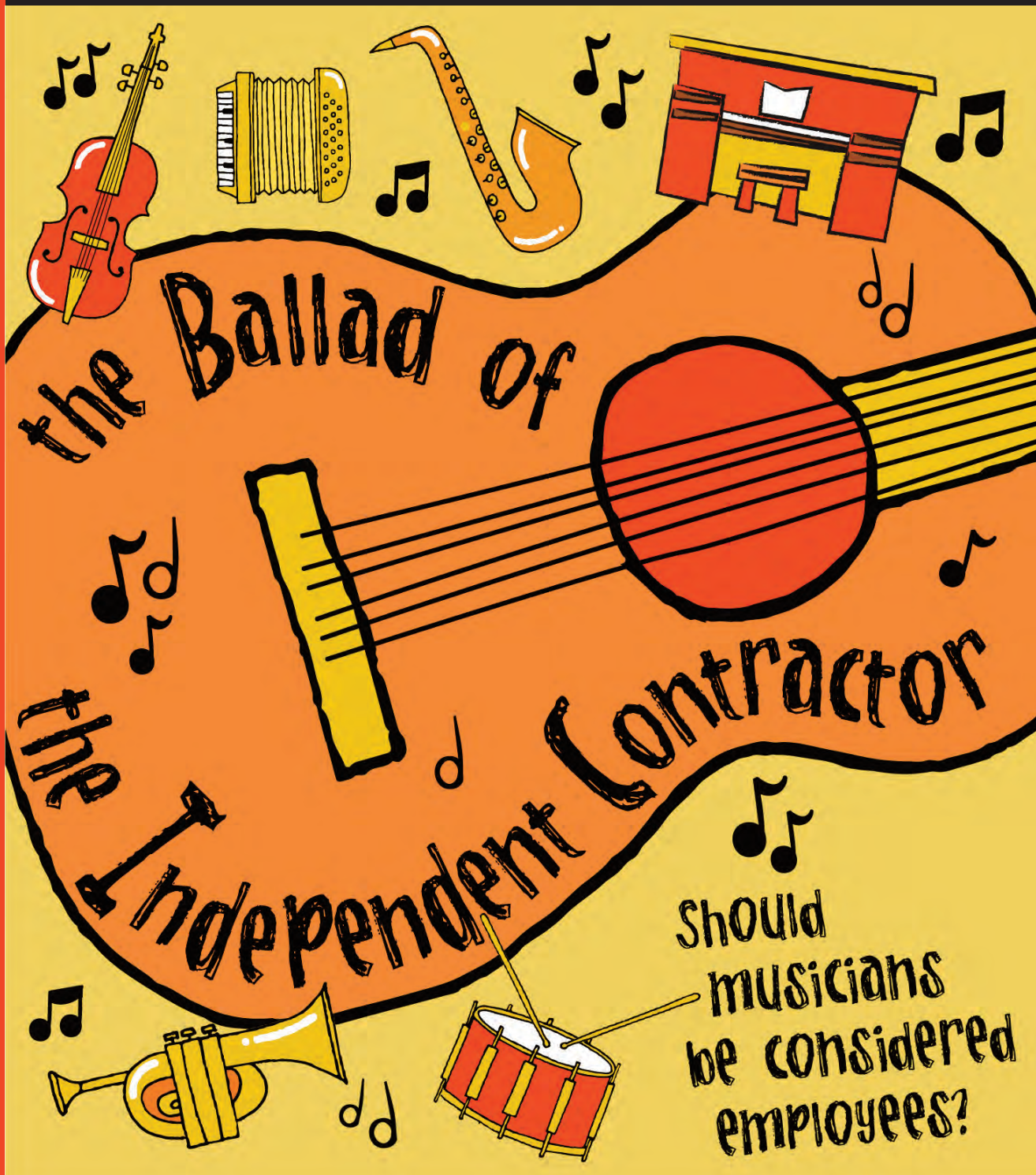
Texas Entertainment and Sports Law Journal

State Bar of Texas
Entertainment & Sports Law Section

Spring/Summer 2017 — Volume 26 • No. 1



TESLAW.ORG

The Texas Entertainment and Sports Law section of the State Bar of Texas is comprised of more than 950 Texas-licensed attorneys practicing in the areas of film, music, art, book publishing, and collegiate and professional sports. The TESLAW website at www.teslaw.org offers attorneys a chance to be listed with their focus area of practice in a publicly searchable database. The TESLAW Journal is a recognized publication providing scholarly and insightful articles on the law and practice of entertainment and sports law. Join today to be part of a collegial organization growing the practice of entertainment and sports law in Texas; for new bar members, the first year's dues are free.

CHAIR'S LETTER

Hello, TESLAW Members!

Amy E. Mitchell
Chair 2016-2017

I'm pleased to say that there is a lot happening in TESLAW-Land in 2017!

First, we hired a new web designer, Ryan Martinez, of Bitcore (Austin). Ryan has been hard at work creating a new website theme for TESLAW.org and migrating our massive amount of content. Some of the highlights include:

- Members can once again log in on the website to create an individual member profile! Please take a moment to add yourself and/or confirm your current information. These profiles will be part of a searchable database to help TESLAW become a resource for people seeking Texas-licensed entertainment and sports lawyers.
- Instead of seeing lengthy lists of PDFs in sidebars, you will be able to browse by year and select from thumbnails of TESLAW Journals, our eNewsletter (TESLAW Tidbits), and prior Entertainment Law Institute brochures. Eventually we plan to add tags and make the content fully searchable.
- Numerous images have been added throughout to highlight our members, events, and award recipients. If you think you may have good photos of past events or awards ceremonies for the website, please let me know.
- There is a full events calendar on which we will list events that we feel are relevant to our members throughout the state.

Additionally, the programming for our annual meeting in Dallas on June 22nd is coming together, thanks to the efforts of Chair-Elect, Mike Farris. Specifically, following our section membership meeting at 12:30, there will be a 3-hour ethics program comprised of these topics: Lawyers in History: A Death in the Islands: The Unwritten Law and the Last Trial of Clarence Darrow; Lawyers in Pop Culture: The Ethics of 'Better Call Saul'; and Lawyers in Literature: The Law and Lawyers in Print.

As always, if any of you are looking to get more involved in TESLAW, please don't hesitate to reach out to me or any of the Council members. I look forward to seeing you in Dallas in June!

All the best,
Amy E. Mitchell
Chair 2016-2017

EDITOR'S LETTER

Joel Timmer, Editor

Welcome to the Spring 2017 issue of the Texas Entertainment and Sports Law Journal. I hope you will find this issue's contents useful and informative. We are pleased to publish a number of student-written pieces in this issue. In addition to possibly having their articles published, the Journal also offers students the opportunity to gain some entertainment and sports law-related experience by assisting with the preparation of Journal issues. If you know of a law student interested in entertainment or sports law who is looking to get involved and gain some experience, please have him or her get in touch with me. These opportunities are not limited to students; the same opportunities are available to practitioners and others interested in the field of entertainment or sports law.

The Journal is actively looking for articles for future issues. The Journal seeks to publish articles written by practitioners, law students, and others on a variety entertainment and sports law topics. Articles of varying lengths are considered, from one-to-two-page case summaries and other brief articles, to lengthier articles engaging in in-depth analysis of entertainment and sports law issues. Please submit articles for consideration, or direct any questions about potential article topics, to myself at j.timmer@tcu.edu. I hope to hear from you.

Best Regards,
Joel Timmer
Journal Editor

Submissions

All submissions to the TESLAW Journal are considered. Articles should be practical and scholarly to an audience of Texas lawyers practicing sports or entertainment law. Articles of any length are considered, but as a general guideline should not exceed twenty-five typewritten, double-spaced, 8 ½" x 11" pages, including any endnotes; however, longer articles will be considered. Endnotes must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form. Please submit articles via e-mail in Word or similar format to j.timmer@tcu.edu or to discuss potential topics.

Once an article is submitted, the Journal does not request any additional authorization from the author to publish the article. Due to the number of submissions and the number of potential publications in the marketplace, it is nearly impossible to monitor publication of submissions in other publications. It is up to the author to assure that we are notified should there be any restrictions on our use of the article. This policy has been implemented to assure that our Journal does not violate any other publication's limitation on republication. The Journal does not restrict republication, and in fact encourages submission of an author's article to other publications prior to or after our election to publish. Obviously, the Journal will make the appropriate attribution where an article is published with the permission of another publication, and request such attribution to the Journal, if we are the first to publish an article.

Profile of the Entertainment and Sports Law Section of the Austin Bar Association

By Megan Tholen

The Entertainment and Sports Law Section of the Austin Bar Association (ESLABA) was created in 2013. Austin entertainment lawyer (and current Chair of the Texas State Bar's Entertainment and Sports Law Section) Amy E. Mitchell spearheaded the section's formation. She was inspired to create the section after speaking at the Dallas Bar Association's Sports and Entertainment Law Section (The Dallas section was the subject of a profile in this Journal's Fall 2015 issue. It has since expanded its focus to include art law, changing its name to the Entertainment, Art & Sports Law Section). The Entertainment and Sports Law Section was the first new section to be added to the Austin Bar Association in decades. Its addition was unanimously approved by the Association's Board.

The Section started with about a dozen people attending its first meeting, and has grown to about 50 members since then. Regular events include monthly CLE lunches. Issues covered in the monthly luncheons span a spectrum of topics relating to Austin's lively sports and entertainment culture, such as trademark issues for athletes and legal issues for filmmakers. Early in 2017, the section held a panel at the University of Texas Law School on how to be an entertainment lawyer, providing advice and tips for current law students and recent graduates. In addition, each January the Section co-sponsors "Burns Night," an annual celebration of Scottish poet and lyricist Robert Burns.

Austin Bar Association members can join the Section for a fee of $35. In addition to the benefits discussed above, members also enjoy discounted entrance to meetings and access to practice documents. The Section provides invaluable networking and pro bono opportunities through collaborations with groups such as the Copyright Society and Texas Accountants and Lawyers for the Arts (TALA). Young lawyers looking to make their start in the entertainment and sports law world of Austin can make some great connections and find valuable opportunities through the ESLABA.

Emilio Nicolas makes a presentation to the ESLABA on Music and the Right of Publicity

A section mixer at the Mean-Eyed Cat.

Protecting Musicians from Discrimination: Repairing the Common Law Agency Doctrine

By Benjamin Brown

Benjamin Brown is a 3L at UT Law who will clerk at the Texas Court of Criminal Appeals after graduation. This article was inspired by his background in the performing arts.

Introduction

Though all branches of government have placed a premium on protecting employees from workplace discrimination and harassment, federal courts throughout the country have consistently excluded musicians from the protection of anti-discrimination statutes. These courts, relying on statutory ambiguities and an obtuse application of the common law agency test, have ignored the realities of the music profession and branded nearly all musicians with an independent contractor status which renders them ineligible for the benefits of Title VII, the Americans with Disabilities Act (ADA), and other remedial laws.[1] This has yielded an absurd and regrettable result, for the law currently leaves musicians without any significant recourse in the face of workplace discrimination.

In Subpart I, this Article will first provide some background on anti-discrimination statutes, the employee-independent contractor distinction, and the common law agency test. Subpart II will then survey decisions from various federal circuits that have applied the traditional version of the common law agency doctrine to claims of discrimination by musician-plaintiffs. Subpart III will then argue that courts must forgo this agency doctrine because it ignores the realities of the music industry and consequently precludes most musicians from civil rights causes of action, thereby contravening the statutory purpose of Title VII, the ADA, and other similar laws. Finally, in Subpart IV this Article will propose that courts instead apply the analysis used by the D.C. Circuit Court of Appeals in *Lancaster Symphony Orchestra v. National Labor Relations Board.*[2] The nuanced and insightful version of the traditional agency test used in this case not only furthers the congressional goals embodied in anti-discrimination statutes, but also accounts for the realities of the modern-day music profession.

I. Anti-Discrimination Statutes and the Common Law Agency Test

Generally, anti-discrimination statutes that target working relationships only prevent discrimination against "employees."[3] Additionally, courts have interpreted the term "employee" to exclude independent contractors and all other types of agents,[4] rendering the employee-independent contractor distinction crucial to the adjudication of discrimination cases. When drawing this distinction, courts first look for statutory guidance, but the text rarely sheds any light on this question.[5] As a result, courts have traditionally turned to the common law agency test in order to classify discrimination plaintiffs.[6]

The crux of the common law agency test is the element of control. Though the test may vary from circuit to circuit, all courts agree that its application seeks to determine the level of control that a hiring party retains over its agent.[7] A higher level of control indicates that the agent is an employee, while a lower level of control indicates that the agent is an independent contractor.[8] When applying the traditional formulation of this test, courts will often borrow from the factors listed in the Restatement of Agency, which include: (1) requisite level of skill; (2) duration of the relationship; (3) method of payment; (4) whether or not the work is part of the regular business of the employer; and (5) whether or not the parties believe they are creating an employer-employee relationship.[9] This is not an exhaustive list of factors and no single element is dispositive,[10] resulting in notable discrepancies between various circuits' formulations of this test

II. Application of the Common Law Agency Test to Musician-Plaintiffs

This subpart will discuss courts' application of the common law agency test to musicians and other similarly situated plaintiffs in detail. Though this subpart will survey cases from different federal circuits that employ different analyses, the common thread of these decisions is their rigid adherence to the letter, rather than the spirit, of the common law agency test. These

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courts consistently label musicians as independent contractors and consequently refuse to place these plaintiffs within the protective scope of anti-discrimination statutes.

A. The Eighth Circuit

The landmark Eighth Circuit musician discrimination case is *Lerohl v. Friends of Minnesota Sinfonia.* The plaintiffs in this case were Tricia Lerohl and Shelley Hanson—two musicians who performed with the Minnesota Sinfonia.[11] Hanson alleged that Friends of the Minnesota Sinfonia, the corporation that governed the symphony, violated the ADA by failing to accommodate her disability.[12] In addition, both Lerohl and Hanson alleged that the organization violated Title VII by terminating them in response to the sexual harassment claims they levied against the symphony's conductor, Jay Fishman.[13] The district court, however, dismissed the complaint after finding that the plaintiffs were independent contractors and therefore not entitled to the protections of Title VII or the ADA.[14]

In its opinion, the Court of Appeals conducted its own analysis of the plaintiffs' employment status to determine whether they fell within the purview of these statutes.[15] Noting that neither Title VII nor the ADA provided a meaningful definition of "employee," the court opted to apply the common law agency test.[16] Though the court claimed that Supreme Court precedent mandated the application of this test, it is worth noting that the cited Supreme Court case dealt with the Employee Retirement Income Security Act (ERISA), not Title VII or the ADA, and therefore was of questionable relevance in *Lerohl*.[17]

In its application of the common law agency test, the court focused on the issue of control. While the court conceded that the symphony and the conductor retained "undisputed control in selecting the music to be played, scheduling Sinfonia rehearsals and concerts, and determining the manner in which the concert music was collectively played," the court dismissed these facts as irrelevant because they implicated the wrong type of control.[18] Instead, the court focused on the "freedom-of-choice" afforded to the symphony musicians—specifically, that the musicians could decline particular Sinfonia concerts and elect to play elsewhere.[19] The court also highlighted that musicians were paid on a per-concert basis, that the Sinfonia did not withhold income taxes, and that the Sinfonia did not provide any employment benefits except contributions to a pension fund.[20]

The court also briefly addressed the holding of *Seattle Opera v. National Labor Relations Board*, which held that the singers of the Seattle Opera were employees rather than independent contractors.[21] Nevertheless, the court quickly brushed this decision aside to pave the way for its determination that the plaintiffs were independent contractors.[22] The Court of Appeals consequently affirmed the lower court's dismissal of the plaintiffs' claims.[23]

B. The Ninth Circuit

The reasoning employed by the Eight Circuit in *Lerohl* also pervades similar Ninth Circuit decisions. For example, in *Lutcher v. Musicians Union Local 47*, the court ruled that plaintiff Joe Lutcher's Title VII religious discrimination claim was

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Dreams Shattered: A Trend Coaches and Universities Must Address

*By Kornel Rady**

Kornel Rady is a 2L at SMU Law. He is currently the president of the Sports & Entertainment Law Association at SMU. After graduating he hopes to focus on a career practicing litigation.

A surprisingly scarce amount of legal analysis is placed on high school athletes and their experiences during the National Collegiate Athletic Association ("NCAA") recruitment process. One important legal issue called promissory estoppel should have come into focus as college football's 2016 recruitment period ended. Generally, this recruitment process is quite complex and involves a variety of moving parts. Initially, coaches and university representatives attend games, look at film, and show their interest in a variety of ways. They send letters, e-mails, and make calls, essentially establishing an initial relationship with potential recruits. After this, and throughout the relationship building process, there are ongoing evaluations on both sides. There is constant calculating between universities and student athletes regarding a future together. After this process, schools can offer recruits scholarships through a variety of means. Sometimes it comes during a home visit, after a game, or during an official visit to the offering institution. These scholarships are usually offered verbally and then followed up with a letter discussing the details of the scholarship.

This process was upended in one unfortunate circumstance in 2016, when the University of Michigan revoked the scholarship offer of highly-recruited football player Erik Swenson just two weeks before the closing of recruitment known as National Signing Day.[i] National Signing Day is the penultimate day a vast majority of highly touted recruits sign with their prospective school and make their commitments official by signing a National Letter of Intent confirming their school selection.

In Swenson's case, he committed to Michigan in 2014, and reportedly did nothing to jeopardize his scholarship.[ii] From 2014 to 2016, he rebuffed multiple scholarship offers from schools such as Alabama and closed his recruitment process.[iii] As 2016's National Signing Day approached, he was one of the lucky ones to immediately draw the interest of other schools despite losing his scholarship so close to the deadline.[iv] Eventually, Swenson committed to the University of Oklahoma after a dramatic few weeks.[v] However, think about this: what if Oklahoma had also run out of scholarships to offer?

Swenson could have gone from playing at Michigan, a school with a great athletic and academic reputation with a history of sending players to the NFL, to a smaller school or junior college. The loss of value based on this initial scholarship offer could have been quite a bit more impactful if Swenson was not such a highly recruited player. This also illustrates what makes the situation quite frustrating. Swenson's ability was rated four out of five stars. If he had been a two or three-star recruit, and been offered a scholarship at a smaller school whose class filled up, he may have lost out on his academic and athletic dreams in a more serious way.

The injustice that scholarship revocation causes requires far more attention from institutions, coaches, and student-athletes as lawsuits may arise based on promissory estoppel claims.[vi] Under current rules, these seventeen and eighteen year old kids are subject to treatment similar to that of a commodity. This is simply unacceptable. The NCAA and athletic programs should pride themselves, and many do, on bringing in young men and women to prepare them to be leaders in their community. Treating a recruit like someone you aim to shape and mentor should be a hallmark when a scholarship offer is made. Subsequent commitment signifies an acceptance of such a future relationship together and should, under very few circumstances, be subject to withdrawal. The Swenson example demonstrates that these offers and relationships are far shallower than they should be.

This is not the first time scholarship revocation has received national attention, as just four years earlier football players Joseph Agnew and Patrick Courtney provided their own distressing accounts.[vii] The student-athletes here filed suit after being stripped of their scholarships due to injuries.[viii] They eventually lost the suit with their argument that the quota and regulation of scholarships had an anticompetitive effect on student-athletes.[ix] The court essentially stated that the NCAA rules regarding scholarships do not improperly affect a recognizable market.[x] Additionally, the plaintiffs failed to recognize a market, which is

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required under an antitrust claim.[xi] Despite the outcome, the plaintiffs did initiate a conversation about the rescinding of scholarships for current college athletes. With no true changes, the unraveling of the intentions behind some college programs was placed where all could see. In other words, winning and bringing in new athletes was of utmost importance, rather than living up to what most athletes wrongly assume will be a consistent relationship for four years.

The revoking of scholarships, after multiple years of loyal commitment and shutting down recruitment efforts like Swenson did, can mirror the injustice that the classical promissory estoppel doctrine describes in § 90 of the Second Restatement of Contracts ("Restatement"). The Restatement provides that a promise, on which the promisor should reasonably expect action on the part of the promisee and which does induce such action, is binding if injustice can be avoided only by enforcement of the promise.[xii] Swenson's reliance raises questions about other athletes facing more extreme forms of reliance on a single scholarship. Some of these questions revolve around what kind of injury and value is lost with a revocation similar to Swenson's. Another question is how much of this occurs with lesser-known recruits at smaller schools? The answers to these questions are unknown, but are important for those in leadership roles to be vigilant of the relationships being built with these sometimes-vulnerable young men.

Digging deeper into such an estoppel claim, imagine an ecstatic high school athlete offered a scholarship his or her sophomore year. Additionally, due to loyalty and confidence in the commitment, the athlete decides to reject any other form of recruitment. After this, however, the university pulls the scholarship a week before National Signing Day with no explanation and no other university offers a scholarship. The facts described are not so surprisingly similar to the famous Ricketts promissory estoppel case. The dispute involved a granddaughter who sued her grandfather's estate for cancelling payments. She succeeded on the estoppel claim because of the reliance on those payments after quitting her previous job based on this payment.[xiii]

Comparing this case to the hypothetical, one can immediately say that the grandfather is equivalent to the university when promising something of value. Scholarship revocation as described in the hypothetical is just like what the granddaughter experienced. Such a revocation is clearly an injustice that can be avoided only by the enforcement of the initial scholarship. This is similar to how continuing to pay the granddaughter was the only way to avoid injustice. In most ways the ability to recover scholarship value is impossible. The final part of the analysis to consider is did the original promisor reasonably expect an action and did that action occur? The answer to both questions is yes. In other words, if a coach offers a scholarship he or she should expect that the athlete would accept. Therefore, it is clear that based on the Ricketts case and the Restatement, an estoppel claim could arise.

Generally, universities consider academic potential, athletic ability, character, and scholarship quotas when recruiting a player. Quotas influence scholarship allocation throughout a recruitment period. More specifically, a quota here is a cap on the number of scholarships a program can grant. Theoretically, a program can offer more scholarships than it possesses to ensure it maximizes commitments under this quota system. Scenarios leading to a revocation of an offer generally stem from such an issue. For example, an athlete who commits a crime or does not meet academic requirements should not be offered a scholarship.

It is also worthy to note that a reversal of the injustice can occur when an athlete does not honor their original commitment. Many individuals may take a visit to another school despite initial loyalty. This could and most likely frustrates coaches who place precious resources into the recruitment process. However, the university does not suffer an injury to the extent that an individual student experiences through a revoked offer because of the total number of student-athletes available. In the end, the individual suffers far more in a parallel situation than a school does. Mainly because the student depends on one offer and a school depends on many athletes, this inequity heavily favors institutions that can offer dozens of scholarships to players. Therefore, the purposeful over allocation of scholarships benefits the institution over the individual.

Outside of a promissory estoppel claim there is also a potential cause of action for breach of contract. First, for a breach of contract claim to succeed the agreement must be definite. Generally, in a scholarship case the plaintiff would need an explicit offer and guidelines to follow for success. In fact, most scholarships do arrive in a formal letter describing what the athlete must do to keep the offer through National Signing Day.[xiv] These specific academic and common sense terms, if met, should not lead

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invalid due to his independent contractor status.[24] Lutcher alleged that the Los Angeles Unified School District (School District), which contracted him to perform 23 concerts, refused to renew his contract due to his religious affiliations.[25] Engaging in an employment analysis, the court recognized that the School District retained the right to control the substance of these performances and to terminate the program if they deemed it improper, but the court did not find these aspects of the relationship to be dispositive.[26] Instead, the court emphasized other traditional common law agency factors—Lutcher was paid in a lump sum; he was responsible for providing insurance for his group; and he was responsible for employing, equipping, and transporting the members of his group.[27] Consequently, the court determined that Lutcher was an independent contractor and therefore fell outside the scope of Title VII.[28]

The Ninth Circuit employed similar reasoning in *Flores v. Elektra Records*.[29] In this case, singer Nathanial Flores sued Elektra Entertainment Group, Inc., for refusing to sign him to a recording contract, alleging that the record company rejected him to due to his national origin in violation of Title VII.[30] The court, citing to *Lutcher*, simply concluded that the plaintiff had pled facts that amounted to independent contractor status, and therefore he did not have a cause of action.[31]

C. The First Circuit

The First Circuit has also applied a similar common law agency analysis to performers of all types—from musicians to television personalities. For example, in *Alberty-Velez v. Corporacion de Puerto Rico para la Difusion Publica*, the court dismissed plaintiff Victoria Lis Alberty-Velez's Title VII pregnancy and gender discrimination claims due to her employment status.[32] Alberty-Velez, the host of a Puerto Rican television show entitled "Desde Mi Pueblo," sued defendant television station WIPR, but the lower court dismissed her complaint after determining that Plaintiff was an independent contractor.[33]

The First Circuit, conducting its own employment status analysis, echoed the reasoning of the Eighth and Ninth Circuits.[34] Noting that Title VII did not provide a helpful definition of "employee" and that other courts had applied the common law agency test in similar situations, the court checked off a familiar list of factors: (1) Plaintiff signed a new contract for each episode; (2) Plaintiff could work other jobs when she was not working for WIPR; (3) Plaintiff was paid in lump sum payments; (4) WIPR did not withhold income or social security taxes; (5) WIPR did not provide Plaintiff with insurance or paid leave; and (6) Plaintiff was not designated as an "employee" on her tax returns.[35]

Though the court recognized that WIPR exerted a considerable amount of control over Plaintiff by directing her during filming; determining the location of filming sites; scheduling her working hours; establishing the basic content of the television program; and providing the lights, cameras, makeup, and other equipment necessary for filming, the court was not persuaded to recognize Plaintiff's claims.[36] Though the court asserted that the employment analysis must be conducted "in light of the work performed and the industry at issue," it also concluded that the Plaintiff was focused on the wrong type of control.[37] Analogizing to *Lerohl*, the Court of Appeals determined that the supervision that WIPR retained over Plaintiff was similar to that of an orchestra conductor over a musician.[38] The court, however, held that neither instance of control would characterize an employer-employee relationship, as this method of analysis would classify all actors and musicians as employees "regardless of the other aspects of the [working] relationship."[39]

III. Reasons for Abandoning the Traditional Common Law Agency Test

The central thesis of this Article is that the application of the traditional common law agency test to discrimination suits by musician-plaintiffs is inappropriate, and consequently courts must formulate a new agency test. This subpart will present both legal and prudential justifications for this position, including: (1) that the application of the common law agency doctrine is destructive to the purposes of civil rights statutes and must consequently be adjusted to harmonize with these statutes, (2) that federal courts are not legally bound to apply the traditional test, and (3) that federal courts have previously applied alternative tests, indicating that there is breathing room to formulate new agency doctrine.

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Protecting Musicians from Discrimination: Repairing the Common Law Agency Doctrine

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A. Contravention of Statutory Purpose

i. The Realities of the Music Industry

Federal courts have consistently held that the occupational circumstances of professional musicians do not qualify them as "employees" within the scope of Title VII and other anti-discrimination statutes. These decisions, however, are not sensitive to the realities of the music industry—specifically, that the vast majority of professional musicians do not enjoy the typical, full-time work environment that characterizes "employment" in most other fields.[40] According to surveys conducted by the Department for Professional Employees in the year 2013, over 75% of musicians were not employed full-time, and the average pay for a musician was $23.74/hour.[41] Additionally, a Berklee College of Music survey from 2012 revealed that consistent, salaried employment is not even possible for most musical performers.[42] These data showed that even highly successful musicians, such as Broadway pit musicians or opera soloists, were not salaried, but were instead paid by the performance.[43]

These numbers are striking when contrasted with other industries. For example, according to the Department for Professional Employees, the community and social service industry includes nearly two million professionals, 80% of whom are employed full-time.[44] In addition, nearly all social service positions are salaried.[45] The department also surveyed technical employees in the labor force, the majority of whom are employed full time and enjoy salaried positions.[46]

These data, interpreted as a whole, indicate that the music industry vastly differs from other professional fields, for even the most successful performers may only be employed part-time and may need to contract with multiple employers to earn a living wage.[47] Therefore, it seems inappropriate to apply the same legal standards to professionals in the music industry as those applied to members of other occupations.

ii. An "Absurd Result" Which Contravenes Statutory Purpose

Since federal courts mandate that musicians fit within traditional notions of an "employee" in order to sue under anti-discrimination statutes, and because most musicians do not meet these standards as these employment elements are rare, if not altogether impossible, in the music industry, federal courts have consequently removed over 75% of musicians from the protections of civil rights statutes.[48] Though the term "absurd result" has no concrete definition, excluding the vast majority of an entire profession from the scope of civil rights law seems, by any reasonable definition, to be "absurd."

Additionally, this outcome is not only regrettable; it also contravenes the purpose of anti-discrimination statutes. Looking to the legislative history of these laws, it is clear that Congress intended for them to have a broad, remedial scope.[49] The U.S. House of Representatives Report that preceded the passage of Title VII sets out its purpose, unequivocally stating that the law is meant "to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination."[50] The legislative history of the ADA reveals a similar sentiment, as the Congressional Record advocates for "a broader meaning and application of the ADA[]," and for safeguarding those with disabilities so they need not "choose between managing their disabilities or staying protected from job discrimination."[51]

The federal courts, however, have contravened the purposes of these statutes via their application of the common law agency test. Rather than facilitating a broad and protective civil rights scheme, as Congress intended, courts' strict adherence to traditional notions of agency has narrowed the scope of these laws and robbed many plaintiffs of their protections. Though some may argue that legislative intent is merely persuasive and not binding on the courts, the U.S. Supreme Court has held that when common law principles conflict with statutory purpose, statutory purpose must prevail.[52] The Supreme Court held in *U.S. v. Texas* that "courts may take it as a given that Congress has legislated with an expectation that . . . [common law] principle[s] will apply except 'when a statutory purpose to the contrary is evident.'"[53] Therefore, federal courts must tailor their application of the common law agency test to further the congressional goals of civil rights statutes.

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B. The Availability of Other, More-Suitable Tests

i. Inappropriate Reliance on Nationwide

Though federal courts have consistently applied the traditional agency test to musicians' discriminations suits, legal precedent does not mandate this approach to the employment analysis. Federal courts from all circuits have commonly cited *Nationwide Mutual Insurance. Co. v. Darden* as binding precedent for their application of the common law agency test in the absence of statutory guidance regarding employee status, but this case is distinguishable from musician discrimination suits and therefore is not binding.[54]

In *Nationwide*, Robert Darden, an insurance agent, sued Nationwide Mutual Insurance Company (Nationwide) for recovery of his retirement benefits under ERISA.[55] ERISA, much like Title VII and the ADA, only applies to employees and yet does not provide a meaningful definition of the term "employee."[56] The Supreme Court concluded that, in the absence of a contrary statutory definition, Congress intended for courts to apply the traditional common law agency test.[57]

This case has since been cited to justify the application of the common law agency doctrine to musicians' Title VII, ADA, and Age Discrimination in Employment Act (ADEA) suits— a logical leap which is not warranted in light of the discrepancies between these cases. First, the plaintiff in *Nationwide* sued under ERISA, but ERISA is not an anti-discrimination statute and therefore is not entitled to the liberal construction granted to Title VII, the ADA, and other similar laws.[58] This is a widely accepted tenet of statutory construction, exemplified by the Eight Circuit's assertion that civil rights statutes such as Title VII must be construed liberally in order to effectuate their "remedial and humanitarian underpinnings."[59] Therefore, textual interpretations pertaining to ERISA (such as the definition of "employee") should not be blindly transplanted into civil rights cases.

In addition, the plaintiff in *Nationwide* was an insurance agent, not a musician.[60] As discussed earlier in this paper, it is imprudent when determining employment status to apply the same legal standards to musicians as to members of other professions because the music industry is singular and unique.[61]

Finally, the Supreme Court justified its decision to apply the common law agency test in *Nationwide* by emphasizing that there was no language in ERISA "suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results."[62] Conversely, Title VII, the ADA, and other anti-discrimination statutes include provisions which indicate that the application of traditional agency law principles will, in fact, "thwart the[ir] congressional design" and "lead to absurd results."[63] As indicated by both the plain text and the legislative history of these statutes, Congress intended, in passing civil rights laws, to create a comprehensive remedial scheme which protects agents from workplace discrimination.[64] And, as discussed earlier in this paper, strict application of the common law agency test has both obstructed this purpose and facilitated an absurd result by excluding the majority of musicians from the protective scope of these statutes.[65]

Given these discrepancies, courts have incorrectly relied on *Nationwide* in discrimination suits by musician-plaintiffs, as *Nationwide* is distinguishable from these discrimination cases and consequently is not binding precedent. As a result, courts should instead look to other case law for guidance in their employment status determinations.

ii. Precedent for Deviating from the Traditional Common Law Agency Test

Despite federal courts' ardent loyalty to the traditional agency test when faced with discrimination suits by musician-plaintiffs, there actually exists a wealth of precedent that supports deviation from these traditional factors when evaluating employment status. Courts have, at times, replaced the standard test with two alternative doctrines—the "economic realities" agency test and the "hybrid" agency test.[66]

The Fifth Circuit has repeatedly applied the "economic realities" test, exemplified by the decision in *Hickey v. Arkla Industries*.[67] In this case, the Court of Appeals analyzed the employment status of plaintiff Perry Hickey, who filed suit against his employer, Arkla Industries, Inc., for age discrimination under the ADEA.[68] Rather than apply the traditional agency test, the

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court recognized that it is often appropriate in Title VII cases to apply an "economic realities" test which designates agents as employees if they, "as a matter of economic reality, are dependent upon the business to which they render service."[69] The court also listed a number of relevant factors, including: (1) degree of control; (2) opportunities for profit or loss; (3) investment in facilities; (4) permanency of relationship; and (5) skill required.[70] The court chose this doctrine because it evaluated the extent of control, the central consideration of the traditional test, while also focusing on the agent's economic circumstances.[71]

In addition, the Fifth Circuit applied yet another alternative test—the "hybrid" test—in *Nowlin v. Resolution Trust Corp*.[72] In this case, plaintiff Jolene Nowlin, former employee of defendant Resolution Trust Corporation, sued defendant for sexual discrimination and retaliatory discharge in violation of Title VII.[73] The court, recognizing that the traditional agency test was not appropriate in Title VII actions, applied a hybrid of the traditional and "economic realities" agency doctrines—a test which accounted for the economic dependence of the agent upon the business for which he worked, while also focusing on the extent of control which the employer retained over the "means and manner" of their agent.[74] The court emphasized that the traditional agency doctrine was "ill-fitting," and that the hybrid test allowed for a more well-tailored legal analysis.[75]

Finally, the cases in this subpart are not presented to support the proposition that courts should uniformly adopt either one of these alternative tests—rather, these cases simply demonstrate that no court is bound to the traditional common law agency doctrine. Courts are instead free to explore other tests that may better evaluate the legal aspects of an employment relationship pertinent to a discrimination case.

IV. A Proposed Solution: The "Lancaster Test"

Despite the problematic nature of the common law agency test, there exists a readily available solution that could alleviate all previously-enumerated concerns. This solution is embodied in a case recently decided by the D.C. Circuit Court of Appeals: *Lancaster Symphony Orchestra v. National Labor Relations Board*.[76] This subpart will summarize the facts, reasoning, and holding of this case; propose a workable test of general applicability derived from this case; and explain why this test should supplant the traditional agency test in the context of discrimination suits by musician-plaintiffs.

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A. Lancaster Symphony Orchestra—Facts, Reasoning, and Holding

In this case, musicians of the Lancaster Symphony Orchestra (Orchestra) sought to form a labor union.[77] The musicians formed an organization called the Greater Lancaster Federation of Musicians and filed a petition for certification pursuant to the National Labor Relations Act (NLRA).[78] The Orchestra, however, opposed this petition, claiming that its musicians were independent contractors and consequently had no right to form a union.[79] In response, the National Labor Relations Board (Board) determined that the musicians were indeed employees and that their union was valid.[80] The case at bar resulted from the Orchestra's appeal of the Board's determination.[81]

In its discussion, the court addressed the traditional common law agency doctrine as derived from the Restatement of Agency, focusing specifically on the "extent of control" factor.[82] Contrary to most other circuits which ignored the artistic and logistical control that an orchestra and conductor exercise over their musicians, the D.C. Circuit analyzed the orchestral working dynamic in great detail.[83] The court recognized that, artistically, a conductor "exercises virtually dictatorial authority over the manner in which musicians play," unilaterally determining volume, pitch, bow technique, and vibrato technique.[84] On the whole, the court determined, musicians must defer to their conductor's personal, and at times arbitrary, interpretation of the music.[85] The court then addressed a significant counterargument—that it is the musical score, and not the conductor, which makes these determinations.[86] The court quickly rebutted this notion with a quote from Leon Botstein, the principal conductor of the American Symphony Orchestra:

> I think there's a big misunderstanding. Some people think, well, the composer wrote the music. Well, that's true. And there's a score. But . . . the number of indications of what to do are very few . . . . The score is a map. It doesn't tell you how to drive . . . . [T]his hype about doing only what the composer intended is a nonsense because nobody knows what the composer intended . . . . [P]utting a piece of music on the stage is always about [the] intention of the interpreter.[87]

Continuing to analyze the element of control, the court noted that the conductor and Orchestra also closely regulated the logistical aspects of rehearsals and performances.[88] The conductor required musicians to limit conversations during rehearsal to matters pertinent to the music; musicians were required to maintain a certain posture during rehearsals and performances and were prohibited from crossing their legs; musicians could not speak at all during tuning or when the conductor was on the podium; and musicians were required to respond to cues from the conductor, including indications regarding when to bow and acknowledge the audience.[89] In addition, the Orchestra established etiquette, attendance, decorum, costume, and make-up requirements to which all musicians strictly adhered.[90] The court added that, although these requirements may have seemed trivial, they were well-enforced and directly affected the musicians' employment opportunities.[91]

The court also addressed other factors derived from the Restatement of Agency. The court noted that the plaintiffs' work was "part of the regular business of the[ir] employer" (the eighth Restatement element) because the Orchestra was in the business of performing music.[92] Additionally, the court recognized that although the musicians were paid by the performance, their pay rate was altered according to the duration of each performance.[93] Consequently, their payment was effectively an hourly wage, which is indicative of an employee status.[94]

Finally, the court addressed an issue that was not derived from the Restatement of Agency, but rather from previous D.C. Circuit case law. The court drew upon its reasoning in *Corp. Express Delivery System v. National Labor Relations Board*, a case that introduced the "entrepreneurial opportunities" element of the D.C. Circuit agency doctrine.[95] This test essentially determines whether an agent has significant entrepreneurial opportunity for profit or loss in the scope of their employment, where more opportunity indicates independent contractor status and less opportunity indicates employee status.[96] Related inquiries include: whether an agent may work for other employers concurrently with their original employer, whether an agent may hire their own employees, and whether an agent has a proprietary interest in their work-product.[97] When applied in *Lancaster Symphony Orchestra*, the test indicated that the plaintiffs were employees because they could not contract to fill multiple chairs, assign or sell their places in the orchestra, or hire someone to fill their seats in a particular rehearsal or performance.[98]

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Finally, after considering all of these factors, the Court of Appeals upheld the Board's determination that the plaintiffs were employees and therefore did have the right to unionize.[99]

B. Deriving a Workable Test from Lancaster Symphony Orchestra

This Article proposes that the analysis employed by the D.C. Circuit in *Lancaster Symphony Orchestra* should replace the traditional common law agency test in the context of discrimination suits by musician-plaintiffs. This proposition, however, does not imply that the traditional doctrine should be abandoned altogether. The standard test undoubtedly has merit and has guided courts in properly adjudicating employment status cases in other areas—it has only failed in this particular legal niche.

Additionally, in order to derive a workable test from the D.C. Circuit's long and painstaking analysis in *Lancaster Symphony Orchestra*, it seems prudent to extract the crucial points of this discussion and formulate them into a doctrine of general applicability—for the purposes of this Article, this general test will be called the "Lancaster Test." Much like the traditional agency doctrine, this is a balancing test that evaluates the entirety of the working relationship, and no individual factor is dispositive.

The first element of the Lancaster Test is artistic control. The purpose of this factor is to determine whether the agent, the employer, or both parties may concurrently make decisions regarding musical interpretation and technique. If the agent may make these determinations, or if both parties collaboratively make these determinations, this indicates independent contractor status, and if the employer unilaterally makes these decisions, this is a greater level of control that suggests employee status. For example, in an orchestral setting, this element would generally indicate that musicians are employees because they must defer to the conductor's interpretation of the music. Conversely, in a small group setting such as a jazz combo, this element would usually indicate independent contractor status because musicians in small groups tend to cooperatively generate their musical interpretations and stylistic choices.

The next element of the Lancaster Test is logistical control. This factor determines whether the agent, employee, or both may make decisions regarding rehearsal and performance scheduling, decorum, etiquette, equipment, and attire. Once again, if the agent may make these determinations, or if both parties collaboratively make these determinations, this indicates independent contractor status, and if the employer unilaterally makes these decisions, this indicates employee status. The orchestra and jazz combo analogy is also appropriate here: in an orchestra, the conductor or the organization governing the orchestra often sets these standards, and musicians are given little input. This situation would suggest an employer-employee relationship. Conversely, in a jazz combo, these decisions will probably be made collectively, in which case the musicians should be deemed independent contractors.

The third factor of the Lancaster Test is form of payment, an element borrowed from the Restatement of Agency.[100] This factor, however, should be analyzed with the same precision that the D.C. Circuit used in *Lancaster Symphony Orchestra*. Courts should not blindly accept the category of payment, such as salary, hourly, or lump sum, but rather consider the circumstances surrounding the payment process to determine its true nature. For example, the court in *Lancaster Symphony Orchestra* recognized that, although musicians were paid by the performance, their lump sums were altered depending upon the length of the performance, which is akin to an hourly wage.[101]

Finally, the last factor of the Lancaster Test is a modified version of the "entrepreneurial opportunity" element used by the D.C. Circuit.[102] This element is modified because, as the court presented it, it is not readily applicable to the music profession in its entirety.[103] Specifically, the Lancaster Test preserves this factor to evaluate whether musicians may concurrently work for other employers while they work for their original employer.[104] This aspect informs the employer-agent relationship and is generally applicable. The Lancaster Test, however, does not ascertain whether musicians may profit, in an "entrepreneurial" sense, from their positions. It does not seem realistic to expect that any musical group, large or small, would allow its members to assign, sell, or subcontract their position to another musician. Therefore, the Lancaster Test excludes this aspect of the D.C. Circuit's reasoning.

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C. The Benefits of the Lancaster Test

Federal courts should uniformly apply the Lancaster Test because it remedies the deficiencies of the traditional common law agency doctrine.[105] The Lancaster Test is sensitive to the unique aspects of the music industry, including the prevalence of part-time and inconsistent employment, the dearth of salaried positions, and the intense artistic and logistical control that many employers exert over their musicians. Consequently, this doctrine, rather than expecting musicians to fall within the traditional occupational mold, allows courts to provide a fair opportunity for plaintiffs to prove that their employment status places them within the scope of anti-discrimination statutes.

As a result, this test will allow many more musician-plaintiffs to take advantage of the discrimination protections afforded by Title VII, the ADA, and other civil rights statutes. Such an outcome not only satisfies the legislative purposes of these laws,[106] but also comports with Supreme Court doctrine mandating that statutes prevail over common law principles.[107]

Conclusion

In summary, agency doctrine must adjust to accommodate the occupational norms of the music industry. Traditionally, in discrimination suits by musician-plaintiffs, federal courts have rigidly applied an outdated agency test (dating back to the 1950s) that cannot properly carry out the remedial purpose of civil rights laws in the twenty-first century.[108] This agency doctrine of old, though still relevant in many fields, does not account for the unique and singular nature of the music industry and has consequently excluded many musicians from the protective scope of anti-discrimination legislation.

Despite these systemic problems, there exists a readily available solution which could easily be adopted by federal courts. This proposed solution, the "Lancaster Test," is an adaptation of the D.C. Circuit's analysis in *Lancaster Symphony Orchestra* which both incorporates tenets of the traditional agency doctrine and elements, such as artistic and logistical control, and which account for the nature of modern-day occupational relationships in the music profession.[109]

This test should be uniformly adopted among all federal circuits because it would allow courts to more accurately gauge the locus of control between musicians and their employers, consequently providing musicians with a fair opportunity to prove that they fall within the protective scope of civil rights statutes.

ENDNOTES

1 *See, e.g.*, Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 492 (8th Cir. 2003) (holding that symphony musicians were independent contractors); *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 884 (9th Cir. 1980) (holding that plaintiff musician was an independent contractor of the hiring school district).

2 822 F.3d 563, 567–68 (D.C. Cir. 2016) (exploring the extent of control which an orchestra and director hold over their musicians).

3 *See, e.g., Americans with Disabilities Act, 42 U.S.C.A. § 12112(b)* (West 2016) (confining the scope of the statute to "employee[s]"); Title VII, 42 U.S.C.A. § 2000e-2 (West 2016) ("It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees . . . because of such individual's race, color, religion, sex, or national origin.")..

4 *See, e.g.*, Spirides v. Reinhardt, 613 F.2d 826, 829 (D.C. Cir. 1979) (holding that the language of Title VII excludes independent contractors and those not "directly employed" by an employer)

5 *See, e.g.*, Alberty-Velez v. Corporacion de Puerto Rico para la Difusion Publica, 361 F.3d 1, 6 (1st Cir. 2004) (observing that the definition of "employee" provided by Title VII was meaningless).

6 *See, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992) (claiming that when a statute does not "helpfully" define the scope of an employee, courts should apply the traditional agency test).

7 *See, e.g.*, *Alberty-Velez*, 361 F.3d at 7 ("[T]he extent to which the hiring party controls 'the manner and means' by which the worker completes her tasks will be the most important factor in the analysis.").

8 *See* North American Van Lines, Inc. v. Nat'l Labor Relations Bd., 869 F.2d 596, 599 (D.C. Cir. 1989) (asserting that particularized, detail-oriented control over an agent characterizes an employer-employee relationship).

9 Restatement (Second) of Agency § 220 (1958).

10 *Alberty-Velez*, 361 F.3d at 10–11.

11 Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 487 (8th Cir. 2003).

12 *Id.*

Continued on page 16.

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13 Id. at 487–88.

14 *Id.*

15 *See id.* at 489 (applying the common law agency test).

16 *Id.*

17 *Lerohl*, 322 F.3d at 489; *see generally* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

18 *Lerohl*, 322 F.3d at 490.

19 *Id.* at 491.

20 *Id.* at 488–89.

21 *Id.* at 490–91.

22 *Id.* at 492.

23 *Id.* at 493.

24 633 F.2d 880, 883 (9th Cir. 1980).

25 *Id.*

26 *Id.* at 882.

27 *Id.*

28 *Id.* at 883.

29 *See* No. 04-15052, 2005 WL 319015, at *1 (9th Cir. Feb. 10, 2005) (finding that the plaintiff was not entitled to Title VII protections due to his independent contractor status).

30 *Id.*

31 *Id.*

32 *Alberty-Velez v. Corporacion de Puerto Rico para la Difusion Publica*, 361 F.3d 1, 11 (1st Cir. 2004).

33 *Id.* at 3–4.

34 *Compare id.* at 6–11, *with* Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 492 (8th Cir. 2003), *and Lutcher*, 633 F.2d at 883 (exhibiting similar applications of the common law agency test).

35 *Alberty-Velez*, 361 F.3d at 6–9.

36 *Id.* at 4, 9.

37 *Id.* at 9.

38 *Id.*

39 *Id.*

40 *See Professionals in the Workplace: Professional Performers*, Department for Professional Employees at 2 (2014), http://dpeaflcio.org/wp-content/uploads/Professional-Performers-2014.pdf (revealing that the vast majority of musicians do not hold full-time jobs).

41 *Id.* at 5.

42 *See Music Careers in Dollars and Cents: 2012 Edition*, Berklee College of Music at 1–2 (2012), https://www.berklee.edu/pdf/pdf/studentlife/Music_Salary_Guide.pdf (indicating that very few musical jobs are salaried positions).

43 *Id.*

44 *Professionals in the Workplace: Community and Social Service Professionals*, Department for Professional Employees at 1 (Feb. 2015), http://dpeaflcio.org/wp-content/uploads/Community-and-Social-Service-Professionals-2015.pdf.

45 *See id.* at 3 (breaking down the median salaries for various social service positions).

46 *Professional and Technical Employees in the Labor Force*, Department for Professional Employees (Aug. 2014), http://dpeaflcio.org/professionals/professionals-in-the-workplace/professional-and-technical-employees-in-the-labor-force/.

47 *See Professionals in the Workplace*, *supra* note 40, at 2 (revealing that the vast majority of musicians do not hold full-time jobs).

48 *See id.* (revealing that the vast majority of musicians do not hold full-time jobs).

49 *See* H.R. Rep. No. 102-40, at 1 (1991) (outlining the purpose of Title VII); 154 Cong. Rec. S9626-01 (Sept. 26, 2008) (statement of Sen. Reid) (detailing the purpose of the ADA).

50 H.R. Rep. No. 102-40, at 1 (1991).

51 154 Cong. Rec. S9626-01 (Sept. 26, 2008) (statement of Sen. Reid).

52 503 U.S. 529, 534 (1993).

53 *Id.*

54 Compare Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992), *with* Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486 (8th Cir. 2003), *and* Lutcher v. Musicians Union Local 47, 633 F.2d 880 (9th Cir. 1980) (exhibiting many factual discrepancies between these cases).

55 *Nationwide*, 503 U.S. at 320–21.

56 *Id.*

57 *Id.* at 327–28.

58 *See* Employee Retirement Income Security Act, 29 U.S.C.A. § 1132(a) (West 2016) (providing redress for employees who are denied retirement benefits); Equal Emp't Opportunity Comm'n v. W. Publ'g Co., 502 F.2d 599, 603–04 (8th Cir. 1974) (asserting that civil rights laws must be construed liberally); Armbruster v. Quinn, 711 F.2d 1332, 1340–41 (6th Cir. 1983) ("Since [Title VII] has been universally held to be broadly remedial in its purpose, such remedial effect can be given only upon a broad interpretation of the term employee.").

59 *Equal Emp't Opportunity Comm'n*, 502 F.2d at 603–04.

60 *Nationwide*, 503 U.S. at 319–20.

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61 *Supra* Subpart III(A)(i).

62 *Nationwide*, 503 U.S. at 323.

63 *Id.*

64 *See* H.R. Rep. No. 102-40, at 1 (1991) (outlining the purpose of Title VII); 154 Cong. Rec. S9626-01 (Sept. 26, 2008) (statement of Sen. Reid) (detailing the purpose of the ADA).

65 *Supra* Subpart (III)(A)(ii).

66 *See, e.g.*, Hickey v. Arkla Indus., 699 F.2d 748, 751 (5th Cir. 1983) (applying the "economic realities" test in an age discrimination case); Nowlin v. Resolution Tr. Co., 33 F.3d 498, 505 (5th Cir. 1994) (applying the "hybrid" test in a Title VII case).

67 *See* 699 F.2d at 751 (applying the "economic realities" test in an age discrimination case).

68 *Id.* at 749.

69 *Id.* at 751–52.

70 *Id.*

71 *Id.*

72 33 F.3d 498, 505–06 (5th Cir. 1994).

73 *Id.* at 500.

74 *Id.* at 505–06.

75 *Id.* at 506.

76 *See generally* 822 F.3d 563 (D.C. Cir. 2016) (applying an agency test which is more sensitive to the nuances of the music profession).

77 *Id.* at 565.

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Lancaster Symphony Orchestra*, 822 F.3d at 565.

83 *Id.* at 566–67.

84 *See id.* at 567 ("[T]he conductor's role is not simply to keep time while the musicians follow the music but rather to mold the performance into the conductor's personal interpretation of the score.").

85 *Id.*

86 *See id.* (discussing the extent of a conductor's discretion to interpret the written music).

87 *Id.*

88 *See Lancaster Symphony Orchestra*, 822 F.3d at 567–68 (emphasizing that the Orchestra enforced an array of attendance and decorum requirements).

89 *Id.* at 566.

90 *Id.* at 567–68.

91 *Id.* at 566.

92 *Id.* at 565.

93 *Id.* at 568.

94 *Lancaster Symphony Orchestra*, 822 F.3d at 568.

95 *Id.* at 569; *see also* Corp. Express Delivery Sys. v. Nat'l Labor Relations Bd., 292 F.3d 777, 780 (D.C. Cir. 2002) (asserting that employment status may be determined by an agent's "entrepreneurial opportunity for gain or loss").

96 *Lancaster Symphony Orchestra*, 822 F.3d at 569.

97 *Id.*

98 *Id.*

99 *Id.* at 570.

100 *See* Restatement (Second) of Agency § 220 (1958) (listing form of payment among its factors).

101 *Lancaster Symphony Orchestra*, 822 F.3d at 568.

102 *See id.* at 569 (analyzing the plaintiff's entrepreneurial potential for gain or loss).

103 *See id.* (evaluating whether musicians could assign, sell, or subcontract their positions).

104 *Id.*

105 *See supra* Subpart III (presenting this Article's critique of the common law agency doctrine).

106 *See* H.R. Rep. No. 102-40, at 1 (1991) (outlining the purpose of Title VII); 154 Cong. Rec. S9626-01 (Sept. 26, 2008) (statement of Sen. Reid) (detailing the purpose of the ADA).

107 *See* U.S. v. Texas, 503 U.S. 529, 534 (1993) ("[C]ourts may take it as a given that Congress has legislated with an expectation that . . . [common law] principle[s] will apply except 'when a statutory purpose to the contrary is evident[.]'").

108 *See* Restatement (Second) of Agency § 220 (1958) (addressing the common law as it existed in the year 1958).

109 *See* 822 F.3d at 566–69 (presenting the D.C. Circuit's agency analysis).

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to any revocation.[xv] Mutual assent must also be present, which would likely exist in the plain written terms provided in the offer letter. Lastly, consideration is achieved through a bargain of exchange as the college recruiters and the student-athletes show what value they can bring to both parties. Knowing that basic elements of a contract exist and the potential of promissory estoppel on its own can give rise to a lawsuit, why is there not more focus on scholarship revocation amongst high school student-athletes?

The lack of litigation likely exists for reasons ranging from a dearth of legal knowledge to an absence of recourse for potential plaintiffs. Parents and representatives of student-athletes are probably not aware that revoking a scholarship as described in the hypothetical above could provide legal grounds for a suit. Despite such grounds, this process would likely favor the defendant, as the institution would have far more resources and experience to maintain that there has been no wrongdoing. Furthermore, a commitment from a teenager aged fifteen to eighteen years old is something that is precarious from the beginning. Their lack of capacity especially without heavy parental involvement casts another shadow of doubt over the whole recruitment process. These are young adults who are not sure of their place in the world. They act with indecisiveness, leading coaches and universities to respond similarly. However, when a university can reasonably anticipate that once an individual commits he or she will not seek out other opportunities, there then exists the potential for injustice if that scholarship is revoked for no particular reason. Again, it is reasonable to expect action and once the action occurs, injustice may only be avoided by fulfilling the original scholarship promise. Universities, if the student-athlete does not commit a mistake through academic, criminal, or athletic error, should avoid leaving these individuals with nothing.

Erik Swenson said in an interview after his scholarship offer was revoked that, "They could have told me this February 1 or January 31, so at least they gave me some time." Erik Swenson was one of the lucky ones to still have an opportunity to live out his dream of playing college sports. Not everyone in the future will be as fortunate. The extremely competitive recruitment process is placing student-athletes and coaches in risky situations where tough choices will be made. Despite the competitiveness, it remains as important as ever that the process is geared towards molding young men and women into leaders for our nation. Therefore, if a university commits the way Michigan did to Swenson, it is important to follow through instead of leaving a young person with limited or no direction.

As a Bloomberg article focusing on the status of the NCAA mentioned recently, the current model it uses is not perfect, but it is good.[xvi] It inspires competition, increases opportunities for all sorts of athletes, and generally benefits universities with the amateurism structure it follows. However, knowing there still exists imperfections, action must be taken especially when it involves young adults who can become dependent on a single scholarship offer. One writer, Jamie Nomura, has called for widespread action, including the elimination of National Signing Day, foregoing signing periods by allowing athletes to sign immediately, and a complete overhaul of the current system by assigning high school student-athletes official representatives.[xvii]

Eliminating National Signing Day and the signing period is not realistic and also takes away from many the excitement athletes experience in formalizing their commitment. An elimination of a day where athletes begin to finally formalize in writing their commitment in whatever form would spread the recruitment process even more thin than it already is. Having one day where a vast majority of athletes formalize the process allows them to prepare for the next step and allows universities to assimilate them in the necessary manner. Imagine if coaches and players were running around recruiting athletes who were supposed to start school in a month. That would prevent coaches from doing their actual job and prevent these already understandably indecisive young adults from procrastinating in their decision-making. The positives do not outweigh the negatives as the only perceivable benefits are getting the process over with early and forcing coaches to not offer too many scholarships.

Despite these benefits, the negatives that are likely to originate from such a change include little flexibility to deal with the indecisiveness players have or the over-confidence a player has in an institution when offered early enough. Another hypothetical along those lines is if a student accepts an offer at age 16 and signs with a university. This student may have a change of heart or a circumstance that requires him or her to stay closer to home. This example amongst many others could become common when eliminating the structure provided by the signing period and National Signing Day.

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Another one of Mr. Nomura's proposals would be to assign an official representative for athletes looking to commit to programs.[xviii] The athletes would have direction from a knowledgeable official who could answer basic questions about what a commitment involves and how to go about the process. However, this is an idea that would most likely just work on paper. Imagine the bias each individual would have about his or her own experiences. The advisor could favor a particular school or coach, which could lead to conflict of interest. Also, this would essentially add an advisor to the already large cohort of people in the ears of these athletes. If anything, such an advisor should remain assigned not to one player, but perhaps a particular district or region. In the end, such a proposal sounds like a decent idea, but it would add unnecessary bureaucracy to an already complex process.

Mr. Nomura also proposes some smaller less drastic actions that could make positive change such as limiting the number of scholarships a coach can offer and formalizing every offer through writing.[xix] He also discusses an improved honor system forcing coaches to be more genuine in their offers.[xx] These are all formidable proposals, which use easy solutions to apply formalities and structure to a process that needs these types of changes. New rules rather than new people, is something that could add more clarity to recruiting. These particular fixes are relatively straightforward here and could greatly help this process benefit all parties.

Most importantly, drastic alterations can cause confusion and the system could be fixed with one alteration not suggested by Mr. Nomura. The change would involve a deadline to revoke a scholarship. Implementing reasonable notice from a school before revoking a scholarship could be the simple answer to the problem of scholarship revocation right before signing day. If there was an equivalent of National Signing Day for schools to revoke scholarships, athletes could be given the necessary time and notice to regroup. Having a cushion is extremely important, as it would then provide time for them to recruit at other schools and look at other options in general. Adequate notice to avoid a situation like the one Swenson experienced is extremely important as it can help stabilize the competitiveness of college recruitment. In the end, getting the best recruits may help coaches win games, but coaches must realize that it remains important to ensure young student-athletes do not lose out on a chance to succeed because of a misguided scholarship offer.

ENDNOTES

* Thank you to my SMU Law Contracts Professor David Taylor for all of his guidance in writing this article.

i *See* Mark Snyder, *Former Commit Swenson: U-M Told Me Not To Come* (Jan. 10, 2016), http://www.freep.com/story/sports/college/universitymichigan/wolverines/2016/01/20/erik-swenson-michigan-football/79063212/.

ii *See* id.

iii *See* id.

iv *See* id.

v *See* id.

vi Multiple law reviews articles have presented this thought over the years, but few have been able to come up with concrete examinations of solutions to the problem. *See* Michael J. Cozzillio, The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name, 35 Wayne L. Rev. 1275 (1989); and Robert N. Davis, The Courts and Athletic Scholarships, 67 N.D. L. Rev. 163 (1991).

vii *See Agnew v. Natl. Collegiate Athletic Assn.*, 683 F.3d 328, 332, 2012 BL 152300 (7th Cir. 2012).

viii *See* id.

ix *See* id.

x *See* id.

xi *See* id.

xii *See* Restatement (Second) of Contracts § 90 (Am. Law Inst.): Promise Reasonably Inducing Action or Forbearance.

xiii *See Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898).

xiv Play Division I Sports, NCAA, http://www.ncaa.org/student-athletes/play-division-i-sports (last visited Dec. 18, 2016).

xv Jason Kirk, SB Nation, *What College Football Scholarship Letters Look Like: The Good, Bad and Normal*, http://www.sbnation.com/college-football-recruiting/2013/8/6/4594008/college-football-scholarship-offer-letters-virginia-arizona (last visited Dec. 18, 2016).

xvi *See* Philip D. Bartz and Nicholas S. Sloey, *NCAA Sports: No Death Penalty Under the Antitrust Laws*, Bryan Cave LLP, Bloomberg Law Reports.

xvii *See* Jamie Y. Nomura, *Refereeing the Recruiting Game: Applying Contract Law to Make the Intercollegiate Recruitment Process Fair*, 32 U. Haw. L. Rev. 275 (2009).

xviii *See* id.

xix *See* id.

xx *See* id.

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