Williams, *infra* note 81; Lynch, *infra* note 85.

81. Williams v. Eaton, 310 F. Supp. 1342 (D. Wyo. 1970), 443 F.2d 422 (10th Cir. 1971), 333 F. Supp. 107 (D. Wyo. 1971), 468 F.2d 1079 (10th Cir. 1972).

82. *Williams*, 468 F.2d at 1081-84.

83. *Id.* at 1083. It is important to note the timing of the *Williams* case. The political unrest and threat of student protest might have pressured the courts to expand the scope of a university's ability to quell potential student unrest.

that coaches, who are state employees, could also be regulated. The suppression of a coach's religious speech that violates the Establishment Clause has to be considered at least as reasonable as the logic used by the university trustees to suppress the activities in *Williams*.[84]

Due to the position of authority occupied by a coach, few, if any, student-athletes would try to disobey or argue with the coach's policy. Thus, for a coach serving as a teacher, administrator, or preacher, the collegiate locker room provides an unparalleled opportunity for the imposition of religious values on a captive audience. Public university employees do not have a carte blanche right to impose religious values on a captive audience. In *Lynch v. Indiana State University*, the Indiana Court of Appeals held that a policy of a public university permitting a teacher of a non-religious subject to introduce religious indoctrination into the classroom is violative of its religious neutrality under the Establishment Clause.[85] The court concluded that even though the reading of the Bible was voluntary, there was still the element of coercion in light of the supervisory position of control occupied by the instructor over student grades and conduct.[86] The plight of a student-athlete would be more severe than that of a math student because the student-athlete normally spends several hours every day with a coach, instead of just one or two hours every couple of days with a math instructor.

In addition to relying on judicial decisions, some states have been successful in limiting a teacher or coach's religious speech through ordinances. Such a statute was used by Memphis State University to limit the religious speech of Coach Dempsey. The Tennessee Statute provides for a period of silence in public schools "to prepare themselves for the activities of the day."[87] However, the statute further stated that, "nothing contained in this section shall authorize any teacher or other school authority to prescribe the form or content of any prayer."[88]

A coach could try to institute a prayer led by a student, priest, rabbi, or by no one, however, the lack of a leader that can be associated with the state does not, in itself, dismiss potential state action. The use of the state owned locker room and state sponsorship of athletics provides a

84. *Widmar*, 454 U.S. at 276. *See also Breen*, 614 F. Supp. at 359, where the court concluded that rights under the Free Speech Clause may be limited by strictures that the Establishment Clause places on state institutions.

85. Lynch v. Indiana State University Board of Trustees, 378 N.E. 2d 900 (Ind. App. 1978), *cert. denied*, 441 U.S. 946 (1978).

86. *Id.* at 903.

87. TENN. CODE ANN. section 49-6-1004 (a) (1983).

88. TENN. CODE ANN. section 49-6-1004 (b) (1983).

sufficient nexus to implicate the state.[89] Voluntary participation in prayers also does not provide the coach with a strong defense, because even if a prayer is voluntary the state action of endorsing a specific religion is unconstitutional.[90]

The problem with practices that are secular in nature and voluntary in application is that they can quickly become religious and non-voluntary. To ensure a coach does not use the locker room as a forum for forced indoctrination would require governmental monitoring of the prayers.[91] Two major questions asked in Establishment Clause cases is whether the governmental involvement is excessive; and, whether the involvement is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.[92] The inclusion of the state as a religious monitor of the coach's actions will impermissibly entangle the state with religion.

Due to the fact that any prayer adopted by, led by, or enforced by a public university athletic coach can run afoul of the First Amendment, universities have to explore other options to allow team prayer in a public university locker room. To help overcome the potential stigma of a coach led prayer, the coach could either institute a moment of silence for pursuing whatever interest the student-athletes might have, casually mention religion without advocating prayer, or open the locker room into a public forum. A coach's strongest argument would be the development of a moment of silence for pursuing purely secular objectives. If the coach can prove that no religion was mentioned and the activity was designed to build team unity, then the practice would not violate the Establishment Clause.[93]

A. Silent Prayer

Silent prayers adopted by the students themselves or instituted by the state for purely secular reasons, can provide the environment where individual reflection or prayer can thrive in the locker room without implicating the state or the coach in religious activities. Silent prayers that are sponsored by the government, however, can still violate the Establish-

89. *See* Weisman, *supra* note 37.

90. "The [e]stablishment [c]lause focuses on the constitutionality of the state action, not on the choices made by the complaining individual." *Jager*, 862 F.2d at 832. *See also Engle*, 370 U.S. at 430, n.77.

91. *Lemon*, 403 U.S. at 619.

92. Walz v. Tax Commission, 397 U.S. 664, 675 (1970), *cited in* Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n., 766 F. 2d 932, 957 (6th Cir. 1985).

93. *See generally* Wallace v. Jaffe, 472 U.S. 38, 67 (1985) (O'Connor, J., concurrence).

ment Clause. In *Wallace v. Jaffe*, the Supreme Court held that an Alabama Statute which authorized a one minute period of silence in all public schools "for meditation or voluntary prayer" was a law respecting the establishment of religion.[94] The statute was struck down because it did not have a secular purpose and the motivation for passing the statute was to advance religion.[95] To be a valid moment of silence, the practice has to be adopted with purely secular intentions.[96] Some states have adopted valid moments of silence statues by including in the statutes that the purpose of the silent moment is to help settle down the students.[97]

B. Casual Communication

A coach has the inherent right to bring the athletes into a huddle and ask them to think about what it means to be playing in the game. Nothing in the First Amendment says that a state employee can never use the word God.[98] The coach could also tell the athletes that "through the grace of God no one will get injured." A statement of this sort, and in this context, would not be considered religious indoctrination, but rather a polite remark. While technically there might not be a First Amendment violation from causally mentioning the word God, if a mere mention starts sounding like a prayer, governmental entanglement in having to monitor the speech could violate the Establishment Clause.

C. Equal Access

If a coach allows a different religious group to pray before each game, under the equal access theory, this practice could be valid. The equal access theory has been examined by the Supreme Court in both the university and high school context. In *Widmar v. Vincent*, a student group sued the university for the right to use state facilities for religious reasons under the free exercise and free speech clauses.[99] The Court concluded that the Establishment Clause does not bar a policy of equal access for a religious club when university facilities are open to all other

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94. *Id.* at 61.

95. *Id.* at 56-7.

96. *See generally Wallace*, 472 U.S. at 67 (O'Connor, J., concurrence).

97. *See* Abington, *supra* and accompanying text note 73. *See also Wallace*, 472 U.S. at 71.

98. The coach has to be very careful, even if the name of God is not used, because the statement still might be considered a religious prayer. Thus the use of the term God is not dispositive of what constitutes a prayer, rather the idea or intention of the statement is the controlling factor. *See generally* Annotation, *supra* note 74, at 1353, *citing* De Spain v. De Kalb County Community Sch. Dist., 384 F.2d 836 (7th Cir. 1967), *cert. denied*, 390 U.S. 906 (1967).

99. *Widmar*, 454 U.S. at 263.

student groups.[100] The Court concluded that if a university creates a forum generally open for use by student groups, it cannot discriminate against groups based on the content of their speech.[101] Thus an "Equal Access" policy is not incompatible with the Establishment Clause.[102]

In 1984 the Equal Access Act was passed to apply the *Widmar* holding to high schools.[103] In analyzing the constitutionality of the Equal Access Act, the Supreme Court in *Board of Education of the Westside Community School v. Mergens* upheld the constitutionality of the act based on the act's requirement that there be, "a limited open forum, the organization has to be a non-curriculum related group, and state employees can only attend in a non-participatory capacity."[104] The Court concluded that the high school could allow the religious club to use school facilities like any other group in the limited open forum.[105] The Court defined a limited open forum as a noncurriculum related student group that meets on school premises during noninstitutional time.[106] In his concurrence Justice Marshall thought that the plurality's reliance on *Widmar* was inappropriate because the university took concrete steps to disassociate the university's name from the religious program; and for the religious club in *Mergens* to be valid, the high school would have to take similar steps to "fully disassociate" itself from the religious program.[107]

One of the most important aspects of the Supreme Court's decision in *Mergens* is the realization that the Religious Clause violation was brought about by indirect school sponsorship of peer pressure. Justice O'Connor felt that even though attendance at the meeting was not mandatory, there still remained the "possibility of student peer pressure."[108] The potential for peer pressure, along with the potential necessity for governmental monitoring to ensure equal access, makes the option of opening the locker room into a public forum less attractive than silent prayers.

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100. *Id.* at 263. The Court in *Lamb's Chapel* required all schools to either open their facilities to the broadest array of groups or to none at all. *Lamb's Chapel*, 124 L. Ed. 2d at 361-2

101. *Widmar*, 454 U.S. at 269-70.

102. *Id.* at 270-75.

103. Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 235 (1990).

104. *Id.* at 233.

105. *Id.* at 239.

106. *Id.* at 235.

107. *Id.* at 266-67.

108. *Id.* at 251.

VI. CONCLUSION

Prayer is a topic close to the hearts of most Americans. The majority might not have any problem with prayers in their children's locker room, but religious minorities might have a problem with this practice. The First Amendment was designed to protect these minorities.

Prayer in a public university locker room violates the Establishment Clause because the prayers take place in a state facility, during a state activity, and are normally led by a state official. College students are more mature than high school students, therefore, college students are less susceptible to peer pressure and more capable of comprehending that the prayers do not indicate state support for religion. The authoritative position held by the coach and the restraints involved in athletics, however, does require public universities to provide student-athletes with a higher level of protection than regular college students. Based on the current sense of power exhibited by some college athletes, there appears to exist a new breed of student-athletes willing, and sometimes eager, to exert their rights through strikes, boycotts, or other actions. While some college athletes have been able to lash-out against their former coaches, the majority of student-athletes dare not raise a single objection to the conduct or actions of their coach or institution.

College athletes are, on a whole, in a rigidly supervised environment that is controlled by a state agent, therefore, college athletes should have a level of protection comparable to the protection afforded to middle/high school students in First Amendment cases. If a team prayer is led, monitored, or supervised by a coach, the coach's free speech right has to be suspended to avoid entanglement. However, based on the *Weisman* and *Jones* cases, if there is no state endorsement or entanglement or if the team prayers are implemented and controlled by the athletes themselves without state assistance, the prayers will not violate the Establishment Clause.

Coaches still have at least one Hail Mary left in their arsenal. Prayer could still be utilized in a public university locker room if the coach adopts a neutral policy for a moment of silence before a game for individual reflection. This practice will be valid as long as all student-athletes are given the option of choosing their own actions during the silent period.